# THE PATH OF CONSTITUTIONAL LAW

**AN E-TREATISE & COMPANION BOOK**  
**UPDATED 2018 EDITION**

By

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CHAPTER 2  

PREFACE

This book is published in an electronic format to provide students, practicing lawyers, and scholars with a user friendly and inexpensive source of information and analysis on the path of constitutional law in the United States – a path that echoes themes in all areas of the law. Parts I, II, and III of the book discuss the styles of decisionmaking used by Justices of the Supreme Court and the factors that influence case outcomes, the standards of review, and the format of opinions and resulting law. Part IV discusses the law recognized or created by the Court in the various eras of American law. It is organized by general doctrines and by the clauses of the Constitution. A brief summary of the main themes explored in the book appears in the Summary of Themes on page 5.

A 2018 Supplement to the E-Treatise has been appended to the end of the E-Treatise. The Supplement can be accessed from the Title Page 1, or by clicking on this link: 2018 Supplement. For any point in Chapters 01-32 where material in the Supplement is related to the E-Treatise text, a boldface S, with a visible link, will appear at the end of the sentence, or with the relevant footnote. Clicking on that S will take the reader to the part of the Supplement relevant to that E-Treatise text.

There are many ways to identify topics and move from one topic or section to another. The following are available on Adobe Reader, version 7, as described below. Similar functions are on other versions. For example, in Adobe Reader, version 8, right click on “Next Page” icon to add the very useful “First Page”, “Last Page”, “Previous View”, and “Next View” features.

A. Using the cursor, drag the box in the right hand column or click on the arrows at the top or bottom of that column to move from one page to the next.

B. Press on the keyboard “Page Up”, “Page Down”, “Home”, or “End”.

C. Left click on any link. Most numbers and references to Chapters, Sections, or page numbers are active as links to other pages or sections. To use a link, left-click when the hand cursor, placed under a link, points upward.

D. Left click on a bookmark in the left hand margin to be taken to Chapters or sections. [Expose bookmarks by dragging the right margin to the middle.]

E. Use the search function by clicking on the search icon (in version 7 a binocular in the top row of icons; in earlier versions, Edit > Search) and follow on-screen prompts which appear in the right hand column. The search function can be used to locate pages, particular cases, topics, or authorities of interest. It thereby supplements the conventional table of cases, table of authorities, and index. [Press “Hide” in the upper right hand to remove the search column and restore the text to its original size.]

F. In Adobe Reader, version 7, a click in the circles on the bottom of the screen will move to a “Previous View” or the “Next View.” The bars and outer triangles at the bottom of the page will lead to Page 1 (“First Page”) or to the end of the book (“Last Page”). The inner triangles will move one page forward or backward.

For further information on moving about in the book in version 7 and arranging pages to your satisfaction, consult HELP, which follows on the next page. [ON ADOBE, AMAZON, AND MOST READERS, ALT/LEFT ARROW WILL RETURN TO PREVIOUS VIEW]
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1. HOW IS THE PROGRAM CONSTRUCTED?
   a. The entire book is on a PDF file that appears in the middle or on the right hand side.
   b. Bookmarks to the text are on the left hand side of the screen.
   c. The Adobe Acrobat program permits movement from bookmarks to text, allows movement in the text through movement icons and links, and permits the user to search for page numbers, sections, subsections, individual words, and phrases (including the names of cases or of authorities).

2. HOW TO MOVE UP/DOWN OR FORWARD/BACKWARD IN THE TEXT
   a. Click on an arrow at the top or bottom of the right hand margin, drag the box-shaped symbol up or down, or press on the keyboard “Page Up” or “Page Down”.
   b. In the center at the bottom of the page is an indicator of the page number and on the right and left of the indicator are triangles which, when clicked on, move one page forward or one page backward. Click on a circle for previous or next view. The vertical bars send to Page 1 or the end as do keyboard keys “Home” and “End”.
   c. Virtually every number in the text or tables, or reference to a Chapter or section number, is a link to that page or section number. Use a left click when the hand symbol, placed under a link, points upward to the number or reference that is a link.

3. MOVING BETWEEN BOOKMARKS AND TEXT
   a. To reveal the column of bookmarks, move the cursor to the left lines until a symbol similar to “#” appears. Then hold down on a left click and drag the line to the right.
   b. At the right-hand side of the bookmarks is rectangular symbol. Move the cursor to the symbol, and hold down a left click to move up or down in the bookmarks.
   c. When a bookmark notes a relevant part or section of the text, the user can highlight the item by placing the cursor on that item. To move to the text, click or press “Enter.” Click on a bookmark + or - to reveal or hide sections within Chapters.
   d. To return from text to a bookmark, put the cursor on a bookmark and click.

4. HOW TO CHANGE THE SIZE OF TEXT
   There are circles with + or - in the upper set of icons, with a percentage indicator between them. Zoom in or zoom out by clicking on the circles.

5. THE SEARCH FUNCTION
   a. Put cursor on the search icon atop the page (and which looks like a set of binoculars), or on Edit > Search, then click and follow on-screen prompts in the upper right.
   b. The search function will disappear by a click on “Hide”, which appears in the upper right above the search function.

6. MOVING BETWEEN TABLES AND TEXT
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   b. Then, click on Table to Contents in order to get a link to Tables.
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LINKS IN THE TEXT

Almost all numbers and cites to sections are active links. When the hand-cursor is on a link, it will point upward with the index finger. Left Click on the link to be taken to its destination.

BOOKMARKS

To see Bookmarks, click on Bookmarks in the tool bar on the left side of the text

To move down the list of Bookmarks, drag the bar on the right side of the Bookmarks tool box

To see or hide Bookmarks to sections, click on + or - that appear to the left of bookmark symbols

To hide Bookmarks feature, click on the “x” at the top right of the bookmarks tool box

ADVICE ON MOVING TO SPECIFIC PAGE OR CHAPTER HEADING

Search for pages by using a phrase, for example “Page 35”, or use Pages tab at left side of screen Search for Chapters by the format “Chapter 12”, or use a Bookmarks tab or a table with page links

NAVIGATING AROUND IN THE TEXT

IN TOOL BOX AT THE BOTTOM OF THE PAGE OF ADOBE READER:

Click on green circle at bottom of the page to return to your previous or next page viewed Bar on left goes to First Page \ Triangles give previous or next page \ Bar on right goes to Last Page Images of pages on right of tool box at the bottom of the page permits the text to be viewed as a single page, as a single page with continuous scrolling, as two pages facing each other, or as four pages formatted with two pages facing each other and continuous scrolling down to the next two pages facing each other

ON KEYBOARD: Use “Page Up” or “Page Down” or “Home” or “End”
CHAPTER .4 SUMMARY OF THEMES

§ .4.1 The Purpose of this Book

This book is intended to provide a detailed description and analysis of Supreme Court decisions interpreting and applying the Constitution. Also, it provides an explanation of how those decisions have resulted from applying four different styles of decisionmaking to the facts and to the sources for interpretation. Those styles are introduced in Chapters 1-3 of the book. Also considered in the book are the causes for each of the styles being present in the judicial predisposition of the controlling Justices during various eras of American legal history. These eras and causes are considered in Chapters 13-16 of the book.

§ .4.2 The Sources of Constitutional Interpretation

The sources for interpretation of the Constitution can be divided into contemporaneous and subsequent. Contemporaneous sources are those existing when the Constitution was framed. There are three kinds: text, context, and history. These sources can be subdivided, as follows:

1. The Constitution’s text, including
   a. The literal meaning of the text, and
   b. The text’s purpose or spirit;
2. The context of a particular provision, including
   a. Related provisions and maxims of construction, and
   b. Arguments derived from the structure of the Constitution, including theories of judicial review, federalism, separation of powers, and checks and balances;
3. Historical evidence concerning the framers’ and ratifiers’
   a. Specific intent, and
   b. General intent.

Subsequent sources are those which came into being after the Constitution was framed and ratified. There are three varieties, as follows:

1. Legislative and executive practice, and social practice, under the Constitution;
2. Judicial precedents interpreting the Constitution;
3. Arguments concerning the consequences of a particular judicial decision, including
   a. Consequences considered in light of text, context, and history; and
   b. Consequences considered in terms of practice, precedent, and policy.

These sources are considered in depth in Chapters 5-6. Chapter 8 discusses in particular the purpose of various constitutional provisions and that impact on constitutional interpretation. The different styles of decisionmaking that have predominated in various eras of American legal history weigh these sources differently, and some are not considered by one or several of the styles. Details are provided in the book, particularly in Chapters 9-12, and a summary is provided immediately below.
§ 4.3 Interpretation Sources and the Styles of Constitutional Decisionmaking

As discussed in Chapter 9, between 1873 and 1937, the predominant approach to constitutional interpretation was formalism. Today, Justices Scalia and Thomas make use of that style, and they may be joined by Justice Alito, as discussed in the Addendum chapter of this book. Formalists believe that the Constitution has a fixed, static meaning that can be changed only by amendment. Thus, they rely almost exclusively on contemporaneous sources, particularly literal meaning and specific historical intent, although they will follow well-established precedent as “settled law.”

As discussed in Chapter 10, from 1937 until 1954, a majority of the Supreme Court Justices adopted the interpretation theories of Justice Oliver Wendell Holmes, Jr. Holmes shared the formalist emphasis on literal meaning and specific historical intent, but was willing to consider purpose or general intent arguments because of his focus on the fact that all law has a purpose. Since Holmes also thought that law should reflect the will of the people, he gave considerable deference to legislative, executive, and social practice. Holmes also followed precedents which were settled law or on which persons had substantially relied. In this view, the Constitution thus can be a living document, particularly to the extent its interpretation reflects legislative and executive practice, or judicial precedents. A recent follower of this style was Chief Justice Rehnquist. Chief Justice Roberts appears likely to be a Holmesian, as discussed in the Addendum chapter of this book.

As discussed in Chapter 11, between 1954 and 1986, a majority of the Court were instrumentalists in that they viewed the Constitution as a living document which should be interpreted as an instrument to bring about just results. For instrumentalists, all of the sources of constitutional interpretation are relevant in the interpretation process, including consequences considered in terms of policy considerations. Influential instrumentalists have included Chief Justice Warren, and Justices Douglas, Brennan, and Marshall. On today’s Court, Justices Stevens, Ginsburg, and Breyer embody a moderate form of instrumentalism in their decisions.

As discussed in Chapter 12, from 1789 until 1873, and again in recent key votes since 1986 of Justices Powell, O’Connor, Kennedy, and Souter, the judges followed the 18th-century tradition of reasoned elaboration of the law in light of the law’s purposes and history, with fidelity to precedent and to a considered and consistent legislative, executive, or social practice. Chief Justice John Marshall and modern natural law Justices have also considered how consequences may interact with principles that are embodied in constitutional text, context, history, practice, or precedent.

Table 13.4 at § 13.4 summarizes the interpretation style of Justices on the Court since 1968. Text at § 13.4 summarizes the interpretation style of Justices on the Court since 1937. The entry “Justices” in the Name Index refers to the interpretation style for all 110 Justices who have been confirmed between 1789-2006. The "New Justices Addendum" notes styles for recent additions.

§ 4.4 The Format of Constitutional Law

The four styles of decisionmaking that have been applied to the sources of constitutional interpretation by various Supreme Court Justices have tended to produce different legal structures for use in judicial review. The first difference that can be observed is whether the legal reasoning of a Justice on particular issues is predominantly deductive or inductive. Formalists tend to be
deductive. Instrumentalists tend to be more inductive, with Holmesians and natural law Justices somewhere in between. Similar relationships exist for the four most important kinds of decisions that determine the form or shape of any legal doctrine, as shown by the table below. 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. The table below suggests how all of these decisions tend to be made by the Justices who use various styles of decisionmaking.

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<td>Natural Law</td>
<td></td>
</tr>
<tr>
<td>Instrumentalism</td>
<td>Inductive Balancing Factors Standards Fact Questions</td>
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With respect to deduction and induction, there is a tendency for all Justices to reason deductively where the Constitution’s terms are relatively detailed and specific. For terms phrased more generally, like “equal protection” or “due process,” judicial elaboration has tended to be more inductive. However, the above general pattern tends to hold, regardless of the specificity of constitutional terms. These issues are discussed in depth in Chapters 4 and 7 of the book.

§ .4.5 The Decisions Reached by Applying the Styles to the Sources

In Chapters 17-32 of this book, Supreme Court decisions are discussed in the conventional order of judicial review and other structural factors, followed by individual rights, beginning with general economic and non-economic rights, then the Civil War Amendments, and concluding with the First Amendment. Emphasis is placed on the changes in the controlling decisionmaking style, and how the changes have influenced the substance of, and purposes advanced by, the governing doctrine.

As an advance look at some of the observations which are detailed in this book, it can be noted that instrumentalists, who tend to be liberal in their political predisposition, tend to believe that the Constitution created a very powerful federal government with little reserved to the states, and whose separation of powers principles favor the legislative branch rather than the President. Instrumentalists tend to believe that the general powers of government are limited by many explicit and implicit individual rights that are constitutionally protected from government action unless they can be justified by important or compelling interests and narrow tailoring. Instrumentalists prefer standards that allow for judgments in light of particular facts.

Formalists, who tend to be conservative in their political predisposition, find more powers reserved to the states by the 10th Amendment, and separation of powers principles that favor the President.
They are reluctant to find implied individual rights unless they are supported by a long and well-established history. They prefer bright-line rules rather than standards, and prefer doctrine to reflect categorical elements rather than a balancing or factor-weighing approach.

Holmesians side with formalists in supporting clear and definite rules, but they are more willing to defer to legislative or executive judgments on the scope of governmental powers. Conservative Holmesians tend to join formalists in support of states’ rights principles of federalism, while liberal Holmesians tend to join instrumentalists in favor of federal power.

Natural law Justices tend to be in the middle on structural matters. They prefer a balanced approach to federalism and separation of powers issues, and are willing to find implied rights if supported by an emerging national consciousness reflecting background natural law principles embedded in the Constitution by the framers and ratifiers, most of whom believed in some version of natural law.

The Subject Matter Index references these points under entries: Federalism, Formalist Constitutional Interpretation, Holmesian Constitutional Interpretation, Instrumentalist Constitutional Interpretation, Natural Law Constitutional Interpretation, Rules versus Standards, and Separation of Powers.

CHAPTER .5 STANDARDS OF REVIEW USED BY THE COURT

In many cases on constitutional law, the central issue is what level of scrutiny should be used by the Court. This book will explore when each level is used. A Table summarizing each of the seven levels of review noted here appears in Table 7.2, at page 186. The most deferential standard of review, used by Chief Justice Marshall in 1819 in McCulloch v. Maryland, and today described as minimum rational review, is found most prominently in cases on substantive due process and equal protection review of economic legislation. Under this level of review, a burden is placed on the challenger to show that the challenged government action has no legitimate end, or that the means are not rationally related to that end, or that the means impose an irrational burden on individuals. Substantial deference is given to the government in applying this test.

There are six higher levels of review. In second-order rational review, no substantial deference is given to the government, and the relationship of means to legitimate ends, considering the benefits and burdens of the government action, must be reasonable and not excessive, in an overall factor-weighing approach. In a slightly higher level of review, called in this book third-order rational review, the burden is shifted to the government to establish the constitutionality of its action.

Next there is intermediate review, where the government must show that its interests are important or substantial, the means are substantially related to the ends, and the means are not substantially more burdensome than necessary. This level appears in equal protection cases on discrimination based on gender or illegitimacy. The term “intermediate with bite” is used in this book to describe the next-higher standard that is used for reviewing content-based regulations of commercial speech. It is the same as intermediate review, except that the means must be directly related to the substantial end, rather than being merely substantially related.

Finally, in use for such cases as race discrimination, are two strict scrutiny standards. Both require the government to justify its actions in terms of a compelling interest, and the means must be
directly related to achieving that interest. For the highest level of strict scrutiny, the law must also be the least restrictive effective alternative. However, a few cases, such as involving racial redistricting, have used a loose form of strict scrutiny, where it is enough if the means are not substantially more burdensome than necessary, rather than having to be the least burdensome effective alternative that the government could have adopted.

Part IV of the book, Chapters 17-32, provides many examples of these seven levels of review.

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CHAPTER 7 EXECUTIVE SUMMARY OF THE BOOK

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PART I: THE MATERIAL OF CONSTITUTIONAL LAW

CHAPTER 1: THE MATERIAL OF JUDICIAL DECISIONMAKING

§ 1.1 Introduction to the Path of Constitutional Law Decisionmaking

It is a commonplace observation that real learning implies a “deep understanding” of a conceptual framework along with “detailed knowledge” of a rich factual base.\(^1\) This book provides such a framework and base – in metaphorical terms, a detailed atlas or roadmap – for studying the path of American constitutional law. The book covers United States constitutional doctrine from the Constitution’s ratification in 1789 to October 2006, with a “New Justices Addendum” on additions to the Court of Chief Justice John G. Roberts, Jr. on September 29, 2005, and Justices Samuel A. Alito Jr. on January 31, 2006; Sonia Sotomayor on August 8, 2009; Elena Kagan on August 7, 2010; Neil Gorsuch on April 7, 2017, and Brett Kavanaugh on October 6, 2018. A 2018 Supplement, at the end of this E-Treatise, discusses constitutional doctrine from October 2006 - August 2018.

Inspiration for the book traces to Justice Oliver Wendell Holmes, Jr., who in 1881 opened his great book, *The Common Law*, by saying, “The law embodies the story of a nation’s development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become. We must alternatively consult history and existing theories of legislation. But the most difficult labor will be to understand the combination of the two into new products at every stage.”\(^2\)

The new products today in constitutional law embody a combination unique in Court history. This is the gradual transformation from precedents and law designed by Justices who adhered to one style of constitutional interpretation – the instrumentalist, result-oriented, judicially-activist, situation-sense 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. The instrumentalist approach toward law generally is discussed in this book at § 3.3, with detailed discussion of the instrumentalist approach to constitutional law discussed at Chapter 11.

In contrast to the instrumentalist approach, popular usage is that a non-instrumentalist judge rejects 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 of this usage 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.\(^3\)

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2. Oliver Wendell Holmes, Jr., The Common Law 1 (1881).
3. See, e.g., Morell E. Mullins, Sr., *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, 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 so used in this book, as explained at § 8.4. This approach has also been called a “formalist” approach, and was most popular on the Supreme Court from 1873-1937. The term “formalism” is used in this book, not “textualism,” since each approach to constitutional interpretation discussed in this book 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. The formalist approach toward law generally is discussed at § 3.1, with detailed discussion of the formalist approach to constitutional interpretation discussed at Chapter 9.

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 book, 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, as noted at § 10.2.1.2. This approach was most popular among a majority of Supreme Court Justices from 1937-54. The Holmesian approach to law generally is discussed at § 3.2, with detailed discussion of the Holmesian approach to constitutional interpretation discussed at Chapter 10. As noted at § 3.2, 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. Aspects of the relationship between the Holmesian approach and “strict construction” of statutes and the common law are also discussed at § 3.2.

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 book, this approach will be 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. This natural law approach is discussed more generally at § 3.4, with detailed discussion of the natural law approach to constitutional law discussed at Chapter 12. 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, as well as to the subsequent events of legislative, executive, and social practice and judicial precedents.
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 has survived on the Court in the personages of Justices John Paul Stevens, Ruth Bader Ginsburg, and Stephen Breyer, as discussed at § 11.3.1. At least since 1986, however, a majority of Justices have not adopted an instrumentalist perspective on constitutional interpretation.

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. Indeed, in each Term from 1991 through 2004, when all three Justices were on the Court, there usually were some 7-2 decisions where Justices Scalia and Thomas’ formalist approach left them alone in dissent, as discussed at § 9.3.1. During this time, 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 in some cases, as discussed at §§ 12.4.1-12.4.3, each was inclined to adopt 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 discussed at §§ 13.1 & 14.2, 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 1973, as noted at § 13.4. This clash among the four approaches is likely to continue in the near future. As discussed in the “New Justices Addendum,” Chief Justice Roberts has tended to follow a Holmesian interpretation style similar to Chief Justice Rehnquist; Justices Alito and Gorsuch have tended to follow, and new Justice Kavanaugh likely will follow, a formalist style similar to Justice Scalia, with a slight affinity for Holmesian deference; and Justices Sotomayor and Kagan have tended to follow a liberal moderate instrumentalist style similar to Justices Ginsburg and Stevens. As discussed at § 15.4, a modern version of natural law will likely become the dominant 21st century approach. Until Justice Kennedy’s retirement, effective July 31, 2018, it was the swing vote from 1986-2018. The new swing vote is likely Chief Justice Roberts.

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.”

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Similarly, in this book 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, it is easier than it might otherwise be to see that 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 book takes the discussion to a higher level of abstraction, often by dealing with groups of cases, so that general principles about the competing perspectives can emerge and be stated more clearly.

§ 1.2 Understanding the Causes of Constitutional Interpretation

§ 1.2.1 Aristotle’s Four Causes Used to Explain Any Thing or Situation: Material, Formal, Efficient, and Final Causes

For aid in designing the conceptual framework of this book, the authors have consulted Aristotelian philosophy. The nature of Aristotle’s influence on this book accords with an observation made in Professor Richard McKeon’s introduction to Aristotle’s philosophy, where McKeon said:

When . . . men return in later ages to read a philosopher’s works, their study seldom yields them concrete knowledge or useable information, unless it be history or philology, but often suggests directions of inquiry and methods inspired by the manner . . . of that philosophy.5

McKeon’s insight is valuable, as aspects of Aristotle’s substantive philosophy are clearly wrong, like his view that some men are by nature slaves, discussed at § 8.4.1 nn.72-78, or that objects, like acorns, have purposes, discussed at § 16.2.2 nn.32-33. Regarding directions of inquiry and methods, however, Aristotle’s insights are still usefully considered. McKeon explained that for Aristotle:

Ideally . . . four causes are used to explain any thing or situation, although on occasion only two or three may be accessible to investigation: the material cause out of which a thing comes to be (as the silver of a bowl); the form or definition (as the shape of the bowl); the efficient cause (as the hammering of the silversmith); and the final cause (as the purpose for which the bowl is intended).6

McKeon explained that Aristotle studied philosophy at a time when others were discussing formal and material causes. Aristotle considered his contribution to have been the discussion of efficient and final causes. As to how the causes fit together, McKeon said that in Aristotelian philosophy, “The relation of form and matter is determined in his analysis by the final and efficient cause, not by some assumption about the nature of being or some inference from the nature of thought.”7


6 Id. at xx.

7 Id. at xx.
While there is nothing magical about this approach, attention to Aristotle’s four causes can help assure that every aspect of a topic is given appropriate consideration. For example, in providing students an overview of a course, a professor reasonably can convey to them a summary of the material to be studied (coursebook, supplements, and other such material, that is, material causes), and the topics to be covered by that material (formal causes). The relation between these two formal and material matters can be foretold by the professor through noting the methods of preparation and classroom performance (efficient causes), and the goals of the course, including discussion of the final examination (final causes). Use of Aristotle’s methodology in this way has helped structure and organize the material in this book, as is explained in the remainder of this Chapter.

§ 1.2.2 Application of a Causal Analysis in the Four Parts of This Book

Aristotle’s four causes – material, formal, efficient, and final – remind us that in considering any topic one needs to address four things: what it is one is analyzing, how to define it, how it changes, and what is its purpose. Consequently, this book is divided into four Parts, each one based primarily on a perspective provided by one of Aristotle’s four causes.

Part I of this book identifies the materials that underlie all judicial decisionmaking: common law, statutory interpretation, and constitutional law decisionmaking. Part I shows how these materials combine in ways that have led to the four judicial decisionmaking styles: natural law, formalism, Holmesian, and instrumentalism. Part I concludes with a discussion of the materials by which each of the approaches molds common law, statutory interpretation, and constitutional law doctrine. This includes discussion of whether the doctrine should be phrased in absolute, categorical terms or as a balancing test, as discrete elements to meet or factors to weigh, as a specific rule or a more general standard, and the doctrine’s relationship to previously decided judicial precedents.

Part II of the book focuses more directly on the form or shape of constitutional law. The focus of Part II is thus on the specific materials, devices of interpretation, methods of reasoning, and ends sought in the constitutional interpretation process. As with Aristotle’s example of a silver bowl, Part II discusses the terms and definitions used to describe some judicial act as a proper act of constitutional interpretation, just as the formal cause of a silver bowl is the form or defined shape that is used to categorize some object as a bowl.

Part III of the book concentrates on efficient causes. This Part discusses first the different ways that Justices have made use of the materials and forms of constitutional law as, in Aristotle’s silver bowl example of the “hammering of the silversmith,” they “hammer out” decisions in individual cases that link basic materials and principles to fact situations. This Part also discusses the efficient causes that lie behind why a majority of Justices on the Supreme Court at different times in our Nation’s history have adopted one of the four distinct judicial decisionmaking styles.

Part IV of the book is concerned with final causes. Part IV thus summarizes the specific outcomes of decisions whose coming into being is the purpose, or final cause, of judicial review. In support of this endeavor, Part IV describes in some detail the basic doctrines, standards of review, interpretive methodology, and results of constitutional adjudication in the context of its many and varied specific factual applications.
§ 1.3 Use of the Four Causes in Each Part of This Book

One productive use of the Aristotelian methodology is to note that within each category of causes, secondary aspects exist. For example, there are formal, efficient, and final cause aspects of material causes, just as there are material, efficient, and final cause aspects of formal causes. Again, there is nothing magical about this fact. However, making use of this fact has permitted a relatively structured approach toward organizing and categorizing the various topics necessary for an analysis of constitutional law. Secondary aspects of Aristotle’s four causes are reflected within the Chapters that comprise each of the four Parts of this book. An introduction to each of these secondary aspects, and how they have structured the various Chapters in this book, appears next.

§ 1.3.1 Part I – The Materials of Constitutional Law

As noted, Part I of this book concerns the materials that are used in the four judicial decisionmaking styles out of which the content of constitutional decisionmaking is constructed. Chapter 1 has begun the discussion by introducing the material on which constitutional decisionmaking is based, that is, the four judicial decisionmaking styles.

Chapter 2 discusses the form or shape of this material. One aspect of this form is defining the judge’s view on the nature of law that the judge is called upon to apply. Is law viewed as sufficiently autonomous from policy considerations that justice can be done by concentrating primarily on logical application, or is law believed to be so infused with purpose and policy that it should be interpreted as a means to social ends so that consequences are of vital importance? Chapter 2 deals with these and related questions by discussing two different approaches to the nature of law: analytic versus functional. A second aspect of the form of the judicial decisionmaking styles is defining what judges are called upon to do when engaged in judicial review. Are they to find all relevant principles within the law itself or should they test their reasoning by some external standard of rightness, some social or moral value, such as promoting democracy or protecting individual autonomy? These and related questions are addressed by discussing two different approaches to the nature of the judicial task: positivist versus normative.

Chapter 3 focuses on how different answers to the above questions – analytic versus functional; positivist versus normative – are combined to create the four decisionmaking styles that have been used during various eras of American legal history on matters of constitutional law, statutory interpretation, and common law to “hammer out” decisions. Presentation of this efficient aspect of the material of constitutional law concludes the following about the four decisionmaking styles: formalism (analytic positivism); Holmesian (functional positivism); instrumentalism (functional normative); natural law (analytic normative).

Chapter 4 discusses the final aspect of this material, the decisions that emerge from “hammering” out results according to each of the four decisionmaking styles. The material of these decisions will inevitably reflect certain choices made by the judges: does the decision adopt an absolute, categorical rule or a balancing test; is the test phrased in terms of discrete elements to meet or factors to weigh; is the doctrine phrased as a specific rule or a more general standard? Chapter 4 thus deals with the structure of law that emerges from use of the materials of judicial decisionmaking.
§ 1.3.2 Part II – The Form or Shape of Constitutional Law

As noted, Part II of this book focuses on the form or shape of constitutional law. Part II thus examines the sources used, interpretation rules and theories, methods of reasoning, and ends sought in constitutional decisionmaking. These matters are dealt with in Chapters 5-8.

Chapter 5 examines the material used by different Justices when interpreting the Constitution: material contemporaneous with the time of ratification (text, context, structure, and history), and material subsequent to ratification (legislative, executive, and social practice under the Constitution, judicial precedents, and prudential considerations, including consideration of contemporary social policy). Chapter 6 focuses on the different forms or definitions of how text, context, structure, history, and subsequent developments are used in constitutional interpretation. Chapter 7 discusses the efficient causes of how, and in what manner, doctrine emerges in constitutional law from the process of case-by-case adjudication. Chapter 8 examines the final causes of constitutional decisionmaking, that is, the purposes or ends of constitutional law that emerge from considering the materials used in constitutional interpretation.

§ 1.3.3 Part III – Decisionmaking Styles as Efficient Causes

Part III of this book, focusing on efficient causes of constitutional law, combines the investigations of Parts I and II into a description of how constitutional law is hammered out by the four different styles of constitutional decisionmaking. This Part compares how each of the four styles uses arguments of text, context, structure, history, and subsequent developments to decide particular cases. It also points out that each one has placed slightly greater emphasis on one or the other of the four causes: formalism (formal causes); Holmesian (material causes); instrumentalism (efficient causes); and natural law (final causes). The formalist style is discussed in Chapter 9; the Holmesian style in Chapter 10; the instrumentalist style in Chapter 11, and the natural law style in Chapter 12.

Part III also discusses the efficient causes that help explain why a majority of Justices on the Court at different times in our Nation’s history have adopted one of the four judicial decisionmaking styles. In discussing these causes, Chapter 13 focuses on the formal fact of changes in American legal history from an initial natural law era, to formalist, Holmesian, and instrumentalist eras, to a modern natural law era today. Chapter 14 focuses on the material cause of these changes, that is, the social and political events in society which form the material base from which constitutional law emerged in its various eras. Chapter 15 discusses aspects of cognitive and moral developmental psychology that help explain changes in the majority approach from one era to the next. Chapter 16 relates the cognitive and moral developmental stages and the judicial eras to aspects of societal development, the final cause or purpose behind legal change to advance and reflect such societal developments.

§ 1.3.4 Part IV – The Final Cause: Decisions and Opinions

To complete the book’s promise for serving as a tool in learning constitutional law, Part IV undertakes a detailed examination of doctrinal results – the final cause or purpose of constitutional adjudication – that have emerged from the rich factual base of actual constitutional decisions. This appears in Chapters 17-32. For each of the doctrines considered, there is an attempt to explain how
the various styles of judicial decisionmaking (efficient causes) in various eras of American legal history (material causes) have reached defined results (formal causes) that were hoped to achieve or preserve certain values in society (final cause or purpose of a decision). The principal focus of these Chapters is on the constitutional doctrines usually covered in a first-year Constitutional Law course in American law schools. Thus, aspects of a criminal defendant’s rights under the Fourth, Fifth, Sixth, and Eighth Amendments, typically covered in a separate upper-level course in Criminal Procedure, are given only brief attention in Chapter 23. That discussion makes clear that the judicial decisionmaking styles applicable to interpreting the rest of the Constitution apply also to them.

In presenting the summary of constitutional doctrine, Part IV is divided into four sub-parts of four Chapters each. The first of these sub-parts focuses on structural issues of constitutional law. Chapter 17 focuses on judicial review; Chapter 18 focuses on federalism; Chapter 19 focuses on separation of powers; Chapter 20 focuses on other aspects of constitutional checks and balances.

The second sub-part of Part IV discusses non-structural constitutional doctrines other than the Civil War Amendments and the First Amendment. Chapter 21 discusses the structure of such individual rights adjudication, including what constitutes sufficient government action to trigger a finding of state action. Individual rights protections involving economic rights are discussed in Chapter 22. Individual rights protections involving non-economic rights are discussed in Chapter 23. The Ninth Amendment’s provision that the “enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people,” is discussed in Chapter 24.

The third sub-part of Part IV discusses the Civil War Amendments. Chapter 25 discusses the 13th Amendment, the 14th Amendment’s Citizenship Clause; the 14th Amendment’s Privileges or Immunities Clause, and the 15th Amendment’s ban on race discrimination in voting. Chapter 26 discusses the 14th Amendment Equal Protection Clause. Chapter 27 discusses the Due Process Clauses of the Fifth and 14th Amendments. Chapter 28 discusses the topic of congressional power to enforce the Civil War Amendments.

The last sub-part of Part IV discusses First Amendment law. Chapter 29 discusses the basic aspects of Freedom of Speech and of the Press. Chapter 30 discusses the various exceptions the Court has created to basic Free Speech doctrine. Chapter 31 discusses the Freedom of Assembly and Freedom of Association aspects of First Amendment doctrine. Chapter 32 addresses the Religion Clauses of the First Amendment: the Free Exercise Clause and the Establishment Clause.

§ 1.4 Conclusion

Part IV is the most concrete section of the book. A reader unaccustomed to philosophic generalities may find it more inviting to begin reading in Part IV. Of course, full understanding and appreciation of the analysis of cases in Part IV will be enhanced by the background supplied in Parts I, II, and III. Once that background is absorbed, it is likely that the intricacies of many cases can better be understood, put into the mental atlas or roadmap, and used in the future as a guide for thinking about constitutional issues and doctrines. There will be ample opportunities for that endeavor because, as discussed at § 17.1.4, under the doctrine of judicial review many vital issues of public policy are ultimately debated and resolved, at least for the time being, in constitutional cases decided by courts.
CHAPTER 2: THE FORM OR SHAPE OF JUDICIAL DECISIONMAKING

§ 2.1 Introduction to the Form or Shape of Judicial Decisionmaking

To understand how any individual goes about the task of deciding a case, it is necessary first to understand that individual’s jurisprudential approach toward law. All individuals, whether they are aware of it or not, have such an approach. Justice Benjamin Cardozo reminded us of this fact in his famous book, The Nature of the Judicial Process, originally published in 1921. As he stated:

We are reminded by William James in a telling page of his lectures on Pragmatism that every one of us has in truth an underlying philosophy of life, even those of us to whom the names and notions of philosophy are unknown or anathema. There is in each of us a stream of tendency, whether you choose to call it philosophy or not, which gives coherence and direction to thought and action. Judges cannot escape that current any more than other mortals. All their lives, forces which they do not recognize and cannot name, have been tugging at them – inherited instincts, traditional beliefs, acquired convictions; and the resultant is an outlook on life, a conception of social needs, a sense in James’ phrase of “the total push and pressure of the cosmos,” which, when reasons are nicely balanced, must determine where the choice shall fall. In this mental background every problem finds its setting. We may try to see things objectively as we please. None the less, we can never see them with any eyes except our own. To that test they are all brought – a form of pleading or an act of parliament, the wrongs of paupers or the rights of princes, a village ordinance or a nation’s charter.1

Justice Cardozo also remarked, “It may not have been the same principle for all judges at any time, nor the same principle for any judge at all times. But a choice there has been, not a submission to the decree of Fate; and the considerations and motives determining the choice, even if often obscure, do not utterly resist analysis.”2

Jurisprudentially, there are two main questions that lie behind any act of judicial interpretation. The first concerns the nature of law: analytic versus functional. The second concerns the nature of the judicial task: positivist versus normative. The remainder of Chapter 2 will examine these two responses to these two questions. Chapter 3 will then combine the two responses to these two questions and show how they create the four judicial decisionmaking styles: formalism (analytic positivism); Holmesian (functional positivism); instrumentalism (functional normative); and natural law (analytic normative). Chapter 4 will then provide a general perspective on the structure of law that emerges from judicial use of these decisionmaking styles in the areas of common-law, statutory, and constitutional adjudication, including the extent to which legal reasoning is predominantly inductive or deductive, and the different approaches to precedent. Taken together, the discussion in Part I of this book will provide the necessary background context for the discussion of the specific issues relating to constitutional interpretation addressed in Parts II, III, and IV of this book.

1 Benjamin Cardozo, The Nature of the Judicial Process 12-13 (1921).

2 Id. at 11.
§ 2.2 The Nature of Law

§ 2.2.1 Analytic versus Functional Approaches to the Nature of Law

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 relatively sophisticated discussion of this difference between an analytic and a functional approach toward the nature of law appeared in a 1988 Yale Law Journal article by Professor Ernest J. Weinrib. As Professor Weinrib noted, “[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. [This approach] repudiates analysis that conceives of legal justification in terms of some goal that is independent of the conceptual structure of the legal arrangement in question.” In contrast, Professor Weinrib noted, "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." As described by Professor Felix Cohen in his classic 1935 article, Transcendental Nonsense and the Functional Approach, “If the functionalists are correct, the meaning of a definition is found in its consequences.”

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4 See generally Bodenheimer, supra note 3, at 111-33 (discussing sociological jurisprudence); Lloyd, supra note 3, at 344-564 (sociological jurisprudence and American legal realism discussed).


6 Id. at 964-65.

A similar, but perhaps more accessible, discussion of the difference between an analytic and functional approach appeared in a 1981 *Cornell Law Review* article by Professor Robert Summers. Comparing a functional versus an analytic approach toward law, Professor Summers noted:

[The functional approach] views law not as a set of general axioms or conceptions from which legal personnel may formally derive particular decisions, but as a body of practical tools for serving substantive goals. Second, it conceives law not as an autonomous and self-sufficient system, 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, it 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).\(^8\)

Not surprisingly, these four differences between a functional and an analytic approach mentioned by Professor Summers track Aristotle’s four causes, discussed at § 1.2.1: material, formal, efficient, and final. With respect to material causes, in Summers’ terms, law is either viewed as a set of general axioms or law is viewed as a pragmatic tool. With respect to formal causes, law is either defined as being autonomous from social policy decisions or law is a means to an end. With respect to efficient causes, law is either an end in itself or is used to fulfill values. With respect to final causes or purposes, the law’s function is either to serve intrinsic values or instrumental ones. Each of these four causes is considered next, at § 2.2.2.

times, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation’s development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.9

University of Wisconsin Law School Professor and Historian J. Williard Hurst summed up Holmes’ functional attitude, as contrasted with the analytic attitude, as follows:

What is “the law,” the life of which we would study? . . . For a man steeped in history there exists no timeless, placeless, essential legal order; on the record, law has been man-made, or at least grown out of men’s social experience, and hence is found always bearing the stamp of particular situations . . . . Moreover, men use law to help order their relationships; by reason of its functions, therefore, law is found enmeshed in particular contexts of circumstances, purpose, and attitude.10

§ 2.2.2.2 Formal Causes and the Nature of Law

With respect to formal definitions, the functional approach conceives law not as an autonomous and self-sufficient system, 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. From an analytic perspective, law is reducible to a unitary general theory, as in algebra or geometry, and thus susceptible to statement in abstract consistent generalizations. Supporting such an analytic approach, Harvard University Law School Dean Christopher Columbus Langdell stated in 1886:

[Law is a science; secondly, that all the available materials of that science are contained in printed books. . . . [T]he library . . . is to us what the laboratories of the university are to the chemists and physicists, the museum of natural history to the zoologists, the botanical garden to the botanists.11

In contrast, from the functional perspective, law is pluralistic and susceptible only to statement in many concrete and narrow generalizations. This is so, Summers noted, because:

Rules and other legal precepts characteristically have more than one goal. It is commonly possible to differentiate several goal levels along a means-end continuum of ascending generality, in which the realization of a low-level goals explicitly formulated in the law serves higher-level goals, usually not so formulated. Thus, we may usually attribute to a rule or other precept directing behavior one or more “immediate” goals, one or more “intermediate” goals,

9 Oliver Wendell Holmes, Jr., The Common Law 1 (1881).

10 James Willard Hurst, Justice Holmes on Legal History 4 (1964).

and one of more “higher-level” or “ultimate goals.” . . . Thus, there usually will be no simple, single goal for a legal precept. The goals of a given precept form a goal “constellation” or “synthesis” that usually reflects some effort to accommodate conflicts in an optimal way.\footnote{12}{Summers, supra note 8, at 884.}

For each new circumstance, this “constellation” of goals will likely suggest a different accommodation to reach an optimal result for that circumstance. Thus, the law will reflect many concrete and narrow generalizations.

\section*{§ 2.2.2.3 Efficient Causes and the Nature of Law}

Efficient causes focus on how things change. Efficient causes of the nature of law thus focus on the precise process of legal change. Regarding this topic, Professor Summers noted, “[Analytic jurists] assume that law is a self-justifying body of precepts to be discovered by reason and applied in light of the ‘logic’ of the language expressing those precepts.”\footnote{13}{Id. at 882.} From such an analytic perspective, “coherence, harmony, and consistency with existing law” are critical; “words of prior opinions and their ‘logic’ control.”\footnote{14}{Id. at 867 n.4.}

In contrast, as Professor Summers noted, from a functional perspective:

a legal precept cannot be self-justifying. To justify having a form of law, it is at least necessary to inquire into its ends and its effects. Does it maximize present wants and interests? By apposite and defensible means? If so, this use of law is justified. In addition, the law does not consist of precepts that may be applied formalistically. Rather, law must be applied in light of its substantive ends.\footnote{15}{Id. at 882.}

Thus, from a functional perspective, the law’s purposes, as well as its logic, are important; “social facts and existing wants and interests” are critical; “judge’s actions in light of facts controls.”\footnote{16}{Id. at 867 n.4.}

\section*{§ 2.2.2.4 Final Causes and the Nature of Law}

Final causes focus on the purpose or final end of the object under study. With regard to the nature of law, the purpose or end of law from an analytic perspective is to follow the language and logic of the relevant legal concepts. As Summers noted, under this analytic perspective “[c]onsistency, analogy, coherence, harmony, and symmetry [are the] main tests of soundness”; law is “a relatively closed system of conceptions and axioms from which judges and others [can] deduce resolutions of almost any issue”; there is “always one ‘true rule,’ ascertainable by reason; laws of governance are
thus similar to universal laws of nature.” As stated by legal philosopher Ronald Dworkin, even in so-called “hard cases,” theoretically there is “one right answer” embedded in the relevant legal doctrine. The judge, however hard the case, is never to determine what the law shall be; the judge is confined to saying what the law is. There is some solution for every conceivable case that the application of reason can discover.

In contrast, from a functional perspective, the law is considered to serve generally substantive values extrinsic to the legal order, rather than intrinsic ones of logic, consistency, and harmony. That is, law’s function is to satisfy democratically expressed wants and interests, whatever they may be, within constitutional limits. As Professor Summers stated, when commenting about the functional challenge to the analytic approach during the first half of the 20th century in America:

They did not look to the past and ask: Is this proposal consistent with X? Analogous to Y? Harmonious with Z? Rather, they looked forward and asked: What can now be done to alter the future? What substantive goals, derived from popular wants and interests, are relevant? What rules or other percepts are required to further them? Thus, the new theorists subscribed to a substantive means-goal rationality.

First, lawmakers had to find facts about the nature and extent of the problem knocking on the law’s door. Holmes and [Harvard University Law School Dean Roscoe] Pound were among the first to advocate the use of social science methods in such inquiries. In a famous essay, Holmes urged the use of statistics, economics, and science generally.

Second, it was assumed that lawmakers must ascertain the causes of economic inefficiency, of official corruption, or excessive hours of labor, or practices that led to impure food and drugs entering commerce. With knowledge of such laws of causation, legislators could predict the social effects that would occur depending on the legal means employed.

Third, science could help determine alternative legal means for coping with problems, and could even help construct such means by discovering or adapting technology.

Armed with such tools, lawmakers could be truly scientific. They could invoke laws of social and legal causation to predict the likely efficacy of alternative legal means, determine costs and benefits, choose the preferred means, and implement them. [The functional approach] generally prescribed this approach not only for legislators but for courts, too.

Because of the inevitable uncertainties that underlie such a process of empirical investigation and means-end reasoning, functionalists are skeptical of the analytic assumption that there is always

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17 Id. at 867 n.4, 889-90.
19 Summers, supra note 8, at 890-92, citing, inter alia, Oliver Wendell Holmes, Jr., The Path of the Law, 10 Harv. L. Rev. 457, 467 (1897), reprinted in 110 Harv. L. Rev. 991, 1001 (1997).
“one right answer” to every legal problem. Furthermore, such a process of empirical investigation requires continual monitoring. As Summers remarked:

Once new law was made by legislature or court, [functionalists] urged that social methods be continuously applied to monitor and evaluate whether the law was working out as envisioned. Fact-finding of this nature would prove useful in deciding whether to modify and perhaps even abandon the current law. Pound stressed that “[t]he compromises and adjustments that will achieve the largest securing of social interests with the least sacrifice, must be sought through a process of trial and error.” Holmes and many others wrote of uses of law as “experiments” and of society as a legal “laboratory.” Holmes even viewed the Constitution in this spirit; “It is an experiment, as all life is an experiment.”

In sum, for functionalists, the end or purpose of law is to serve as an aid in pragmatic adjustment of social interests, law being part of that empirical science. From the analytic perspective, the purpose or end of law is to follow the language and logic of the relevant legal concepts without regard to such pragmatic means-end reasoning, in Langdell’s terms law being more of a library science.

§ 2.3 The Nature of the Judicial Task

§ 2.3.1 Positivist versus Normative Approaches to the Judicial Task

The second main question any judge must ask before deciding how to resolve a legal dispute is 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.

Concerning this issue of the nature of the judicial task, 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 discussed by Professor Frederick Schauer in an article entitled Constitutional Positivism:

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.

20 Id. at 892, citing, inter alia, Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., opinion).
21 See Bodenheimer, supra note 3, at 91-109; Lloyd, supra note 3, at 170-343.
22 See Bodenheimer, supra note 3, at 134-68; Lloyd, supra note 3, at 79-169.
As a result, positivist judges, were they so inclined, could in some systems get away with an amoral conception of their task. 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."

In determining questions of justice, Professor Dworkin noted that from this perspective judges should only make such decisions as they can justify within a theory that also justifies the other decisions they propose to make. That is, a judge adopting such a “normative” perspective should ensure that each decision is consistent with society’s background legal and moral culture, society’s “norms.” As Professor Dworkin has noted, such an approach “condemns the practice of making decisions that seem right in isolation, but cannot be brought within some comprehensive theory of general principles and policies that is consistent with other decisions also thought right.”

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. To the extent that each society can develop its own “rule of recognition” without regard to any independent moral restraints, that would reflect a positivist theory of law. A classic statement of this approach appeared in an article written in 1958 by Professor Hart entitled, _Positivism and the Separation of Law and Morals_. As phrased by 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.

In contrast, a normative theory of law counsels that there are moral restraints on what can constitute a valid “rule of recognition.” A classic defense of this position appeared in Harvard University Law

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25 *Id.* at 1064.


School Professor Lon Fuller’s reply in 1958 to H.L.A. Hart, in an article entitled, *Positivism and Fidelity to Law – A Reply to Professor Hart*. As phrased by Fuller:

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.28

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. . . .

The citizen’s predicament becomes more difficult when, though there is no total failure in any direction, there is a general and drastic deterioration in legality, such as occurred in Germany under Hitler. A situation begins to develop, for example, in which though some laws are published, others, including the most important, are not. Though most laws are prospective in effect, so free a use is made of retroactive legislation that no law is immune to change *ex post facto* if it suits the convenience of those in power. For the trial of criminal cases concerned with loyalty to the regime, special military tribunals are established and these tribunals disregard, whenever it suits their convenience, the rules that are supposed to control their decisions. Increasingly, the principle object of government seems to be, not that of giving the citizen rules by which to shape his conduct, but to frighten him into impotence. . . . So it was with the German citizen under Hitler. . . .29

This broader difference between Hart and Fuller’s general conception of law, and whether there are any normative limitations on what a society’s “rule of recognition” could be and still be regarded


as a valid rule of recognition, is discussed at § 16.4 nn.87-90. In any individual society, however, that society’s “rule of recognition” might be that judges should adopt a positivist or normative approach to judicial decisionmaking. The issue raised here is thus 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.

An example may help make this point clearer. As noted at § 1.1, Justice Kennedy is categorized in this book as following a natural law style of interpretation. As discussed at §§ 2.4 & 3.4, this style of interpretation reflects a normative approach to the nature of the judicial task. It is an interesting question whether Justice Kennedy adopts this style of interpretation because he agrees with Lon Fuller that only such a natural law style of interpretation does justice to law, or he agrees with H.L.A. Hart that a judge should follow the positive “rule of recognition” of his society, and that our framers and ratifiers expected judges to adopt a natural law style of interpretation. From the perspective of how Justice Kennedy decides cases, however, it does not matter much why he adopts the natural law interpretation style, only that he adopts it. In his article, Constitutional Positivism, Professor Schauer made the same observation, when he stated, “[C]onsistent with this conceptual 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, capable of being different at other times or in other systems, while the natural law tradition would see this as an instance of a conceptual truth equally applicable to all existing and possible legal systems.”

As discussed in the next subsection, at § 2.3.2, the judicial decisionmaking task will be different depending upon which style of interpretation, positivist or normative, the judge adopts. Particularly since the authoritative interpreters of the United States Constitution have been judges, at least since the 1803 decision in *Marbury v. Madison*, discussed at §§ 17.1.1-17.1.2.1, this issue of the nature of the judicial task is key for a book on American constitutional law. As English legal philosopher H.L.A. Hart noted about America:

American speculative thought about the general nature of law . . . is marked by a concentration, almost to the point of obsession, on the judicial process, that is, with what courts do and should do, how judges reason and should reason in deciding particular cases . . . . The simple explanation of that concentration is, no doubt, the quite extraordinary role that the courts, above all the United States Supreme Court, play in American government . . . [particularly the] power to review and declare unconstitutional and so invalid enactments of Congress as well as of the state legislatures.

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30 Schauer, *supra* note 23, at 802-03.

§ 2.3.2 Discussion of Positivist versus Normative Approaches in Terms of the Four Causes

§ 2.3.2.1 The Positivist View

Using Aristotle’s scheme of four causes, the material of the judicial task for positivist judges is existing common law, statutes, and constitutional text. With regard to the form or definition of what constitutes law, the positivist view is that judges may only discover, declare, and apply the law as it already exists. With regard to efficient causes, the positivist view is that the logic and purpose of existing concepts control. As discussed at § 2.4, for analytic positivists, only the logic of existing concepts controls; for functional positivists, 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, as discussed at § 2.2.2.3. 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, what Professor H.L.A. Hart called “The Nightmare” in his article entitled American Jurisprudence Through English Eyes: The Nightmare and The Noble Dream. According to Hart:

The Nightmare is this. Litigants in law cases consider themselves entitled to have from judges an application of existing law to their disputes, not to have new law made for them. Of course it is accepted that what the existing law is need not be and very often is not obvious, and the trained expertise of the lawyer may be needed to extract it from the appropriate sources. But for conventional thought, the image of the judge, to use the phrase of an eminent English Judge, Lord Radcliffe, is that of the “objective, impartial, erudite, and experienced declarer of the law,” not to be confused with the very different image of the legislator. The Nightmare is that this image of the judge, distinguishing him from the legislator, is an illusion, and the expectations which it excites are doomed to disappointment – on an extreme view, always, and on a moderate view, very frequently.32

§ 2.3.2.2 The Normative View

In contrast to the positivist view, the material of 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 background norms, and regularly do so, covertly as well as overtly. For normativists, the efficient causes of change in law rest in part on the substance of these background considerations, not merely the logic or purpose of existing concepts. As discussed at § 2.4, for analytic normative theorists, these background considerations are limited to background moral principles; for functional normative theorists, these background considerations can include both principles and policies. The final cause or end of the judicial task for normative theorists is whether the law has a defensible substantive content.

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32 Id. at 972.
In his article, Professor Hart called this conception of the judicial task, “The Noble Dream.” As Hart described it:

[A] legal system was too narrowly conceived if it was represented as containing only rules attaching closely defined legal consequences to closely defined, detailed factual situations and enabling decisions to be reached and justified by simply subsumption of particular cases under such rules. Besides rules of this kind, legal systems contain large-scale general principles; some of these are explicitly acknowledged or even enacted, whereas others have to be inferred as the most plausible hypotheses explaining the existence of the clearly established rules. Such principles do not serve merely to explain rules in which they are manifested but constitute general guidelines for decision when particular rules appear indeterminate or ambiguous or where no relevant authoritative, explicitly formulated rule seems available. . . .

[In the end [this is] the message preached by Karl Llewellyn in his rich and turbulent advocacy of what he termed the grand style of judicial decision. . . . Professor Ronald Dworkin . . . is, if he and Shakespeare will allow me to say so, the noblest dreamer of them all . . . .

The famous case of *Riggs v. Palmer* provides a good example of the difference between a positivist and normative perspective on the nature of the judicial task. The *Riggs* case involved the issue of whether an heir who murdered the testator to ensure the will would not be changed could collect under the will. The dissent in *Riggs* took the positivist view that since the existing legal statutes did not provide that the heir could not collect, then the heir could collect even if that led to an inequitable result. The majority in *Riggs* acknowledged that the relevant statutes did not expressly provide that the murderous heir could not collect. However, the majority based its decision on background “general principles of natural law and justice” embedded in the views of “many generations” of “philosophers and statesmen” and “fundamental maxims of the common law” that no one should be able to “profit” from “his own wrong.” The Court thus gave the relevant statutes on wills an “equitable construction” that denied the heir an ability to profit from his own wrong.

§ 2.4 How Perspectives on the Nature of Law and the Judicial Task Combine

As indicated in the preceding material, variations exist in the relative weight that different judges give to the two critical factors significant for judicial decisionmaking: the judge's views on the nature of law and on the nature of judicial task. Combining the two different views on the nature of law (analytic versus functional) and the nature of the judicial task (positivist versus normative) results in four decisionmaking styles. These modes of legal analysis are listed in Table 2.4 below:

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33 *Id.* at 979-80, 982.

34 115 N.Y. 506, 22 N.E. 188, 191-92 (1889) (Gray, J., joined by Danforth, J., dissenting).

35 *Id.* at 189-90.
Table 2.4

Styles of Judicial Decisionmaking

<table>
<thead>
<tr>
<th>Nature of Judicial Task</th>
<th>Positivism:</th>
<th>Normativism:</th>
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<tbody>
<tr>
<td></td>
<td>Judges as Neutral</td>
<td>Judges as</td>
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<td></td>
<td>Declarers of the Law</td>
<td>Normative Actors</td>
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<thead>
<tr>
<th>Nature of Law</th>
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<tbody>
<tr>
<td>Law as Logical; Analytic or Conceptualist Attitude; Law as Library Science</td>
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<tr>
<td>Formalism/ Analytic Positivism</td>
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<table>
<thead>
<tr>
<th>Nature of Law</th>
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<tbody>
<tr>
<td>Law as Means to Ends; Functional or Pragmatic Approach; Law as Empirical Science</td>
</tr>
<tr>
<td>Holmesian/ Functional Positivism</td>
</tr>
</tbody>
</table>

Discussion of the details of each of these four judicial decisionmaking styles appears in Chapter 3. However, it is useful here to note that presenting these four decisionmaking styles in the context of this two-dimensional Table based upon the nature of law and the nature of the judicial task can help to clarify the confusion that may result from jurisprudential discussion that attempts analysis along a single, one-dimensional scale.

One kind of confusion results from failing to appreciate the differences among the terms “formalism,” “analytic jurisprudence,” and “positivism.” As Table 2.4 indicates, and discussed at §§ 3.1-3.2, there are two basic kinds of positivist theories: the analytic positivism of formalism, associated with individuals such as Harvard University Law School Dean Christopher Columbus Langdell, and the functional or pragmatic positivism associated with Justice Holmes. These two kinds of positivism differ, for example, with the emphasis placed upon the logic of existing rules under the analytic formalist approach versus the emphasis placed upon the purpose lying behind existing rules to advance some social policy, which is emphasized under the functional Holmesian approach.

Similarly, there are two kinds of analytic jurisprudential theories: the analytic positivism of formalism and the analytic normative theories associated with the natural law tradition. For example, as discussed at § 3.4 nn.79-80, in his article on the analytic approach toward law, cited at § 2.2.1 n.5, Professor Weinrib distinguished the natural law and natural rights tradition from "the thinner formalism of positivism, which . . . makes the notion of law as such indifferent to the law's content." Thus, although both adopt analytic approaches to the nature of law, "For Natural Law

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36 See, e.g., Anthony J. Sebok, Misunderstanding Positivism, 93 Mich. L. Rev. 2054, 2054-72 (1995) (discussing the confusion that often surrounds these and other related terms).

37 Weinrib, supra note 5, at 954 n.14.
Theory the idea of morally legitimate power constitutes a real definition of law; for Positivism the rival real definition is contained in a morally neutral concept of socially organized power.\textsuperscript{38}

It should be noted that in his article Professor Weinrib used the term "formalism" to describe any analytic, non-functional approach to law. Thus, for Professor Weinrib, there are two basic kinds of formalist theories, the "thinner formalism" of analytic positivism and the formalism of the natural law and natural rights tradition.\textsuperscript{39} In contrast, in this book, and more in keeping with common use, as discussed at §§ 3.1 & 3.4, "formalism" is used to describe only the analytic, positivist approach to law, while the term "natural law" is used to describe the separate analytic, normative jurisprudential approach of the natural law and natural rights tradition.

This two-dimensional Table can also help clarify the confusion among functional approaches to law. For example, in his article on instrumentalism, Professor Summers grouped Holmes, John Chipman Gray, Karl N. Llewellyn, and Felix S. Cohen, among others, as all sharing the same jurisprudential philosophy of pragmatic instrumentalism.\textsuperscript{40} Each of these individuals did share a functional or pragmatic approach toward law, and thus rejected the analytic presuppositions of a formalist approach. However, as noted at § 3.2 nn.48-50, Holmes and Gray are best understood as having adopted a positivist approach toward the judicial task, while, as noted at § 3.3 nn.53-54, Llewellyn and Cohen adopted a more normative approach associated with the instrumentalist “Grand Style” of judicial decisionmaking. All these individuals were part of the early 20\textsuperscript{th} century “Realist Movement” in the law, which was a functional assault on the analytic presuppositions of the formalist style of decisionmaking, as discussed at §§ 13.1 & 13.2. Nevertheless, despite all being “realists,” there are clear differences between the Holmesian style of interpretation and Llewellyn’s “Grand Style” of interpretation that apply across the fields of common-law, statutory, and constitutional interpretation, as discussed at §§ 3.2-3.3.

This two-dimensional Table can also help clarify differences among normative approaches to the judicial task. 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.\textsuperscript{41}


\textsuperscript{39} Weinrib, \textit{supra} note 5, at 954 n.14.

\textsuperscript{40} Summers, \textit{supra} note 8, at 865.

In terms of what kinds of background considerations judges may use to resolve “hard cases,” the functional instrumentalist approach, associated with Llewellyn’s “Grand Style” of decisionmaking, is willing to consider both arguments of principle and arguments of policy, with an emphasis on functional consideration of social policy calculations, as discussed at § 3.3 nn.51-58. In contrast, Professor Dworkin indicated that he thinks judges in considering background considerations should limit themselves to reasoned, or analytic, balancing of moral principles.\(^{42}\) As discussed at § 3.4 nn.93-106, this view is reflective of a natural law approach toward normative considerations.

Of course, no judge is likely to be a perfect model of consistency in adopting any particular judicial decisionmaking style. Indeed, as Justice Cardozo noted at § 2.1 n.1, many judges may not even be aware of these defined decisionmaking styles, and they may merely represent “forces which they do not recognize and cannot name.” Nevertheless, these four decisionmaking styles can help to clarify what appear to be in most cases systematic differences in decisionmaking style among judges, including Justices of the United States Supreme Court.

An additional example of the benefits of categorizing judicial decisionmaking into four different styles along two dimensions, rather than two different styles along one dimension, comes from considering a 2003 article, entitled *Judicial Review and Legal Pragmatism*, by Stanford Law School Professor Thomas Grey. Professor Grey noted differences between two kinds of judicial reasoning styles, “formalism” and “pragmatism (or antiformalism).”\(^{43}\) Professor Grey’s discussion, however, admitted that there are a number of versions of antiformalism. One version, “policy jurisprudence,” treats “law as a means to social ends, the fulfillment and accommodation of the interests of those the law is meant to serve.”\(^{44}\) This is the judicial decisionmaking style called in this book “instrumentalism.” A second version, Professor Grey noted, is “modern rights theory.” As Grey stated, “Rights-oriented [theorists] differ from policy jurists in making qualitative distinctions between interests and rights, and between policies and principles, giving evaluative priority to rights and principles.”\(^{45}\) This is the judicial decisionmaking style called in this book “natural law.”

As Grey noted, some commentators, including Karl Llewellyn himself, attempted to morph Chief Justice John Marshall’s style of decisionmaking into Karl Llewellyn’s “Grand Style” of decisionmaking. However, there are notable differences between the two styles, including Marshall’s greater focus on analytic, categorical decisionmaking, typical of the natural law style of decisionmaking, versus Karl Llewellyn’s more “flexible and openly instrumental Grand Style.”\(^{46}\) Distinguishing natural law from instrumentalism makes these differences easier to understand.

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\(^{42}\) *See* Dworkin, *supra* note 18, at 1061-65.


\(^{44}\) *Id.* at 479.

\(^{45}\) *Id.* at 480.

\(^{46}\) *Id.* at 479.
In addition, as Professor Grey noted, the formalist style of interpretation of the late 19th century was followed not by any return to John Marshall’s theory of interpretation, or even by immediate acceptance of Llewellyn’s Grand Style of interpretation, but by the “legal Progressives and pragmatists of 1880 to 1930.” As Professor Grey stated, “These writers were not champions of judicial review, but skeptical critics of it, by and large proponents of the supremacy of democratic legislatures, dedicated to reining in the aggressive public law style of the classical liberal judges of the *Lochner* era.” This is the style of interpretation called in this book the “Holmesian” style of judicial decisionmaking. As discussed at §§ 3.2-3.3, separating the Holmesian style of pragmatism from the Llewellyn’s instrumentalist Grand Style of pragmatism can help to explain systematic differences between Holmesian judges, like Justices Holmes, Brandies, and Frankfurter, or Judge Learned Hand, and instrumentalist judges, like Chief Justice Earl Warren and the other liberal, activist Justices of the Warren Court, or state court judges like Judge Roger Traynor. Absent drawing a distinction between Holmes and Llewellyn, it becomes more difficult to talk about these differences in judicial decisionmaking styles, a difficulty that Professor Grey acknowledged in his article when stating “mine does not find an obvious place for . . . activist liberal constitutionalism.”

As a final point, separating the analytic approaches to judicial decisionmaking into natural law and formalism can help explain certain aspects of law, like the jurisprudential underpinnings of the *Lochner*-era liberty of contract discussed by Professor Grey in his article. The standard “progressive” or “pragmatic” account of *Lochner*, Grey noted, was that *Lochner* was just another example of the flaws of an anti-pragmatic, formalist style of decisionmaking. A more complete understanding of *Lochner*, Professor Grey suggested, is 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.”

Distinguishing a natural law approach from a formalist approach can help make these aspects of *Lochner* clearer. As discussed at § 14.2.2 nn.45-55, the blurring of common law and natural law took place through applying a formalist decisionmaking style to the concept of free labor, rather than a more sensitive, natural law approach. As discussed at § 15.4.1 nn.53-56, a blurring of custom and reason was typical of both the 19th-century natural law approach and *Lochner*-era formalism. The *Lochner* doctrine in general is discussed at § 27.3.2.1 nn.149-60.

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47 *Id.* at 490.

48 *Id.* at 508.

49 *Id.* at 494-97.

50 *Id.* at 504-06.
CHAPTER 3: EFFICIENT CAUSES: THE FOUR DECISIONMAKING STYLES

As indicated in Chapter 2, variations exist in the relative weight that different jurists give to the two critical factors significant for judicial decisionmaking: the judge's views on the nature of law, discussed at § 2.2, and on the nature of judicial task, discussed at § 2.3. As discussed at § 2.4, combining the two different views on the nature of law (analytic versus functional) and the nature of the judicial task (positivist versus normative) results in four judicial decisionmaking styles: formalism (analytic positivism); Holmesian (functional positivism); instrumentalism (functional normative); and natural law (analytic normative). Each of these interpretation styles is discussed in greater depth in this Chapter. A short-hand reference for the major differences among these four interpretation styles, suggested by the discussion at § 2.4, is the following: formalist judges emphasize the logical elaboration of existing legal categories; Holmesian judges add to this focus a functional emphasis on the purpose of 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 the analytic balancing of background moral principles embedded in the law; instrumentalist judges add to this normative enterprise an emphasis on functional consideration of background social policies embedded in the law, which become particularly relevant when existing legal categories yield indeterminate or ambiguous results, and thus leeways exist in the law. Table 3.4 summarizing these differences appears at the end of this Chapter, at § 3.4 text following n.106.

§ 3.1 Formalism: The Analytic/Positivist Approach

As discussed at § 2.4, one approach to judicial decisionmaking is represented by analytic, positivist judges who combine a focus on certain, predictable treatment of existing positive law with an insistence on logical rule application. Such judges have generally been called "formalists" because they concentrate on the formal aspects of law – technical rule manipulation in light of a statute's or constitution's words, and the literal holdings of common-law precedents. Under this approach, law is viewed as a closed system of related rules to be logically or mechanically applied. A classic account of this formalist approach appeared in 1908 by Harvard University Law School Dean Roscoe Pound, in an article entitled Mechanical Jurisprudence.1 Professor Robert Summers noted in 1981 when comparing formalism and instrumentalism, "Formalists generally viewed the law as a relatively closed system of conceptions and axioms for which judges and others could deduce resolutions of almost any issue."2 As phrased by Professor Frederick Schauer, in his 1988 article Formalism, “[N]ow that we have established that formalism – in the sense of following the literal mandate of the canonical formulation of a rule – is conceptually and psychologically possible, we must ask whether it is desirable.” For a formalist judge, the answer to that question is “yes.”3

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1 Roscoe Pound, Mechanical Jurisprudence, 8 Colum. L. Rev. 605 (1908).


As noted by many authors, 19th-century Harvard University Law School Dean Christopher Columbus Langdell was a leading advocate of the formalist approach. Professor Thomas Grey, in his article, *Langdell’s Orthodoxy*, has described this approach to judicial decisionmaking as follows:

In the terms of the analytic scheme just sketched, the heart of classic theory was its aspiration that the legal system be made complete through universal formality, and universally formal through conceptual order. A few basic top-level categories and principles formed a conceptually ordered system above a large number of bottom-level rules. The rules themselves were, ideally, the holdings of established precedents, which upon analysis could be seen to be derivable from the principles. When a new case arose to which no existing rule applied, it could be categorized and the correct rule for it could be inferred by use of the general concepts and principles; the rule could then be applied to the facts to dictate the unique correct decision in the case. The system was doubly formal. First, the specific rules were framed in such terms that decisions followed from them uncontroversially when they were applied to readily ascertainable facts. Thus, the classic orthodoxy sought objective tests, and avoided vague standards, or rules that required determinations of state of mind. Second, at the next level up one could derive the rules themselves analytically from the principles.4

As with each of the four judicial decisionmaking styles described in this Chapter, the formalist style can be applied in common-law, statutory interpretation, or constitutional interpretation cases. Two good descriptions of the formalist style as applied to common-law decisionmaking appear in Professor Grant Gilmore’s book, *The Ages of American Law*, and Professor Karl Llewellyn’s book *The Common Law Tradition – Deciding Appeals*. As described by Professors Gilmore and Llewellyn, the formalist style of decisionmaking is based upon the assumption that law is composed of a system of rationally related rules, and that the judge's sole function is to apply those rules mechanically to the case at hand. It is a system of pure logical categorization and deduction. Judges do not need to inquire into the particular consequences of applying the rule in the case before them. The judge's sole duty is to apply the rule, or rules, applicable to the case at hand. The premise of such a system is that change should come, if at all, from the legislative or executive branch. Judges should not make new rules; rather, they should merely apply existing law.5 This analytic positivist approach is also reflected in the late 18th century and early 19th century works of Jeremy Bentham and John Austin in England, as noted at §§ 2.3.1 n.27 & 7.1 text preceding n.1.

Two examples from contract law indicate general and specific aspects of a formalist approach to common-law decisionmaking, and how that approach differs from an instrumentalist approach. Formalism and instrumentalism are compared here because they are opposite approaches to judicial decisionmaking, in the sense that formalism is an analytic positivist approach, while instrumentalism is a functional normative approach. Reflecting the formalist view that logical elaboration of existing legal categories can provide a relatively concise list of legal rules and principles that can govern the outcome of most legal problems, Dean Langdell noted in 1871 about the law of contracts:

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The number of fundamental legal doctrines is much less than is commonly supposed. . . . If these doctrines could be so classified and arranged that each should be found in its proper place, and nowhere else, they would cease to be formidable in their number.  

In contrast to this view, as discussed at § 3.3, a judge following an instrumentalist approach is likely to embrace a wider array of doctrines because of the instrumentalist willingness to consider how background principles and policies embedded in the law must be balanced to achieve the optimal result in each circumstance, Llewellyn’s “Grand Style” of decisionmaking. Thus, as Professor Gilmore noted about Llewellyn’s approach to contract law, an approach that is reflected in part in the drafting of the Uniform Commercial Code in the 1950s, of which Llewellyn was the Reporter:

Transactions between professionals (or merchants) should be treated differently from transactions in which a professional sold goods to a non-professional (or consumer); [that s]ales for resale should be treated differently from sales for use; [that d]istinctions should be made between sales for cash and sales for credit; present sales and future sales; one-shot or single delivery transactions and long-term contract arrangements; [etc.].

With respect to a specific example from contract law, Langdell’s formalist approach led him to reject the “mailbox” rule for the enforceability of acceptances sent by mail. According to Langdell, the basic contract principle that offers, revocations of offers, and rejections of offers are only valid when received logically implied acceptances sent by mail are only valid when received. In contrast, as Llewellyn argued, from a functional perspective a different rule for revocations and acceptances is justifiable because a person making an offer can be expected to assume that an acceptance may be on the way, while a person making an acceptance needs the security of knowing that this acceptance will not be undercut by a later received revocation. Further, in the event the mail is lost, it is more likely that the offeror will inquire about the acceptance rather than the offeree inquiring whether the acceptance was received. Reflecting a similar functional approach toward law, Holmes also supported adoption of the mailbox rule. Holmes wrote about Langdell’s mailbox rule argument:

A more misspent piece of marvelous ingenuity I never read, yet it is most suggestive and instructive. I have referred to Langdell several times in dealing with contracts because to my mind he represents the powers of darkness. He is all for logic and hates any reference to anything outside of it. . . .

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6 Christopher Columbus Langdell, Selections of Cases on the Law of Contracts vi (1871).

7 Gilmore, supra note 5, at 82-83.


10 Letter from Oliver Wendell Holmes, Jr., to Sir Frederick Pollock (Apr. 10, 1881), in Holmes-Pollock Letters 16-17 (Howe, ed. 1941), cited in Sebok, supra note 8, at 2080 n.108.
An example from tort law also indicates differences between a formalist and an instrumentalist approach to common-law decisionmaking. The case of *Hynes v. New York Central Railroad Co.* was triggered on July 8, 1916, when James Harvey Hynes and two of his companions swam across the Harlem River from Manhattan to the Bronx in New York City. Along the Bronx side of the river ran the New York Central Railroad Co.’s right of way. The railroad operated its trains at that point by high tension wires strung on poles and crossarms. A bulkhead had been constructed at the edge of the water to protect the land from erosion. A plank, which could serve as a springboard, was attached to the bulkhead and projected out over the water. As boys in the neighborhood often did, Harvey Hynes and his companions climbed on top of the plank. One of the boys dived safely into the river. As Hynes prepared to dive, a crossarm and electric wires fell from one of the poles. An electric wire struck Hynes, flung him from the shattered board, and plunged him to his death in the water below.

In his mother’s action against the railroad for wrongful death, the jury returned a verdict for Hynes’ mother, but the trial judge set aside the verdict on the ground that she had failed to prove a valid cause of action. Specifically, the judge noted, if Hynes were a trespasser on the railroad’s land, then the railroad would only owe Hynes a duty to refrain from willful or wanton misconduct, and thus negligence on the part of the railroad in failing to maintain the crossarms in a proper condition would not form the basis for recovery. Adopting a formalist approach that followed the logic of the existing legal categories regarding technical trespassers and the duty owed to them, the intermediate appellate court in New York affirmed the decision of the trial judge.11

In contrast, the highest court in New York, the New York Court of Appeals, reversed the decisions of the trial judge and the intermediate appellate court. The New York Court of Appeals, in a decision authored by Justice Benjamin Cardozo, adopted an instrumentalist approach to the case, and rejected a formalist approach. Regarding the two approaches, the Court stated:

> This case is a striking instance of the dangers of “a jurisprudence of conceptions” [that is] the extension of a maxim or definition with relentless disregard of consequences to a “dryly logical extreme.” . . . The truth is that every act of Hynes, from his first plunge into the river until the moment of his death, was in the enjoyment of the public waters, and under cover of the protection which his presence in the waters gave him.

> . . . In one sense, and that a highly technical and artificial one, the diver at the end of the springboard is an intruder on the adjoining lands. In another sense, and one that realists will accept more readily, he is still on public waters in the exercise of public rights. The law must say whether it will subject him to the rule of one field or of the other, of this sphere or of that. We think that considerations of analogy, of convenience, of policy, and of justice, exclude him from the field of defendant’s immunity and exemption, and place him in the field of liability and duty.12

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As noted at the beginning of Chapter 3, at text preceding § 3.1, while formalist judges emphasize the logical elaboration of existing legal categories, instrumentalist judges consider all four kinds of arguments in reaching decisions in any individual case: logic (“analogy”); purpose (“convenience”); background moral principles (“justice”); and background social policies (“policy”).13

The formalist approach to statutory and constitutional interpretation similarly focuses on the logical elaboration of existing legal categories. For these tasks, this principally means the logical (or literal) elaboration of statutory or constitutional text. In his book, A Matter of Interpretation,14 which discusses both statutory and constitutional interpretation, Justice Scalia described this approach as a “textualist” approach to interpretation. As Justice Scalia noted, this approach does not necessarily adopt a strict, or narrow, construction of all constitutional provisions. While there is a policy maxim of strict construction of penal statutes, as discussed at § 5.2.2.1.B nn.40, 43, that policy maxim does not apply to constitutional provisions in general. Thus, Justice Scalia rejected use of the phrase “strict constructionist” to describe his “textualist” approach to constitutional interpretation. As Justice Scalia stated, “[This] is not strict construction, but it is reasonable construction.”15 As noted at § 1.1, the term “textualism” is not used in this book to describe this interpretation style because all four judicial decisionmaking styles start their statutory and constitutional analysis with text. In any event, Justice Scalia has embraced the term “formalism” as well. He has stated, “Of all the criticisms leveled against textualism, the most mindless is that it is ‘formalist.’ Ths answer to that is, of course it’s formalistic! The rule of law is about form, . . . Long live formalism. It is what makes a government a government of laws and not of men.”16

On the question of the relative weight to give literal meaning versus purpose in interpreting statutory or constitutional provisions, all formalist jurists emphasize the literal, plain meaning of the words.17 Formalists are concerned that attempting to determine a provision’s purpose, or purposes, is not a clear, mechanical process that can yield unambiguous results. As stated by Professor Schauer, “The language in which a rule is written and the purpose behind that rule can diverge precisely because that purpose is plastic in a way that literal language is not. . . . It is because purpose is not reduced to a concrete set of words that it retains its sensitivity to novel cases, to bizarre applications, and to the complex unfolding of the human experience.”18 In contrast, formalists have a preference for

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15 Id. at 38.

16 Id. at 25.


18 Schauer, supra note 3, at 532.
clear, bright-line rules that can be applied without regard to the purpose the rule is meant to serve.\(^9\)

As the interpretation task is similar for statutes and the Constitution, fuller treatment of both is reserved for Chapter 9, which considers the formalist approach to constitutional interpretation in greater depth. In short, as discussed at § 9.2.1.1, three variations of the formalist approach have appeared in Anglo-American legal history. They are the Literal Rule, the Golden Rule, and the Plain Meaning Rule. Under the Literal Rule, the court should follow a text’s literal meaning even if that meaning leads to an absurd result. This literal meaning would be determined from considering the dictionary meaning of the text's words, as supplemented by basic rules of grammar as reflected in traditional grammatical maxims of construction. Under this approach, only if the text is ambiguous, and thus has no plain meaning, should the court depart from what the text literally requires.

A second version of formalism is the Golden Rule. The Golden Rule differs from the Literal Rule in that under the Golden Rule the plain meaning of a text should not be followed if it leads to an absurd result. Thus, under the Golden Rule, a court should depart from literal text, whether statutory or constitutional text, if the text is ambiguous or the literal meaning would create an absurd result.

A third version of formalism is represented by the Plain Meaning Rule. Carefully stated, the Plain Meaning Rule does not constrain a court from considering purposes stated on the face of the text when determining the plain meaning of particular language. However, as discussed at § 9.2.1.1, this aspect of the difference between the Golden Rule and Plain Meaning Rule of interpretation has not always been carefully noted by courts. Nevertheless, even under a proper understanding of the Plain Meaning Rule, the literal meaning of text is emphasized more than the functional purpose of the text.

In sum, under any of these versions, the formalist decisionmaking style views the judge's role as the logical, mechanical restatement of the meaning placed into a statute or the Constitution by the framers and ratifiers of that document. Being a positivist theory of law, the formalist sees the judge as a neutral arbitrator who attempts to decide cases in light of existing positive law. Being an analytic, positivist theory of law, formalism has a preference in common-law, statutory, or constitutional adjudication for clear, bright-line rules that are capable of logical, mechanical application, rather than doctrine phrased as balancing tests, factors to weigh, or general standards.\(^2\) This preference is discussed in greater depth at § 4.2 and reflected in Table 4.1. As discussed in Chapter 9, when formalists interpret the Constitution they give great weight to the literal meaning of terms and to evidence of the specific historical intent of the framers and ratifiers regarding a particular constitutional provision because those matters are thought best to reflect an analytic, neutral approach to the positive law adopted by the framers and ratifiers.

For a formalist, the other interpretation styles are defective in that they give judges too much room to invent law and, thus, allow interference with the democratic process, whose basic assumption is that law should be the will of the people as expressed through statutes passed by their elected

\(^9\) See Mark D. Rosen, Nonformalistic Law in Time and Space, 66 U. Chi. L. Rev. 622, 623 n.6 (1999), and sources cited therein.

representatives or embodied in the text of the Constitution. Adopting a rigid, positivist approach that the Constitution is a static source for reasoning, Justice Scalia stated at a conference held in 2002, “The Constitution that I interpret and apply is not living, but dead. . . . Our first responsibility is not to make sense of the law – our first responsibility is to follow the text of the law.”21 Justice Scalia similarly noted in his 1997 book, A Matter of Interpretation, that the alternative view of the “living” Constitution is incompatible with the “antievolutionary purpose of a constitution.”22 This aspect of a formalist approach to interpretation is discussed at §§ 4.1 nn.7-12, 6.3.4 & 9.2.2.1.

The worst offender, for a formalist, is an instrumentalist judge, given such a judge’s willingness to allow background social policy considerations to affect constitutional interpretation. The natural law style, with its concern to search for and carry out background moral principles that may underlie text, likewise contains for a formalist too many opportunities for a judge to “make sense of the law” in a way that could be contrary to the framers and ratifiers’ intent as determined by the literal meaning of enacted text. Formalists are also distrustful of the Holmesian style of interpretation, given its willingness to allow logic to be overcome by experience and by a willingness to allow text to be read in light of a search for underlying purposes.

§ 3.2 Holmesian: A Functional/Positivist Approach

As noted at § 2.4, a second kind of judge combines a positivist emphasis on certain, predictable treatment of existing law with the functional view that legal rules are always means to societal ends. Given this view of legal rules, purely logical treatment of existing law is not sufficient to carry out the judicial task. Judges who adopt this view may be called "Holmesians," after Justice Holmes, whose famous statement was that "[t]he life of the law has not been logic: it has been experience."23 As pragmatic functionalists, Holmesian judges are sensitive to the purposes behind relevant legal rules and texts in order to apply the doctrine in a way best calculated to achieve its intended ends. However, as positivists, Holmesian judges believe that the judicial task is merely to interpret existing law, with any changes in the law coming from the other branches of government, the legislative or executive branch. As Holmes stated, "The first requirement of a sound body of law is, that it should correspond with the actual feelings and demands of the community, whether right or wrong."24

Because the life of the law was not the logic of the formalists, but rather experience, Holmes concluded that law must be responsive to social conditions, as a pragmatic means to that end.25


22 Scalia, supra note 14, at 44.

23 Oliver Wendell Holmes, Jr., The Common Law 1 (1881). This passage from The Common Law is quoted in full at § 2.2.2.1 n.9.

24 Holmes, supra note 23, at 36.

However, Holmes also held the positivist view that judicial decisionmaking is separate from moral discourse. Within the limits thus imposed on the judicial task, Holmes’ pragmatism caused him to focus on the certainty and predictability of law. As Professor Patrick Kelley noted, "Holmes believed a judge could do a number of things to improve the law within the limits imposed by his society's prevailing beliefs. First, a judge can increase the effectiveness of current law in achieving its socially desirable consequences by making it more fixed, definite, and certain. . . . So, too, the positivist judge ought to adhere strenuously to the doctrine of stare decisis, as that makes the law more reliable, certain, and knowable, and hence more effective in achieving its socially beneficial consequences, whatever they may be."

This concern with certainty and predictability led Holmes to postulate that law should be guided by external, objective standards, about which individuals could more readily agree, rather than on internal, subjective standards, about which disagreement is more likely. As Holmes stated, "[W]e ask not what this man meant, but what those words would mean in the mouth of a normal speaker of English, using them in the circumstances in which they were used." As has been noted, Holmes' analysis in *The Common Law*, “called for the adoption of wholly external standards of liability in tort and criminal law. . . . Holmes as a judge never hesitated to adopt external or objective liability standards in tort and criminal law.” For Holmes, "The acceptance of the objective standard for liability in tort and crime would, in his eyes, accelerate certainty, for it would permit and encourage judges to apply a known standard with foreseeable regularity. . . . 'The tendency of the law must always be to narrow the field of uncertainty.'" Similarly, Holmes rejected the subjective theory of contract interpretation, in favor of the objective theory. Under the objective theory, it is not important to determine what the parties in fact subjectively meant; rather, the goal of contract interpretation is to construe the contract objectively in light of how a reasonable person looking at the contract would reasonably interpret what was written or said. Similarly, consistent with his emphasis on objective, external standards, and his denigration of subjective, internal standards, Holmes always spoke of searching for the objective meaning of words used in a statute, and not for the legislature's subjective intent.

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28 Kelley, *supra* note 26, at 461.


30 See, e.g., Goode v. Riley, 153 Mass. 585, 586, 28 N.E. 228 (1891) (Holmes, J., opinion); Hotchkiss v. National City Bank, 200 F. 287, 293 (S.D.N.Y. 1911) (opinion by Holmesian judge Learned Hand) (“A contract has, strictly speaking, nothing to do with the personal or individual intent of the parties. A contract is an obligation attached by mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent.”).

Some commentators, wishing to view Holmes as a forerunner of the instrumentalist approach to judicial decisionmaking, discussed at § 3.3, have a tendency sometimes to discount Holmes' positivist belief that law and morals should be separable. As Professor Thomas Grey has stated, "Holmes believed that adjudication should and must be result-oriented, fundamentally legislative. . . . Sound legislative judgment was thus a primary judicial qualification." This view attempts to collapse Holmes' views into instrumentalism by implanting into Holmes a particular social value science, typically utilitarianism. Professor Patrick Kelley noted that one commentator held the view that "the central core of Holmes' substantive jurisprudence and philosophical methodology arose from the premises of utilitarian jurisprudence." Professor Henry Hart noted about another commentator, "While Holmes speaks of existing law as 'the witness and external deposit of our moral life,' he is careful when he comes to describe what lawyers should be doing and hereafter to avoid any words as soft as 'moral' or 'ethical.' It is only by reading in our own utilitarian concept of these words that we can understand him [as a utilitarian]." Holmes, however, was ultimately skeptical of the validity of any moral system. As Yale Law School Professor of Law and Legal History Robert Gordon has noted, "I think that we have to start somewhere else – specifically with positivism – in order to understand The Common Law. In particular, I am referring to the scientific positivism of such authors as Clifford and Spencer, two of the most aggressive supporters of the tendency 'to treat the world as a hard object gradually being discovered by means of the suppression of human subjectivity.'" Professor Mark DeWolfe Howe has added, "If this interpretation of Holmes' intellectual development is accepted, it means that when he began the study of law in the fall of 1864 he had passed through two decisive phases of his growth. First, he had shaken off the religious faith on which so many assumptions of the world around him were based, and second, he had learned from the [Civil] War that personal taste in morals does not establish universal or objective truth in ethics. Skeptic in faith and skeptic in morals . . . We would do better to stand by Holmes' faith and his skepticism than to repudiate both.

Given this view, the role of the law in Holmes' view was to accommodate to what the dominant group in society wants, "whether right or wrong," as cited above at § 3.2 n.24. Thus, legislatures, as representatives of the majority in our democratic society, are the proper balancers of public policy in society, not courts. As Professor G. Edward White noted, "Holmes' job at the Supreme Court consisted of, in many instances, reviewing the constitutionality of actions of a legislature. In such cases Holmes forged his famous attitude of deference, which was seen as humility and

36 Mark DeWolfe Howe, The Positivism of Mr. Justice Holmes, 64 Harv. L. Rev. 529, 537, 546 (1951).
‘self-restraint’ by admirers and had the added advantage of sustaining ‘progressive’ legislation about which a number of early 20th-century intellectuals were enthusiastic. Deference to legislative policymaking was consistent with the view Holmes had developed on the Massachusetts [Supreme] court. . . . During Holmes’ tenure judicial deference resulted in legislation that helped alleviate some of the inequalities of rampant industrialization; in the 1950’s and 1960’s a similar version of deference would have perpetuated malapportioned legislatures, racially segregated facilities, the absence of legal representation for impoverished persons, and restrictions on the use and dispensation of birth control devices.”37 Indeed, Professor Grant Gilmore remarked that for Holmes “if the dominant majority desires to persecute blacks or Jews or communists or atheists the law, if it is to be ‘sound’, must arrange for the persecution to be carried out with, as we might say, due process.”38 As noted at § 16.2.4 n.68, concerning an article entitled “Holmes, Hobbes, and Hitler,” Holmes agreed with the formalist view that judges should not test their decisions by an external standard of moral rightness. The “uncompromising positivism of [Holmes’ bad man] speech remains.”39 In that speech, Holmes said, “If we take the view of our friend the bad man we shall find that [the] prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.”40

Holmes disagreed with the formalists, however, over whether legal rules ideally should be organized into a system of logically consistent, symmetrically related rules. As noted at § 2.2.2.1 n.9, in contrast to the formalist view, Holmes felt that law should be more responsive to the "felt necessities of the times" than to "logic" or "symmetry." With respect to the common law, Holmes noted that the common law is never purely logical because it is always discarding rules at one end and adopting new rules at the other end in a constant process of change.41 With respect to constitutional or statutory interpretation, Holmes also criticized a purely literal approach. As Holmes noted, "A word generally has several meanings, even in the dictionary. You have to consider the sentence in which it stands to decide which of those meanings it bears in the particular case, and very likely will see that it there has a shade of significance more refined than any given in the wordbook."42

Adopting a functional theory of law, Holmes believed that laws have purposes to which a statute or constitutional provision is a means to an end. As Holmes stated, "[T]he general purpose is a more


38  Gilmore, supra note 5, at 49-50.

39  Hart, supra note 34, at 932.


41  Holmes, supra note 23, at 32.

42  Holmes, supra note 27, at 417.
important aid to the meaning than any rule which grammar or formal logic may lay down."^{43} Holmesian Justice Felix Frankfurter made the same point discussing the interpretation theory of Holmes under the headings “Proliferation of Purpose” and “Search for Purpose.”^{44} Criticizing the formalist approach in one of his opinions, Holmesian Judge Learned Hand said, "[I]t is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning."^{45}

Under the Holmesian view, a judge must focus on both clear text and inferences drawn from purpose. On text, Judge Henry Friendly reported that Justice Frankfurter, a devout follower of Holmes, was wont to remind students when he was a Professor at Harvard, there is a threefold injunction in interpreting a statute: “(1) read the statute; (2) Read the Statute; (3) READ THE STATUTE.”^{46} Reflecting a similar positivist respect for existing law regarding purpose, Justice Frankfurter noted, "[T]he purpose which the court must effectuate is not that which Congress should have enacted, or would have. It is that which it did enact, however inaptly, because it may fairly be said to be imbedded in the statute, even if a specific manifestation was not thought of, as is often the very reason for casting a statute in very general terms."^{47}

In sum, Holmes' distinctive style was to combine positivism with a pragmatic, functional approach to the law, and thus to reject the pure logic and symmetry of the formalist decisionmaking style. Other contemporaries of Holmes, like Professor John Chipman Gray, embraced the same kind of functional positivism.^{48} As Professor Grey noted, when discussing Holmes’ decisionmaking style as a blend of positivism and pragmatism, "Holmes was certainly one of the important American exponents of English analytic positivism, and his prediction theory of law is a significant elaboration of that approach to law. But if this were all there were to Holmes, we would add little by calling him a pragmatist. My suggestion is that we can understand the distinctively pragmatist cast to Holmes' legal thought if we take account of the recent revival and reinterpretations of pragmatism."^{49} When Professor Grey attributed instrumentalist, result-oriented reasoning to Holmes' pragmatism, however, and criticized Holmes for not always following through on this mode of decisionmaking, he was rightly criticized by Professor Kelley for forgetting Holmes' positivism. As Kelley stated:

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45 Cabell v. Markham, 148 F.2d 737, 739 (2nd Cir.) (Hand, J.), aff’d, 326 U.S. 404 (1945).

46 Henry Friendly, Benchmarks 202 (1967).

47 Frankfurter, supra note 44, at 539.


49 Grey, supra note 25, at 789.
A pragmatic judge, Grey suggests, ought to embody in his opinions a synthesis of the instrumental and the contextual. He ought to exercise sound legislative judgment, based upon “considerations of social advantage” . . . . Grey then judges [that] Holmes's performance as a judge failed to live up to these pragmatic guidelines . . . . But what was it, exactly, that Holmes preached. . . . If we add back in what Grey leaves out – Holmes's progressive positivist historicism and his thoroughly reductive theory of judicial decision – we can understand Holmes's theory of judging, too, as a coherent positivist theory.50

In short, not every pragmatist is an instrumentalist. And, of course, not every positivist is a formalist. As summarized at § 2.4, and discussed here, the Holmesian judicial decisionmaking style represents a pragmatic functional positivism, which rejects both formalism and instrumentalism.

This functional positivist approach, when applied to the issue of judicial deference to existing law, has meant that Holmesian judges, more than any other kind of judge, have tended to defer to the government in constitutional cases unless the unconstitutionality of the government action is clear. Holmesian judges, as functional positivists, tend to have a greater level of deference to governmental action than the analytic, positivist formalists, because formalist judges may rule some governmental action unconstitutional based upon a literal interpretation of constitutional text, while the Holmesian emphasis on the functional purpose behind the constitutional provision may permit the governmental action to be constitutional. As positivists, Holmesian judges have a greater tendency to defer to government action than the normative natural law or instrumentalist judges, as those judges will use background considerations of moral principles or, in the case of instrumentalist judges, background considerations of social policy, to question the constitutionality of government action.

For these reasons, the Holmesian deference-to-government approach is the style most properly viewed as a “strict construction” approach to the Constitution, at least in cases involving individual rights challenges to the constitutionality of governmental action. For structural issues of federalism or separation of powers, a deference-to-government approach naturally does not call for strict construction of governmental powers, but rather for a deferential approach toward governmental powers. Similarly, regarding statutes and the common law, the Holmesian approach rejects the policy maxim of strict construction of statutes in derogation of the common law, discussed at § 5.2.2.1.B, because the Holmesian deference-to-government posture requires statutes to be given their full, complete meaning, not a strict interpretation. For reasons of certainty and predictability, however, shared to an extent by all the decisionmaking styles, the Holmesian approach embraces the policy maxim of strict construction of penal statutes, also discussed at § 5.2.2.1.B.

In addition, as discussed at § 10.2.2.1, this deference-to-government posture has meant that Holmesian judges are the most willing to permit legislative and executive action under the Constitution to act as a "gloss" on meaning to the Constitution. To this extent, the Holmesian approach rejects the formalist “static” model of constitutional interpretation in favor of a “living” Constitution. This is true so long as that “living” Constitution derives its support from positive legislative or executive action, rather than judicial normative consideration of background moral principles or social policy.

50 Kelley, supra note 33, at 453-54.
§ 3.3 Instrumentalism: A Functional/Normative Approach

In contrast to the positivism of both the formalist and Holmesian judicial decisionmaking styles, instrumentalists answer the question regarding the nature of the judicial task by adopting the normative view that judges should always test the law by reference to some external standard. As Professor Summers remarked in his article on pragmatic instrumentalism:

A general theory of law that does not address issues of value is, in my opinion, fundamentally incomplete. The law is not merely a formal receptacle. It includes substantive content. . . . [M]ost of the leading instrumentalists . . . followed . . . the American pragmatist philosophers in subscribing to a theory of value that may be characterized as utilitarian, quantitative, conventionalist, and majoritarian. . . . Most pragmatic instrumentalists believed that values in general and the goals of rules and other legal precepts in particular must derive from prevailing wants and interests.51

On the issue of the nature of law, instrumentalists view law in functional terms as a means to the end of some social values. As Professor Summers stated, “That law is, in essence, a means, and only a means, to goals derived from sources outside the law, was perhaps the most characteristic tenet of pragmatic instrumentalism.”52 Indeed, the term instrumentalism reflects the fact that such judges see law in functional terms as an instrument to achieve justice in society.

As noted by Professors Gilmore and Llewellyn, under this functional, normative approach the judge must test the formulation and application of each rule by its purpose and policy. Rules are not tested merely by internal logical symmetry, the focus of formalism. Rather, they are tested by the social ends to which they are the means. Because the consequences of a rule are critical in this means-end reasoning, instrumentalist judges tend to be result-oriented. Thus, they tend to follow, in Llewellyn’s terminology, the “situation-sense” of the case. Of course, judges must follow the law and cannot make law whimsically. But, for an instrumentalist judge, the act of interpreting a constitution, statute, or common-law decision will often call for background social policy considerations to resolve leeway in the law, where no law exactly covers the situation or each of two conflicting rules arguably applies.53 Justice Benjamin Cardozo, who served on the New York Court of Appeals from 1917-32, and Justice Roger Traynor, who served on the California Supreme Court from 1940-70, are often mentioned as exemplars of an instrumentalist approach to common-law adjudication.

Karl Llewellyn called this approach to judicial decisionmaking the “Grand Style.” To determine the “situation-sense” of a case under the Grand Style, Llewellyn noted:

51 Summers, supra note 2, at 875.
52 Id. at 882. For an in-depth discussion of instrumentalism, see id. at 863-96, 908-23.
As 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, but when so qualified it acquires peculiar status. On the side both of case-law and of statutes, where the reason stops there stops the rule; and in working with statutes it is the normal business of the court not only to read the statute but also to implement that statute in accordance with purpose and reason.  

As discussed at § 3.1, the classic formalist view of Langdell was that there are no leeways in the law. Law is a complete system, and the analytic method of logic and reason can deduce fixed answers from the existing legal categories. Thus, any pretense to judicial lawmaking is illegitimate. Adopting a more realist, functional approach, Holmesian judges tend to acknowledge that some leeways in the law exist, but as positivists they are wary of judges taking a leading role in resolving such leeways. As Holmes noted, judge must sometimes exercise “the sovereign prerogative of choice,” but should only do so “interstitially.” The “Nightmare” for positivists, as described by H.L.A. Hart, is that instrumentalist judges will exercise this “sovereign” prerogative in too many cases, and thus will end up legislating from the bench. 

Under standard instrumentalist theory, a judge is not “legislating from the bench” when adopting the instrumentalist style, because the judge is merely resorting to social policies embedded in the law that are separate from the judge’s own values. To the extent this is true, an instrumentalist judge follows society’s rules as much as a formalist judge. Professor David Lyons noted, “[L]aw is rooted in authoritative sources, such as legislative and judicial decisions (a ‘source-based’ view of law). . . . [N]onradical instrumentalists seem to accept a source-based view of law, as do all instrumentalist judges in practice, whatever they may say when writing about the law.” Under this view, the “Nightmare” approach is adopted only in the strawman of a radical instrumentalist, such as Jerome Frank’s famous quip that a judge’s decision may be based on “what the judge had for breakfast,” or a radical natural law theorist, such as proposing that judges should be “Platonic Guardians,” discussed at § 12.2.2.3 nn.72-80.

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55 Oliver Wendell Holmes, Jr, Law in Science and Science in Law, 12 Harv. L. Rev. 443, 461 (1899) (“the sovereign prerogative of choice”); Southern Pac. Co. v. Jensen, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting) (judges are limited to legislating “interstitially”).

56 See H.L.A. Hart, American Jurisprudence Through English Eyes: The Nightmare and The Noble Dream, 11 Ga. L. Rev. 969, 972 (1977). This passage is quoted in full at § 2.3.2.1 n.32.


58 Jerome Frank, Courts on Trial 161-62 (1949).
The difficulty with the standard instrumentalist approach, however, is identifying what those background social policies are that are embedded in the law. As H.L.A. Hart noted in his article, *The Nightmare and The Noble Dream*:

But plainly, merely to adopt this style of decision is not in itself sufficient to banish the Nightmare. Many questions arise. May not the legal system contain conflicting principles? May not a given rule or set of specific rules be equally well explained by a number of different alternative hypotheses? If so, will there not be need at these higher levels for judicial choice, and if so, will not adjudication still fall short of the Noble Dream since such a choice will be an act of lawmaking, not a further discovery of existing law?\(^59\)

More specifically, how is an instrumentalist judge to balance the four kinds of arguments in reaching decisions: logic (“analogy” or “symmetry”); purpose (indicated in part by the “history” of a rule or considerations of “convenience”); background moral principles (a society’s conception of “justice” as indicated in part by “customary” social norms); and background social policies (“policy” or “social welfare” considerations). And there is the further consideration of what to do if the judge reaches one result, but prior judicial precedents suggest a different result.

Focusing mostly on the process of judicial decisionmaking in common-law cases, Justice Benjamin Cardozo considered these questions in his book, *The Nature of the Judicial Process*. He stated:

What is it that I do when I decide a case? To what sources of information do I appeal for guidance. . . . If a precedent is applicable, when do I refuse to follow it? If no precedent is applicable, how do I reach the rule that will make a precedent for the future? If I am seeking logical consistency, the symmetry of the legal structure, how far shall I seek it? At what point shall the quest be halted by some discrepant custom, by some consideration of the social welfare, by my own or the common standards of justice and morals? Into that strange compound which is brewed daily in the caldron of the courts, all these ingredients enter in varying proportions. I am not concerned to inquire whether judges ought to be allowed to brew such a compound at all. I take judge-made law as one of the existing realities of life. . . . The final cause of law is the welfare of society. . . . Logic and history and custom have their place. We will shape the law to conform to them when we may; but only within bounds. The end which the law serves will dominate them all.\(^60\)

In a later book, *The Growth of the Law*, Cardozo stated:

[The judge] is to regulate his estimate of values by objective rather than subjective standards, by the thought and will of the community rather than by his own idiosyncracies of conduct and belief. Often the two standards will be identical. At all events, if the communal thought or will is different, there will be neither statute nor custom nor external token to declare and define the difference. The judge will then have no standard of value available except his own. In such

\(^{59}\) Hart, *supra* note 56, at 981.

circumstance, the objective will be for him merged into the subjective; the axiology that is to
guide him will be his own and not another’s. . . .

We have no fear in this subordinating the individual to the community that great minds and
great souls will be without an opportunity to reveal themselves. The search, indeed, is for
something external, a norm which finds expression in custom or convictions, but, in the very
act of declaring what is found, there springs into being a new norm, a new standard, to which
custom and convictions tend thereafter to conform. . . . The judge interprets the social
conscience, and gives effect to it in law, but in doing so he helps to form and modify the
conscience he interprets. Discovery and creation react upon one another.61

Instrumentalist judges consider such interpretation of the social conscience necessary, given the
leeways in existing positive law. Indeed, Justice Cardozo’s greatest concern in the passage above
seems to be with reassuring the reader that “great” judges with “great minds and great souls” will
not have too little discretion under his proposed approach. In contrast, for positivists, the
instrumentalist approach is a recipe for too much judicial activism. Indeed, as discussed at § 3.4
nn.96-106, even for natural law judges the influence of background considerations should be limited
to analytic balancing of background moral principles, not the more broad-based foray into
background social policies, whatever they may be determined to be.

In theory, a personally conservative or liberal instrumentalist judge should read Cardozo’s objective
social conscience in the same way. In practice, that is not likely to be true. As Cardozo himself
admitted in the passage cited above, in some cases “there will be neither statute nor custom nor
external token to declare and define the difference. The judge will then have no standard of value
available except his own.” Furthermore, even if there were agreement on the basic goals to be
achieved, there will likely be different views among conservative and liberal judges on the best
means to achieve those goals. Such differences over the best means to achieve effective social
policy are critical for an instrumentalist judge because, as Professor Summers noted:

[T]he theory treats the law “in action.” It is concerned not only with the general nature of law
as social means but also with law as it is actually used, and with the practical differences that
law's uses make. This focus extends beyond law's external effects to the workings of its internal
processes – the operation of its complex implementive technology. Thus, the theory necessarily
addresses official legal personnel, their roles as “social engineers,” and the technical skill they
must deploy in those roles. More than any other theory of law, pragmatic instrumentalism is
concerned with the effectiveness of legal action.62

For this reason, more than is true of any other theory, there are likely to be differences in case results
among conservative and liberal instrumentalist judges. Nonetheless, there are conservative and
liberal variations of each of the four judicial decisionmaking styles, as discussed at § 4.4.2 when
considering judicial predispositions in deciding cases. Specific differences among conservative and


62 Summers, supra note 2, at 864.
liberal variations of the four decisionmaking styles in the context of constitutional interpretation are discussed when considering each style in depth, at §§ 9.3.3, 10.3.3, 11.3.3 & 12.3.3.

Justice Cardozo also noted in the passage cited above that independent of how a judge might decide a case in the absence of precedent, there is always the question, “If a precedent is applicable, when do I refuse to follow it?” The differences among the four judicial decisionmaking styles in how each style treats the authoritativeness of precedent are discussed at § 4.3.2, as part of discussing how judges view precedents in general. Specific differences among the four judicial decisionmaking styles regarding their treatment of precedent in the context of constitutional interpretation are discussed at §§ 9.2.2.2, 10.2.2.2, 11.2.2.2 & 12.2.2.2.

For statutory interpretation, a similar concern exists with how to use background social policies that may influence interpretation in any statutory interpretation case. The standard instrumentalist approach is reflected in the Legal Process school of Harvard University Law School Professors Henry Hart and Albert Sacks. Under this approach, judicial creativity is limited to interpreting a statute in such a way as to "fit the statute into the legal system as a whole." In pursuing this task, the court assumes that "the legislature was made up of reasonable persons pursuing reasonable purposes reasonably"; gaps left in statutes are filled in by the courts to "rationalize the law," making it "fair, coherent, and purposive," while based on the legislature's purposes in enacting the law.63 The approach is also reflected in the views of Karl Llewellyn on statutory interpretation and his focus on “text, legislative history, statutory purpose, and contemporary public policy.”64

A classic example of such an approach in practice is Justice Brennan's opinion in the famous statutory interpretation case of United Steelworkers v. Weber.65 The Court held in Weber that the ban on employment discrimination based upon “race, color, religion, sex, or national origin” in Title VII of the 1964 Civil Rights Act did not prohibit voluntary affirmative action by private employers. The Court rejected the argument that the clear text of the statute prohibited affirmative action, reasoning instead that such a reading would violate the broad purpose of the Act to aid minorities.66 Justice Brennan used bits of legislative history to support this interpretation of Title VII.67 The positivist critique of this interpretation, which appeared in Justice Rehnquist's dissent in the case,

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66 Id. at 201-02.

67 Id. at 202-04.
was that Justice Brennan's opinion in *Weber* disregarded clear text, and followed a selective reading of legislative history to produce a result compatible not with Title VII's literal text (the formalist emphasis) or actual congressional purpose (the Holmesian emphasis), but with Justice Brennan's view of the background social policy of civil rights legislation in the 1960s to aid minorities. As this example suggests, in some cases it may not be clear whether some consideration is an actual purpose of a statute, and thus appropriate to consider even under a Holmesian approach, or is merely a background social policy not clearly part of the actual congressional purpose of a particular statute, and thus appropriate to consider only under an instrumentalist approach, and only then if leeways exist in the proper interpretation of the statute after consideration of actual congressional purpose.

A more extreme instrumentalist approach uses the Legal Process approach for filling gaps in the law as justification for even greater creative judicial interpretation and law-making. As noted by Columbia University School of Law Professor John Kernochan, "Some statutes, by virtue of their generality, or otherwise, clearly contemplate judicial creativity. . . . Resort to purpose will resolve many [problems, but] there is often leeway in defining purposes. . . . Where such leeway remains, legislative choices must be made by courts [which] we may label 'policy' or 'public policy.'"

An example of a court following such an approach occurred in *West Winds, Inc. v. M.V. Resolute*. In *West Winds*, the court began by quoting a more modest instrumentalist approach, noting, "It has long been recognized that: 'increasingly as a statute gains in age . . . its language is called upon to deal with circumstances utterly unconsidered at the time of its passage. Here the quest is not properly for the sense originally intended by the statute, for the sense originally put into it, but rather for the sense which can be quarried out of it in light of the new situation.' Llewellyn, *Remarks on the Theory of Appellate Decisions and the Rules or Canons about How Statutes are to be Construed*, 3 Vand. L. Rev. 395, 400 (1950); see H. Hart & A. Sacks, *The Legal Process* 1410-11 (tent. ed. 1958) (unpublished manuscript)." However, the court continued, "[A] court interpreting a statute should 'ask itself not only what the legislation means abstractly, or even on the basis of legislative history, but also what it ought to mean in terms of the needs and goals of present day society. This approach is required by the insuperable difficulties of readjusting legislation by the legislative process and by the fact that it is obviously impossible to secure an omniscient legislature.'"

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70 720 F.2d 1097 (9th Cir. 1983).

71 Id. at 1101.

An in-depth discussion and defense of this more activist model of statutory interpretation appears in former Yale Law School Dean, and now Judge, Guido Calabresi’s book, *A Common Law for the Age of Statutes*, and in Georgetown University Law Center Professor William Eskridge’s book, *Dynamic Statutory Interpretation*.73 Sometimes such a policy approach can be used to narrow a statute’s meaning, rather than expand it.74 In either case, such a policy approach has limits. For example, even the *West Winds* court acknowledged that "[d]espite the general validity of this approach to statutory interpretation, the judiciary is not the proper branch of government to update complex statutes when legislative decisionmaking is necessary[, such as] the Bankruptcy Reform Act's creation of a new intermediate level of debt priorities covering contributions."75

The instrumentalist approach to constitutional interpretation similarly involves resort to background moral principles and social policies where leeways exist in the law following consideration of the text and purpose of constitutional provisions. Because of the general nature of many constitutional provisions, such as due process, equal protection, or freedom of speech, a greater percentage of constitutional cases tend to involve leeways than in the case of statutory interpretation. Followed faithfully, however, the instrumentalist approach to constitutional interpretation is not an invitation to unbridled judicial activism. For example, as noted at §§ 11.2.1.2 n.19 & 11.2.1.3 n.23, Justice Brennan stated that he grounded his approach to the Constitution in terms of a concern with “human dignity” shared by the framers and ratifiers of the Constitution and the 14th Amendment, and thus part of the Constitution’s background context, not his personal views. Nevertheless, because of the potential for greater judicial activism represented by the instrumentalist approach, instrumentalist judges are the judges most often criticized for deciding cases based not on text (the formalist emphasis); text and purpose (the Holmesian emphasis); or text, purpose, and background moral principles embedded in the law (the natural law emphasis). Rather, they are criticized as basing decisions perhaps not even on an actual community consensus about some social policy, but on grounds that the decision reflects a supposed community consensus, or values the judge thinks the community eventually will hold, or the judge's own values.76 Instrumentalist judges are thus often described as judicial activists by their detractors.77

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75 720 F.2d at 1102.


Because even a moderate instrumentalist judge considers actual background social policies of contemporary society as one source of constitutional interpretation, the instrumentalist approach rejects the formalist model of a “static” or “dead” Constitution. Instead, the instrumentalist approach favors a “living” Constitution that draws its breath not only from the text and purpose of the framing and ratifying generation, but also from the history and traditions of contemporary society. Unlike the Holmesian deference-to-government approach, the instrumentalist approach does not limit this “living” Constitution to support from positive governmental action, that is, recent action of the legislative and executive branches. Instead, as discussed at §§ 11.2.2.1-11.2.2.3, the “living” Constitution embodies many sources, including contemporary social views in America and Western Civilization generally, recent judicial precedents, and prudential consideration by judges of contemporary social policy.

§ 3.4 Natural Law: The Analytic/Normative Approach

The fourth mode of legal analysis listed in Table 2.4 is natural law. Natural law theory agrees with the formalist’s embrace of the analytic proposition that law can ultimately be expressed as a system of logically related, universally valid rules, and thus law is not just a means to the end of some social value, regardless of what that does to the symmetry of rules. As Professor Weinrib noted in his article, cited at § 2.2.1 n.5, which touted the virtues of an analytic approach to law, “Formalism postulates that law is intelligible as an internally coherent phenomenon. . . . Formalism can accordingly be summed up as proffering the possibility of an ‘immanent moral rationality.’ . . . This description reflects legal formalism both as it has been understood in the philosophical tradition of natural law and natural right and as it is presupposed in the ideal of coherence to which sophisticated legal systems aspire.”78

On the other hand, natural law theorists disagree with formalism’s embrace of the positivist position that law and morals are separable. Instead, natural law theorists believe that law, properly defined, is connected to an external standard of rightness, the standard of natural law. Thus, as cited at § 2.4 n.37, Professor Weinrib distinguished in his article the natural law and natural rights tradition from "the thinner formalism of positivism, which . . . makes the notion of law as such indifferent to the law's content."79 As one commentator explained, "Behind all these attempts to find a place for a higher law may be discerned a feeling of discontent with justice based on positive law alone, and a strenuous desire to demonstrate that there are objective moral values which can be given a positive content and expressed in normative form."80

A judge following this analytic, normative approach evaluates law in terms of how it advances background moral principles, but, like a formalist, views law as a set of principles implemented through logic and reason. There are, of course, a number of natural law traditions, including both religious or theological natural law traditions and more secular natural rights traditions. Thus, for


79 Id. at 954 n.14.

example, there is the classical natural law tradition of Plato, Aristotle, and the Stoics, including Cicero; the Christian natural law tradition, as reflected in the writings of Augustine in the 4th century, Thomas Aquinas in the 13th century, and others; the Renaissance natural law tradition of Grotius, Burlamaqui, Puffendorf, and Vattel; the civic Republican tradition of Harrington and others; the Enlightenment natural law tradition of the English, Scottish, and French Enlightenments; and various versions of modern 20th-century natural law. The impact of these different versions of natural law as applied to constitutional interpretation and decisionmaking is discussed at §§ 8.4.1 & 12.3.3. The intent in the remainder of this section is to describe the general features which unite all of these natural law theories, to distinguish them from the formalist, Holmesian, and instrumentalist approaches to judicial decisionmaking, and to provide an introduction to the natural law approach most prominent at our Nation’s founding.

At the outset, it is important to note that despite being a normative approach to the judicial decisionmaking task, the natural law approach, like the instrumentalist approach, is not a justification for unbridled judicial activism. Indeed, the basic premise of a natural law decisionmaking style is that the judge does not have unbridled discretion, but rather is disciplined by natural law theory. Under a natural law approach, societies typically have positive legal enactments—constitutions, statutes, and a record of prior judicial decisions—and in deciding cases judges examine those enactments very carefully. Judges in the natural law decisionmaking tradition will be quite careful to ask, however, whether the drafters of a constitution included natural law principles in the constitution. As Dean Roscoe Pound observed in 1938, "In studying the formative era of American law we are concerned immediately with the eighteenth-century natural law which became embodied for us in the Declaration of Independence and is behind our bill of rights." Natural law thinkers would also likely take natural law principles into account in passing statutes. As Dean Pound noted, "[T]he believers in eighteenth-century natural law did great things in the development of American law because the theory gave faith that they could do them. Application of reason to the details of the received common law was what made the work of the legislative reform movement of enduring worth. Some of its best achievements were in formulating authoritatively what men had reasoned out in the era of the school of the law of nature in the seventeenth and eighteenth centuries."

Despite this limitation on judicial activism, certain more radical versions of natural law theory may be as willing as certain more radical versions of instrumentalism to let views outside the mainstream of society affect judicial decisionmaking, as is discussed at § 12.2.2.3 nn.72-80, regarding the view of the judge as a “Platonic Guardian” of society. On the other hand, the natural law theory of our constitutional tradition, as espoused by Chief Justice John Marshall, Justice Joseph Story, James Madison, and others during the framing and ratifying period, held that judges should consider only the background moral principles that emerge from considering the Constitution itself. This flows from viewing the natural law philosophy of our framers and ratifiers as primarily influenced by Enlightenment natural law theory, and the Enlightenment's "social contract" conception of the nature

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83  Id. at 27.
of government and the proper role of the judiciary in such a society to follow the "social contract" as set out in a written Constitution. Professor Kermit Hall has 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.84

Additional limitations on judicial activism also flow from the approach to judicial decisionmaking dominant during the framing and ratifying period. As discussed at §§ 4.3.2-4.3.4, judges wishing to follow the natural law judicial decisionmaking style of the framers and ratifiers would need to pay great attention to the grand traditions of the Anglo-American common-law system, which includes such principles as fidelity to precedent, reasoned elaboration of the law, and deciding cases on narrower grounds where possible. However, as discussed at § 12.3.3 nn.115-18, because the Christian natural law tradition assumes that natural law is an emanation of God’s will and reason and is not dependent on a social contract, that natural law tradition may be more receptive to the argument that judges may occasionally supplement the natural law principles the framers and ratifiers adopted with natural law principles derived from other sources, including religious ones.

Admittedly, argumentation under a natural law or a positivist regime may appear to be superficially similar. In both cases resort is had to the constitution, statutes, and prior judicial decisions, and great respect is paid to their meanings. Indeed, where words used in a constitution or statute do not reflect a sound natural law position – as with the case of slavery in the United States Constitution before the 13th Amendment85 – the judge’s responsibility under the natural law theory which framed our Constitution is to follow the Constitution until the natural law position is added to the document. As one author has noted, "[T]here are occasions when the Court is limited in what it can do. . . . [I]f the Marshall Court did not have substantial lawmaking discretion in the slavery cases, it would be misleading to say that it 'legitimated' slavery. That odious accomplishment was the work of colonial and state laws . . . , and, as the Abolitionists claimed, the Constitution of the United States."86 Of course, to say that judges, as judges, are limited to following clear constitutional commands does not mean that citizens should not press for reform consistent with a natural law vision. As has been


noted, "Repressive and unjust laws have too often seen birth in the Halls of Congress (e.g., the Fugitive Slave Acts of 1793 and 1850) and have too often been given the imprimatur of the Supreme Court. The only way out of this difficulty is to recognize that some connection must exist between law and enduring moral norms [by] which the performance of government officials can be judged."\(^{87}\)

Despite this superficial similarity between non-Platonic Guardian natural law interpretation and interpretation under a positivist regime, the analytic task of interpreting words from a natural law perspective is a different enterprise than interpreting words from a formalist perspective. Because of the natural law sensitivity to interpreting words in light of background moral principles, natural law judges will focus not only on the literal meaning of words, but also on the words’ purposes. As Professor Michael Moore noted in his article, *A Natural Law Theory of Interpretation*:

Once a judge determines the ordinary meaning of the words that make up a text and modifies that ordinary meaning with any statutory definitions or case law developments, there is still at least one more task. A judge must check the provisional interpretation reached from these ingredients with an idea how well such an interpretation serves the purpose of the rule in question. The necessity of asking this question of purpose Lon Fuller made familiar to us in his famous 1958 debate with H.L.A. Hart.\(^{88}\)

In that debate, Professor Hart posed the following hypothetical: “A legal rule forbids you to take a vehicle into the public park. Plainly this forbids an automobile, but what about bicycles, roller stakes, toy automobiles? What about airplanes?” Professor Hart’s view was that in many circumstances, the so-called “core” of the rule, no resort to arguments of purpose would be needed. Only in case of ambiguity or an absurd result from literal meaning would one be in the “penumbra” of the rule, which would require resort to purpose.\(^{89}\) In contrast, Professor Fuller’s view was that one can only truly understand what any particular rule means by reference to the purpose behind the words’ utterance. As Fuller stated, “If a statute seems to have a kind of ‘core’ meaning that we can apply without a too precise inquiry into its exact purpose, that is because we can see that, however one might formulate the precise objective of the statute, this case would still come within it.”\(^{90}\)

Following Fuller’s view, a natural law theory of interpretation emphasizes the importance of understanding a provision’s purpose. The natural law focus on a provision's purpose was most famously stated in 1584 in what has come to be known as "The Rule of Heydon's Case." In

\(^{87}\) Riga, *supra* note 85, at 109.


\(^{90}\) Lon L. Fuller, *Positivism and Fidelity to Law – A Reply to Professor Hart*, 71 Harv. L.Rev. 630, 663 (1958).
Heydon's Case,91 Lord Coke stated 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." This resort to purpose in every case makes the natural law theory of interpretation similar to Holmesian theory, but unlike formalism.

Despite this similarity, natural law interpretation differs from Holmesian interpretation in a critical respect. It has been noted:

“There is a tendency to think of judges,” Holmes wrote Laski in 1926, “as if they were independent mouthpieces of the infinite, and not simply directors of a force that comes from the source that gives them their authority . . . .” And that is precisely how [Holmes] thought of natural law – a mystic overlaw, not law in any true sense, theology or morals if you like, but not law. The demand for the superlative that we find in all men was at the bottom of the philosopher's effort to prove that truth was absolute, and of the jurist's search for criteria of universal validity which he collects under the head of natural law. That is why the jurists who believed in natural law seemed to [Holmes] to be “in that naive state of mind that accepts what has been familiar and accepted by them and their neighbors as something that must be accepted by all men everywhere.”92

In contrast to Holmes’ view, natural law judges believe that background moral principles do lie behind all legal enactments, that judges must make an effort to seek out and describe these principles, and, where leeways exists, that judges should interpret the law consistent with the logic of these principles. As Professor Ronald Dworkin has stated, “The doctrine demands, we might say, articulate consistency.”93 This doctrine has also been phrased as a requirement of deciding cases according to “neutral principles.”94

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91 76 Eng. Rptr. 637, 638 (1584). See generally Warren Lehman, How to Interpret a Difficult Statute, 1979 Wis. L. Rev. 489, 495-504 (1979) (discussing the use by Aristotle, Aquinas, and Plowden of “practical reason” and following the “equity” of the statute); Moore, supra note 88, at 314-18, 384-88 (discussing use of “purposes” and “equity” of the statute to carry out better the “wishes” of the legislature, “even if the judge disagrees with the wisdom of such wishes”).  
92 Francis Biddle, Justice Holmes, Natural Law, and the Supreme Court 40-41 (1960).  
In contrast to an instrumentalist approach, the natural law style of interpretation believes that judges should seek out only background moral principles, not background social policies, to apply this requirement of articulate consistency. As Professor Dworkin stated:

Arguments of policy justify a political decision by showing that the decision advances or protects some collective goal of the community as a whole. The argument in favor of a subsidy for aircraft manufacturers, that the subsidy will protect national defense, is an argument of policy. Arguments of principle justify a political decision by showing that the decision respects or secures some individual or group right. The argument in favor of anti-discrimination statutes, that a minority has a right to equal respect and concern, is an argument of principle.

It is plainly competent for the legislature to pursue arguments of policy and to adopt programs that are generated by such arguments. If courts are deputy legislatures, then it must be competent for them to do the same. . . . I propose, nevertheless, the thesis that judicial decisions in civil cases, even in hard cases . . . . . are and should be generated by principle, not policy.95

The principal reason for this limitation, Dworkin indicated, is the familiar one regarding a concern that judicial resort to policy arguments might place the judge too much in the role of a legislator, while decisions based upon moral principles embedded in society’s laws are less susceptible to that kind of criticism. Under a natural law approach, if a moral principle is truly embedded in society’s laws, then an individual has a right to a decision based upon that moral principle, even if that principle is not explicitly stated in any current constitutional, statutory, or common-law decision. Any argument of unfair surprise by one party is countered by the fact that the other party would be unfairly surprised if the court did not decide the case consistent with that moral right.96

Regarding the requirement of articulate consistency, Dworkin noted:

[T]his demand is relatively weak when policies are in play. Policies are aggregative in their influence on political decisions and it need not be part of a responsible strategy for reaching a collective goal that individuals be treated alike. It does not follow . . . that if the legislature awards a subsidy to one aircraft manufacturer one month it must award a subsidy to another manufacturer the next. In the case of principles, however, the doctrine insists on distributional consistency from one case to the next, because it does not allow for the idea of a strategy that may be better served by unequal distribution of the benefit in question. If an official believes, for example, that sexual liberty of some sort is a right of individuals, then he must protect that liberty in a way that distributes the benefit reasonably equally over the class of those whom he supposes to have the right. If he allows one couple to use contraceptives on the ground that this right would otherwise be invaded, then he must, so long as he does not recant that earlier decision, allow the next couple the same liberty.97

95 Dworkin, supra note 93, at 1059-60.

96 Id. at 1061-62.

97 Id. at 1064-65.
This reason helps explain the special respect that natural law judges have for precedents and hypothetical examples, a respect not shared equally by instrumentalist judges, as discussed in greater depth at § 4.3.2. As Dworkin stated:

An argument of principle can supply a justification for a particular decision . . . only if the principle can be shown to be consistent with earlier decisions not recanted, and with decisions that the institution is prepared to make in hypothetical circumstances. That is hardly surprising, but the argument would not hold if judges based their decisions on arguments of policy. They would be free to say that some policy might be adequately served by serving it in the case at bar, providing, for example, just the right subsidy to some troubled industry, so that neither earlier decisions nor hypothetical future decisions need be understood as serving the same policy.98

Some commentators have argued that this distinction between principles and policies is not one capable of ultimate theoretical defense. For example, Scottish legal philosopher and Professor Neil MacCormick has noted, “To articulate the desirability of some general policy-goal is to state a principle. To state a principle is to frame a possible policy-goal.”99 Nevertheless, as a practical matter, one can draw a distinction, following Professor Dworkin’s writings, between arguments of principle upon based “a requirement of justice or fairness or some other dimension of morality” and arguments of policy based upon “an improvement in some economic, political, or social feature of the community.”100 For purposes of a practical understanding of how judges decide cases, the distinction between principles and policies is thus of practical use.

Former Yale Law School Dean and Professor Harry H. Wellington phrased the practical difference between arguments of principle and arguments of policy as follows:

The first type of justification [policy] is consequentialist; it looks to the future. The rule on which a holding rests will, according to the rationale of the decision, change the behavior of individuals or institutions. The articulated rule serves a policy that in turn is designed to effectuate a societal goal; the justification sounds in terms of benefits and costs.

The second type of justification [principle] looks to the past. Its persuasiveness is not in what it will be; it does not move us toward a goal. Instead, the rule has persuasiveness because it vindicates a principle embedded in the moral ideals of the community; the justification sounds in terms of rights and obligations.

Of course, the vindication of a principle may have significant effects. Indeed, it may entail – as in desegregation – remedial efforts that change the nature of society. But this does not mean, in this class of cases, that effect should be equated with justification any more than it should be

98  Id. at 1065.


100  Ronald Dworkin, The Model of Rules, 35 U. Chi. L. Rev. 14, 23 (1967). This passage is quoted in full at § 2.4 n.41.
when a court carries out a legislative command by enforcing a statute. There too the decision has an effect, but the justification for the decision . . . remains the authority of the legislature.

This distinction [is] between a forward looking policy justification and a backward looking justification from principles embedded in the moral ideals of the community . . . .

Of course, some judges may be willing to give respect to both arguments of principle and policy, but weight their consideration more in one direction than the other. For example, a judge leaning in the direction of natural law might be willing to rely on policy argumentation only if the wisdom of that policy goal is supported, in Professor MacCormick’s terms, by “some unstated but presupposed principle.” Such connections may be easy to make, if arguments of policy based upon “an improvement in some economic, political, or social feature of the community” are related to a categorization of versions of natural law as “economic, political, or ethical natural law,” discussed at §§ 13.1 nn.14-16, 30-40 & 14.2.1. Even without so linking arguments of principle and policy, one might take the view, as phrased by Columbia University School of Law Professor Kent Greenawalt:

[T]hat the Constitution institutionalizes many individual rights against claims of collective good, that statutes create rights that judges should not casually cast aside when they believe them to do disservice to the collective welfare, and that rights to be found within the common law should not be overridden whenever they are thought to be inconvenient. This view would lead to the conclusion that when one party has a clearly warranted claim of right, it should never be rejected or should be rejected only upon the strongest showing of urgent public necessity.

On the other hand, a judge leaning in the direction of instrumentalism might agree with Professor Kent Greenawalt’s ultimate conclusion that “Dworkin’s arguments for the proposition that judges should not rely on policy arguments are unpersuasive.” Furthermore, given the instrumentalist era of common-law, statutory interpretation, and constitutional adjudication in the United States in the mid-to-late 20th century, discussed at §§ 13.1 & 14.2.4, Professor Greenawalt was accurate when he asserted in 1977 that, as a factual matter, policies “do underlie common law decisions in areas as disparate as torts, contracts, conflict of laws, and ‘jurisdiction,’ and there is good reason to suppose that close examination would reveal their . . . use in any other areas that might be examined.”

As the interpretation task is similar for statutes and the Constitution, fuller treatment of the natural law approach to both is reserved for Chapter 12, which considers the natural law approach to

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102 MacCormick, supra note 99, at 263.
104 Id. at 1003.
105 Id. at 1015.

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constitutional interpretation in greater depth. In deciding common-law cases, a natural law judge, where leeways exist in the common law, would decide the case in a way to advance natural law principles embedded in society’s laws, rather than retard them. The classic example of this in American legal history is the transformation by judges of contract, tort, property, and other aspects of the common law during the first half of the 19th century based upon the economic natural law theories of John Locke and Adam Smith, discussed at § 13.1 nn.5-16.

In sum, as a normative approach, the natural law judicial decisionmaking style goes beyond literal text and purpose to background moral principles, but, as an analytic approach, emphasizes logical application of law, bending text and purpose, where leeways exist, to create a reasoned elaboration of the law consistent with the requirement of articulate consistency. The approach rejects judicial use of background social policies to fill gaps in the law, as that places the judge potentially too much in the role of a legislator. An updated version of Table 2.4, reflecting the more detailed aspects of the four judicial decisionmaking styles as developed in Chapter 3, results in the following:

### Table 3.4
#### Updated Version: Styles of Judicial Decisionmaking

<table>
<thead>
<tr>
<th>Nature of the Judicial Task</th>
<th>Judicial Emphasis of Decisionmaking</th>
<th>Emphasis of Judicial Decisionmaking</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Positivism: Judges as Neutral Declarers of the Law</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Nature of Law</td>
<td>Formalism/</td>
<td>Logic;</td>
</tr>
<tr>
<td>Law as Logical; Analytic or Conceptualist Attitude</td>
<td>Analytic Positivism</td>
<td>Analogy; Symmetry</td>
</tr>
<tr>
<td>Law as Library Science</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Law as Means to Ends;</td>
<td>Holmesian/</td>
<td>All of the Above Plus</td>
</tr>
<tr>
<td>Functional or</td>
<td>Functional Positivism</td>
<td>Purpose; History of a Rule;</td>
</tr>
<tr>
<td>Pragmatic Approach;</td>
<td></td>
<td>Convenience</td>
</tr>
<tr>
<td>Law as Empirical Science</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Normative: Judges as Normative Actors</strong></td>
<td>All of the Above Plus</td>
<td></td>
</tr>
<tr>
<td>Nature of Law</td>
<td>Natural Law</td>
<td>Background</td>
</tr>
<tr>
<td>Law as Logical; Analytic or Conceptualist Attitude</td>
<td></td>
<td>Moral Principles; Customary Norms;</td>
</tr>
<tr>
<td>Law as Library Science</td>
<td></td>
<td>Justice</td>
</tr>
<tr>
<td>Law as Means to Ends;</td>
<td>Instrumentalism</td>
<td>All of the Above Plus</td>
</tr>
<tr>
<td>Functional or</td>
<td></td>
<td>Background</td>
</tr>
<tr>
<td>Pragmatic Approach;</td>
<td></td>
<td>Social Policies; Social Welfare;</td>
</tr>
<tr>
<td>Law as Empirical Science</td>
<td>Law as Means to Ends:</td>
<td>Social Conscience</td>
</tr>
</tbody>
</table>

CHAPTER 4: FINAL CAUSE: STRUCTURE OF LAW AS DETERMINED BY JUDGES

As used in this book, the term “structure of law” refers to the authoritative determinations made by courts on the meaning of constitutional provisions, statutes, and the common law. The shape of these determinations takes different forms, just as an Aristotelian bowl, discussed at § 1.2.1, can take different forms, as long as it is not so flat that it becomes a plate or so round that it becomes a vase.

The background to any act of judicial decisionmaking depends on whether the judge is operating within the framework of a common-law system or a civil-law system. The differing nature of these two systems, and the impact that has upon judicial decisionmaking, particularly the fact that legal reasoning tends to be more inductive in common-law countries, especially for common-law or some constitutional issues, while legal reasoning tends to be more deductive in civil-law countries, in terms of interpreting civil-law codes, is discussed at § 4.1. The form or shape of legal doctrine is discussed at § 4.2. This involves noting that, at a minimum, four different decisions must be made to determine the form or shape of any legal doctrine. The first decision is whether the doctrine should be phrased in absolute, categorical terms or as a balancing test. Once that decision is made, the next decision is whether that categorical or balancing test should be phrased in terms of elements to meet or factors to weigh. The third decision is whether those elements or factors should be phrased in the language of specific rules or broader standards. The final decision is whether those rules or standards should be viewed as questions of law to be applied by the judge or questions of fact to be determined by the trier of fact, in a common-law system typically a jury. Judicial use of precedent is discussed at § 4.3. Sometimes judges make broad use of precedent in their judicial opinions; other times judges make narrow use of precedent. Usually judges follow precedent, but sometimes precedent is overruled. Finally, the structure of law that emerges from the use of the materials of judicial decisionmaking is dependent upon various predispositions that judges may have in deciding cases. Aspects of these predispositions are discussed at § 4.4.

All of these possible variations on the structure of law reflect choices that must be made within the usually defined limits of what constitutes an acceptable approach to legal doctrine and judicial decisionmaking. It should come as no surprise that the different styles of judicial decisionmaking tend to favor different styles of legal reasoning, different forms or shapes of legal doctrine, and different approaches to precedent. Judicial predispositions regarding legal reasoning are discussed at § 4.1. Judicial predispositions regarding the form or shape of law are discussed at § 4.2. That discussion will suggest the following about the general judicial predispositions of the decisionmaking styles:

<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>

Table 4.1
Judicial Predispositions in Legal Reasoning and the Form of Legal Doctrine

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§ 4.1 Common-Law versus Civil-Law Countries: Induction versus Deduction

As many authors have noted, judicial reasoning in constitutional, statutory, or common-law cases can adopt either an inductive or a deductive mode of reasoning. Typically in statutory interpretation cases, or interpretation of a code in a civil-law country, the judicial reasoning is more likely to follow a deductive mode of analysis. In contrast, common-law adjudication is more likely to reflect an inductive mode of analysis, particularly in resolving leeways in the law. Constitutional adjudication is somewhat more complicated. Judicial reasoning in constitutional cases has tended to be more inductive in areas where the constitutional provision is phrased in relatively detailed, specific terms, and thus where adjudication is more like statutory interpretation. For constitutional text phrased more generally, like the First Amendment provision that “Congress shall make no law . . . abridging the freedom of speech,” or the 14th Amendment provision that “no State shall . . . deny to any person equal protection of the laws,” judicial elaboration has tended to be more inductive.

The difference between deductive and inductive modes of analysis was discussed by Columbia Law School Professor Harry Jones. In his article, Our Uncommon Common Law, he stated:

The story of law in the Western World is a tale of two cities, Rome, where the continental European legal tradition had its rise, and London, to which our own legal system traces its pedigree. The nations of Europe and the Americas, and such Asian and African nations as have followed European legal patterns, are divided into two great law families: the civil-law countries and the common-law countries. A civil-law country is one whose legal system reflects, however remotely, the structural concepts, principles, and decisional methods of classical Roman law, the law of the Roman Empire as compiled and promulgated at Constantinople in the sixth century as the Corpus Juris Civilis of the Emperor Justinian. . . . [T]he story of the common law has to begin in London [with] the royal courts at Westminster.1

Professor Jones noted about the civil-law system:

A lawyer, judge, or legal scholar schooled in the civil-law tradition approaches legal problems and legal sources with certain philosophical presuppositions quite different from those of the common-law lawyer. . . . [I]n the civil-law universe of discourse, nothing is law, in the full sense, that has not been written down in exclusive textual form and enacted by the state’s sovereign power. In civil-law countries, the codes in which private law is cast are formulated in broad general terms and are thought of as completely comprehensive, that is, as the all-inclusive source of authority to which every disputed case must be referred for decision. The civil-law lawyer or judge, faced with a particular problem or controversy, must locate his answer somewhere within the four corners of the authoritative code. Learned commentary on the code may help him discover the code’s true meaning for the case at hand, but his decision must ultimately be justified, at least in form, by deduction from some principle in the code itself – and most certainly not by reliance on the authority of past judicial decisions.2

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2 Id. at 448.
Professor Jones contrasted this with the mode of reasoning of the common-law system:

The common-law lawyer works in quite another metier and brings different jurisprudential presuppositions to his tasks. Although a great deal of contemporary American and English law is legislative in origin, the law inferred from judicial precedents is fully as important with us as the law set down by statutory enactments. . . . [O]ur codes are not the all-inclusive, systematic statements found in civil-law countries. In any event, our modes of thought are less deductive, far less confident that the final answer to every contemporary problem can be found within the confines of any enactment, however comprehensive. An eminent Italian jurist, impatient with my incorrigibly common-law habits of reasoning, once put the difference to me in these terms:

Given the same problem to a civil lawyer and a common lawyer. What do we do? We find the governing principle in the text of the code. What do you do? You look for a case. We reason from principle. You stumble along by analogy. I wonder how you ever get anything decided at all.

My friend’s charge is overstated, but he is quite right in a way. We common-law lawyers . . . do exhibit a Pavlovian stimulus and response effect: give us a problem, we try to think of a case, a judicial precedent, and if we cannot think of one, we go off to the library and start looking for it. We are uneasy with doctrinal generalizations, more comfortable with the facts of cases than with general concepts, and we never feel quite secure about our professional predictions until we have located a “case in point,” that is, a past court adjudication in a controversy that was factually alike, or something like, the problem now presented to us.3

Professor Jones cautioned in his article that we should be wary about exaggerating these differences. Professor Steve Nickles similarly noted in an article about the civil law, “[A civilian lawyer] looks at the articles of a Code not as mere rulings, but as particular expressions of more general ideas. Therefore, if no express answer to a certain problem is found in the Code, it is not improper to consider various articles in order to induce from them a more general rule and to apply this rule if it can give a solution. It has sometimes been said that articles of a code are not only law, but sources of law. This is true, not only in the sense that the courts may, by deduction, decide on the implications of a certain article, but also in the sense that the courts may, if necessary, use induction to discover the general rules implied in the provisions of a code, and then, reverting to deduction, develop the full potential of these rules in the solution of the problem at hand.”4 On the other hand, some differences do remain. The common law’s typical inductive process embraces a “‘frame of mind which habitually looks at things in the concrete, not in the abstract: . . . which prefers to go forward cautiously on the basis of experience from this case to the next case, as justice in each case

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3 Id. at 448-49.

seems to require, instead of seeking to refer everything back to supposed universals; [it is] the frame of mind behind the sure-footed Anglo-Saxon habit of dealing with things as they arise instead of anticipating them by abstract universal formulas.”

Former Attorney General of the United States and former Dean of the University of Chicago Law School Edward H. Levi remarked on inductive versus deductive reasoning as follows:

There is, I think, a pattern of judicial reasoning in common law cases, which grows by comparing cases and reasoning by example of analogy from one particular situation to another – thus having a strong inductive element, and yet feeling the necessity to remold and announce rules which justify the new result reached. The new rule, which may have found new meanings in old language, thus becomes a kind of neutral principle which will be changed again in the future. The development of the law of torts is filled with such examples. On the other hand, the interpretation of legislation places a different task on the courts and involves a kind of deductive reasoning, since the words are fixed in the statute and are there to be applied. The initial interpretation of these words – which may be very ambiguous words – by the courts, in early decisions under the statute, are likely to fix the meaning of the legislation in a way that subsequent decisions of the courts in common law cases are not fixed. So there is rigidity and fixity in statutory interpretation. A third kind of reasoning involves the written constitution. Written constitutional provisions are like statutes in that the constitution has set words. But when a court says this is a constitution and not a statute, it often means that the words are allowed to change in meaning, and that they are subject to reinterpretation as though they were common law concepts. And then the court means something more. It means, as Justice Frankfurter said (almost as soon as he found his seat on the bench), “The ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it.” The written constitution therefore gives the court great power – not just great power to declare legislation invalid, as Chief Justice Marshall found, but great power to disregard prior decisions of the court itself, to tear up whole periods of interpretation, and to start over again.

So there is a good deal of the common law type of reasoning in constitutional cases, incremental reasoning – reasoning by example – which it is easier for a court to use when big changes would be bogged down by hot disputes covering matters of policy. Thus at a time when the United States Supreme Court was refusing to permit national regulation to wipe out child labor in the states by closing the channels of interstate commerce to the products of that labor [discussed in this book at § 18.2.2], it found no difficulty in closing the channels of interstate commerce to the transportation of women for immoral purposes or the transportation of diseased cattle, or adulterated foods, or similar products in which it found similarity. And when the Court had walked a considerable distance down this road, it found it easier to uphold a national statute regulating wages and hours [discussed in this book at § 18.2.3]. When the Court did so, it referred to these cases where obnoxious things had been kept out of interstate commerce to show there was a general power to prohibit and regulate, for the distinction which had made an exception of deleterious and harmful products “was novel when made and unsupported by any

provision in the Constitution.” Those cases had been used as stepping stones, and when they were no longer needed, their separate classification was abandoned. You will find this going on continually. It makes for a certain adroitness on the part of the Court.6

Of course, this “adroitness” has been criticized by some jurists, particularly formalists, as undermining the certainty and predictability of law prized by formalists, and as reflecting a living, rather than static, model of the Constitution. For example, when discussing the Court’s contemporary view of the constitutionality of the death penalty, Justice Scalia has written:

As our opinions say in the context of our Eighth Amendment jurisprudence (the Cruel and Unusual Punishment Clause) its meaning changes to reflect “the evolving standards of decency that mark the progress of a maturing society.” This is preeminently a common-law way of making law, and not the way of construing a democratically adopted text. . . . One would suppose that the rule that a text does not change would apply a fortiori to a constitution. If courts felt too much bound by the democratic process to tinker with statutes, when their tinkering could be adjusted by the legislature, how much more should they feel bound not to tinker with a constitution, when their tinkering is virtually irreparable. It certainly cannot be said that a constitution naturally suggests changeability; to the contrary, its whole purpose is to prevent change – to embed certain rights in such a manner that future generations cannot readily take them away. A society that adopts a bill of rights is skeptical that “evolving standards of decency” always “mark progress,” and that societies always “mature,” as opposed to rot. Neither the text of such a document nor the intent of its framers (whichever you choose) can possibly lead to the conclusion that its only effect is to take the power of changing rights away from the legislature and give it to the courts.7

To the contrary, as discussed at §§ 6.3.1-6.3.4, proponents of a living Constitution do conclude, to varying extents, that legislative, executive, or social practice and judicial precedents can sometimes provide a gloss on meaning to the Constitution, and that this approach is consistent with how the framers and ratifiers anticipated the Constitution would be interpreted. As Chief Justice Marshall stated in McCulloch v. Maryland,8 “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 be best provided for as they occur.”

In addition, particularly from an Enlightenment natural law perspective there is faith in man’s “progress” over time and in the “evolving standards of decency.” Of course, this faith is not blind.


As major influence on the drafting of the Constitution, and later fourth President of the United States, James Madison, wrote in *The Federalist Papers* No. 55, “As there is a degree of depravity in mankind which requires a certain degree of circumspection and distrust: So there are other qualities in human nature, which justify a certain portion of esteem and confidence. Republican governments presupposes the existence of these qualities in a higher degree than any other form.”

In contrast, a particular conservative version of a religious natural law tradition, such as a Calvinist-inspired view of humanity as “radically fallen” from a state of grace, is more likely to embrace Justice Scalia’s concern that societies may well “rot” over time.

As discussed at § 7.1, the most prominent individual of the framing and ratifying generation to have adopted a theory of constitutional interpretation similar to a formalist, deductive, static model of interpretation was Thomas Jefferson. However, Jefferson’s approach must be considered against a backdrop of Jefferson’s view that since “the earth belongs in usufruct to the living,” each new generation has the right to make for itself a new Constitution. Under such a view, the United States Constitution of 1789 would not have been intended to endure for ages, but only until the next constitution was adopted. A static model of interpretation makes better sense given this view, for flexibility can come from newly adopted constitutional language. Such newly-adopted language would thus be the mechanism for law to reflect man’s progress over time and the evolving standards of decency, a faith Jefferson shared with Madison and the Enlightenment natural law tradition.

Despite Jefferson’s support, this view of constantly newly adopted constitutions was rejected by the framing and ratifying generation, including Jefferson’s close friend James Madison. Madison’s letter to Jefferson, counseling against such a doctrine, is instructive. It has been noted, “Among the objections cited by Madison was that too frequent appeals to the people to ‘new-model’ government would ‘in great measure deprive the government of that veneration, which time bestows on every thing, and without which perhaps the wisest and freest governments would not possess the requisite stability’ . . . . Another objection put forward by Madison was that a frequent reference of constitutional questions to the decision of the whole society raised ‘the danger of disturbing the public tranquility by interesting too strongly the public passions.’”

Aspects of the amendment process related to the ease of amendment are discussed at §§ 7.1 nn.19-20 & 20.1.1.3 nn.20-21.

As Justice Scalia’s observations above suggest, the formalist style of decisionmaking is the style most comfortable with deductive modes of reasoning. This applies not only to constitutional and statutory interpretation, but also to common-law decisionmaking. As noted at § 3.1 n.4, Langdell’s model of the common law stressed a deductive process of reasoning where a “few basic top-level

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10  *Id.* at 71.


12  Mayer, *supra* note 11, at 300-01.
categories and principles formed a conceptually ordered system above a large number of bottom-level rules. The rules themselves were, ideally, the holdings of established precedents, which upon analysis could be seen to be derivable from the principles.”

The Holmesian focus on certainty and predictability in the law, noted at § 3.2 nn.26-31, also has a predisposition toward deductive modes of reasoning. However, as a pragmatic, functional approach to law, Holmesian judges are more willing than formalists to engage in inductive modes of reasoning, particularly when such reasoning will help to illuminate the purposes behind existing legal categories. As noted at § 2.2.2.4, the functional view is that law is an empirical science, not the deductive library science of the formalists.

As an analytic approach to law, the natural law style of decisionmaking shares with the formalist style a desire for legal reasoning to be as deductive as possible. However, as discussed at § 3.4 nn.88-94, as part of the normative natural law emphasis on the background morality of the law, the natural law style shares with the Holmesian style a recognition of the importance of considering the purposes of legal categories. This creates the need as under the Holmesian style for greater resort to inductive reasoning than under formalism. In addition, the natural law resort to background moral principles embedded in the law typically will require an inductive mode of analysis to determine the content of those principles. As noted at § 4.1 n.4, when referring to a similar problem posed in a civil-law system where leeways exist in the existing legal categories, “the courts may, if necessary, use induction to discover the general rules implied in the provisions of a code, and then, reverting to deduction, develop the full potential of these rules in the solution of the problem at hand.” For this reason, while preferring legal reasoning to be as deductive as possible, the natural law style typically involves greater use of inductive modes of reasoning than the Holmesian style.

As a functional, normative approach to law, the instrumentalist style is the most receptive to inductive modes of reasoning in common-law, statutory, and constitutional contexts. As noted at § 3.3 nn.53-54, in each of these contexts, where the reason for the rule stops, there stops the rule. Determining the optimal result in each social circumstance, the so-called “situation-sense” of each case, will typically require some amount of inductive reasoning weighing background social contexts, judicial precedents, and existing legal categories to determine the proper legal result. The greater legal indeterminacy created by such legal reasoning is outweighed for instrumentalist judges by the ability to advance better social welfare or social justice. As Justice Cardozo remarked in a passage cited at § 3.3 n.60, “Logic and history and custom have their place. We will shape the law to conform to them when we may; but only within bounds. The end which the law serves will dominate them all.”

Although the focus of Part I of this book is on the styles of judicial decisionmaking in a common-law system, it is useful to note that the same issue of the four judicial decisionmaking styles exists in civil-law countries also. The general nature of legal reasoning may be more deductive in civil-law countries than in common-law countries, particularly because areas like contracts, torts, and property

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are governed by legislative codes, and thus are more like statutory interpretation, rather than developed through the common-law system of precedent and reasoning by analogy. Within a civil-law system, however, a formalist civil-law judge is likely to be the most deductive in legal reasoning, while an instrumentalist civil-law judge is likely to be the most inductive in practice. Agreeing with a more instrumentalist approach to civil-law decisionmaking, Justice Cardozo noted in 1921, “I think the tone and temper in which the modern [common-law] judge should set about his task are well-expressed in the first article of the Swiss Code of 1907.”15 That section provides:

The Code governs all questions of law which come within the letter or spirit of any of its provisions.
If the Code does not furnish applicable provisions, the judge shall decide in accordance with customary law, and failing that, according to the rule he would establish as a legislator.
In this he shall be guided by approved legal doctrine and legal tradition.16

The approach reflects an instrumentalist approach because the judge is authorized to consider all four kinds of arguments. First, the judge considers the law’s letter (the literal text, emphasized by formalists) and spirit (purpose of the law, the added focus of Holmesians). Next, if leeways exist in the law, because the Code does not furnish applicable provisions, the judge considers customary law (where leeways exist, custom or background moral principles, the added focus of the natural law style) and, if leeways still exist, how the judge would rule as a legislator (where leeways exist, social welfare or social policy considerations, the added focus of instrumentalism).

§ 4.2 The Form or Shape of Legal Doctrine

As noted in the introduction to this Chapter, at a minimum four different decisions must be made to determine the form or shape of any legal doctrine. These decisions involve the following choices: (1) whether the legal doctrine is presented in absolute, categorical terms, or is phrased as a balancing test; (2) whether the legal doctrine is phrased as a set of elements to meet, or is phrased as a set of factors to weigh; (3) whether the legal doctrine takes the form of rules to follow, or takes the form of standards to meet; and (4) whether the legal doctrine is phrased as an issue of law for judicial determination, or is phrased as a factual issue to be determined by the trier of fact. Each of these decisions is discussed below with reference to common-law, statutory, and constitutional adjudication. Further discussion of these issues with respect to the specific issue of constitutional adjudication appears at § 7.2, as part of Part II’s focus on the form or shape of constitutional law.

§ 4.2.1 Categorical Rights versus Balancing Tests

One conception of rights is that rights are absolute for the area which is covered by the right. Under this conception, rights “trump” all other considerations; they are not balanced against other

15 Id. at 140.

considerations. This is the classic philosophic sense of rights, as noted by Ronald Dworkin.\textsuperscript{17} This approach has also been called a categorical approach.\textsuperscript{18} Comparing a categorical approach with a balancing approach, former Stanford Law School Dean and Professor Kathleen Sullivan has written:

Categorization and balancing each employ quite different rhetoric. Categorization is the taxonomist’s style – a job of classification and labeling. When categorical formulas operate, all the important work in litigation is done at the outset. Once the relevant right and mode of infringement have been described, the outcome follows, without any explicit judicial balancing of the claimed right against the . . . justification for the infringement. Balancing is more like grocer’s work . . . – the judge’s job is to place competing rights and interests on a scale and weigh them against each other.\textsuperscript{19}

Of course, for most categorical rights there are exceptions where the right does not apply. Having an exception to a categorical right, however, is not the same as doctrine being phrased as a balancing test. For example, under contract law, the standard rule is that there must be consideration to make an enforceable contract. In some cases, however, such as those involving promissory estoppel or moral obligation, no consideration is needed. But each of these doctrines is phrased as an absolute right: where consideration applies, it is absolute; where the exceptions apply, they are absolute.\textsuperscript{20}

In many common-law areas, the doctrine is phrased in such categorical terms. For example, under contract law, there needs to be a valid offer and acceptance for there to be an enforceable contract; where the statute of frauds applies, a writing is required to make the contract enforceable, unless some exception applies, like promissory estoppel.\textsuperscript{21} In tort law, whether there exists an assault, a battery, or a false imprisonment depends upon rules phrased in categorical terms.\textsuperscript{22}

A number of rights in the United States Constitution have been held by the Court to be of this kind. For these rights, no balancing of the individual’s right versus the government’s needs is done. For example, as discussed at § 25.1, the 13\textsuperscript{th} Amendment’s ban on slavery is stated in absolute, categorical terms. Similarly phrased in absolute terms are the ban on legislative Bills of Attainder in Article I, discussed at § 23.2.2.1; the President’s power in Article II to pardon individuals for federal offenses, discussed at § 19.3.5; and the view under Article III that federal courts cannot render opinions on matters which are political questions, discussed at § 17.3.4.

\textsuperscript{17} See Ronald Dworkin, Taking Rights Seriously xi (1977).


\textsuperscript{19} Id. at 293-94.

\textsuperscript{20} See generally Joseph M. Perillo, Calamari & Perillo on Contracts 174-77, 229-30, 253-57 (5\textsuperscript{th} ed. 2003) (discussing consideration, moral obligation, and promissory estoppel doctrine).

\textsuperscript{21} Id. at 26-31, 798-801.

\textsuperscript{22} See generally Prosser and Keeton on The Law of Torts 39-54 (5\textsuperscript{th} ed. 1984).
For many doctrines, however, the relevant test is not phrased in such categorical terms, but instead is phrased as a balancing test. In an article entitled *Constitutional Law in the Age of Balancing*, Professor Alexander Aleinikoff described balancing tests as follows:

By a “balancing opinion,” I mean a judicial opinion that analyzes a constitutional question by identifying interests implicated by the case and reaches a decision or constructs a rule of constitutional law by explicitly or implicitly assigning values to the identified interests. . . . [B]alancing, as I define it, differs from methods of adjudication that look at a variety of factors in reaching a decision. These would include some of the familiar multi-pronged tests and “totality of the circumstances” approaches.23

Consistent with this definition, the distinction is made here between balancing tests, discussed in the remainder of this section, and the separate issue of whether a doctrine employs elements or a “variety of factors” in reaching a decision, discussed in the next section, at § 4.2.2. So defined, a balancing test is a test that involves a cost-benefit analysis of means and ends – in Aleinikoff’s terms “a head-to-head comparison with competing interests.”24 The logic of this cost-benefit analysis means that in every balancing test there are three basic components of the test, no matter how the test is officially phrased. First, there is question of what principles or policies are involved, that is, what are the ends to be achieved by the doctrine. Against the backdrop of these ends, the means of the action under review are examined both for the benefits achieved by the means (the benefit) and the burdens imposed by the means (the cost) as part of a cost-benefit analysis. Thus, balancing tests inevitably involve a three-part consideration of ends, benefits, and burdens.

For example, in contract law, the doctrine of whether a covenant not to compete is enforceable or not is phrased as a balancing test. The benefits of any covenant not to compete in terms of protection of trade secrets, or customer lists, or employer investment in training is balanced against the anti-competitive costs of a covenant not to compete given the covenant’s scope in terms of time, place, and subject-matter. These benefits and burdens are considered against a backdrop of governmental ends to support freedom of contract, while also supporting marketplace competition. In such cases, the ultimate test is whether the covenant not to compete is “reasonable” given the cost-benefit analysis.25 Similarly, in tort law, the famous Hand formula for determining whether some act constitutes actionable negligence is phrased as a balancing test. Under the Hand formula, the benefit of preventing an accident, measured by the probability of an accident (P) times the harm or liability caused (L), is balanced against the cost or burden of taking action to prevent the harm (B). The end is to reduce the overall cost of activity, that is, whether the benefit is worth the cost.26

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24 Id.


26 See generally Prosser and Keeton, *supra* note 22, at 173 n.46.
Many constitutional rights are similarly phrased as balancing tests. As Justice Holmes’ famous example states, even the First Amendment requirement that Congress shall pass no law “abridging the freedom of speech” does not permit an individual to shout “fire” in a crowded theater.\(^{27}\) For such rights, some balancing of individual interests versus governmental interests is required.

These balancing tests inevitably involve a three-part consideration of ends, benefits, and burdens. In each case, the Court considers the government’s ends, how the statute’s means beneficially advance the ends, and how the statute’s means burden individuals regulated by the statute. Professor Aleinikoff noted that the procedural due process cases and the dormant commerce clause cases are classic examples of balancing tests.\(^{28}\) Under the due process test of *Mathews v. Eldridge*,\(^ {29}\) the Court considers: (1) “the government’s interest” or ends in the case; (2) the means by which the existing procedures achieve the government’s ends, including “the risk of an erroneous deprivation through present procedures and the probable value, if any, of additional or substitute procedures”; and (3) “the private interest” that will be burdened. Under dormant commerce clause analysis, as phrased in *Pike v. Bruce Church, Inc.*,\(^ {30}\) the Court considers: (1) the state’s “legitimate local public interest”; (2) the means by which the statute achieves these ends, including whether the benefits of the statute could be promoted “as well with a lesser impact on interstate activities”; and (3) given this, whether the “burden” on interstate commerce is “clearly excessive” given the statute’s benefits.

More examples of balancing tests in constitutional law are considered at § 7.2.1. As noted there, given the definition of balancing tests adopted here, only what Professor Aleinikoff called “ad hoc balancing” counts as a balancing test, because only in such cases does the Court engage in the three-part cost-benefit analysis in applying the test. Professor Aleinikoff also discussed what other commentators have called “definitional” balancing, exemplified, he said, by the conclusion in *New York v. Ferber*, discussed at § 30.1.4.1, that a balancing of interests suggests that the distribution of child pornography is not protected by the First Amendment.\(^ {31}\) The Court’s view in *Ferber* that child pornography is never protected by the First Amendment is best conceived as adopting a categorical approach to doctrine based upon a weighing of factors. As discussed at § 7.2.2 nn.57-59, such examples of “definitional” balancing are best understood in terms of a categorical approach because in each case the doctrinal structure eventually adopted is a categorical rule of general application.

As might be predicted, analytic approaches to law, like formalism and natural law, naturally have a predisposition for as many categorical rules to be adopted as possible. As Professor Aleinikoff noted, “ad hoc balancing may undermine the development of stable, knowable principles of law.”\(^ {32}\)

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\(^ {27}\) Schenck v. United States, 249 U.S. 47, 52 (1919) (Holmes, J., for the Court).


\(^ {29}\) 424 U.S. 319, 335 (1976), discussed § 27.4.3.2.

\(^ {30}\) 397 U.S. 137, 142 (1970), discussed § 20.3.2.1.D.


\(^ {32}\) Id. at 948.
As stated at § 1.1, and developed at §§ 13.1 & 14.2, an original natural law era on the Supreme Court existed from 1789-1873, and a formalist era existed from 1873-1937. It is thus no surprise that Professor Aleinikoff reported, “The great constitutional opinions of the nineteenth and early twentieth century did not employ balancing as a method of constitutional argument or justification.” In contrast, as Professor Aleinikoff noted, balancing developed based on the pragmatic, functional theories of Holmes, Cardozo, and Llewellyn, and triumphed on the Supreme Court after 1937. This is consistent with the Holmesian era on the Supreme Court of 1937-54 and an instrumentalist era of 1954-86, as stated in § 1.1 and developed at §§ 13.1 & 14.2.

In modern times, however, the natural law judge’s great respect for precedent, and willingness to consider background moral principles embedded in the law, discussed at § 3.4 nn.93-106, has pushed natural law judges more in the direction of a willingness to accept balancing tests. The precedents and background moral principles embedded in Court doctrine since 1937 during the Holmesian and instrumentalist eras are filled with more balancing tests than the precedents and doctrine considered by natural law judges between 1789-1873. 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 substantive landscape of judicial precedents and background moral principles.

This fact is discussed in greater depth in the context of constitutional adjudication at § 13.3, where a distinction is drawn between traditional natural law doctrinal results of 1789-1873 and modern natural law doctrinal results today. In her previously cited article, Professor Sullivan noted aspects of this tension between the traditional natural law reluctance to employ balancing tests, and the modern natural law greater willingness to use balancing tests, when among the modern natural law Justices on the Supreme Court she noted that Justices O’Connor and Souter “staunchly defend the balancing mode” while Justice Kennedy “appears a rising ally” to formalist Justice Scalia in “condemn[ing] balancing for affording judges excessive discretion.” Justice Kennedy has been a particular critic of balancing tests in those areas of the law where Justice Kennedy, despite his usual natural law style of interpretation, has adopted more of a formalist approach, as in First Amendment free speech cases, as discussed at §§ 12.4.1 nn.162-64 & 29.2 nn.58-59.

Despite being a functional approach to law, the Holmesian preference for law to be as certain and predictable as possible, discussed at § 3.2 nn.26-31, has pushed Holmesian judges in the direction of categorical rules where possible. Furthermore, as discussed at § 26.1.2.2 nn.73-79, the Holmesian deference-to-government predisposition has meant that Holmesian judges are likely to press for adoption of the deferential “minimum rational review” balancing test, if a balancing test is going to be applied. As Professor Sullivan noted, the minimum rational review balancing test “functions as a de facto categorical mode of analysis despite its nominal use of balancing rhetoric. . . . True, the standard formulations of [rational review] require a court to go through the motions of balancing . . . . But this is not real balancing. If the standard is rationality, the government is supposed to

33 *Id.* at 949

34 *Id.* at 952-72.

win.”\textsuperscript{36} Thus, although the Holmesian style of interpretation is not as faithful to pure categorical rules as formalists, in the contemporary context the Holmesian style is likely to support more doctrine phrased as categories or based upon “minimum rational review” than the natural law style of interpretation.

Instrumentalists tend by far to be the judges most comfortable with balancing tests. Professor Sullivan identified instrumentalist Justices such as Marshall, Blackmun, and Stevens as advocates of balancing.\textsuperscript{37} Professor Aleinikoff noted that balancing tests “spread” like “wild clover” during the 1960s, 1970s, and 1980s on the Court. Further, since balancing tests ultimately turn on a cost-benefit analysis, a concern exists regarding how to evaluate costs and benefits in a principled way.\textsuperscript{38} This is similar to the difficulty of determining Cardozo’s “objective social values” to guide instrumentalist decisionmaking, discussed at § 3.3 nn.59-62. As discussed there, for supporters of instrumentalism that difficulty is not viewed as a major problem; for supporters of the other decisionmaking styles, that difficulty tends to give judges too much discretion in deciding cases.

Cases involving statutory interpretation can also raise this issue of a categorical approach versus a balancing test. In most statutes, of course, the plain language of the statute will indicate whether the statute is adopting a categorical approach or a balancing test. However, sometimes it is unclear whether a statute’s text anticipates a categorical approach or a balancing test. For example, in \textit{Regents of the University of California v. Bakke},\textsuperscript{39} one issue in the case was whether the language in Title VI of the 1964 Civil Rights Act providing that no person shall be subjected to discrimination “on the ground of race” reflected a categorical approach banning all discrimination based upon race, or whether the language merely referred to the strict scrutiny balancing test under the Equal Protection Clause for testing cases of racial discrimination. Not surprisingly, most of the formalist and Holmesian judges on the Court, like Chief Justice Burger and Justices Rehnquist and Stewart, concluded that the statute adopted a categorical approach, while most of the instrumentalist judges on the Court, like Justices Brennan, Marshall, and Blackmun, along with modern natural law judge Justice Powell, concluded that the statute adopted strict scrutiny balancing. This predictive power is not absolute, however, as instrumentalist Justice Stevens joined in a categorical understanding of Title VI, while Holmesian Justice White joined in the balancing approach. Such a departure from a judge’s usual mode of analysis is discussed at §§ 4.4.2-4.4.4 regarding judicial predispositions.

Based on this discussion, Table 4.1 places formalist judges as the judges most predisposed toward doctrine phrased in categorical terms, while instrumentalist judges are most predisposed toward balancing tests. Holmesian judges are placed closer to formalists than natural law judges reflecting

\textsuperscript{36} \textit{Id.} at 296.

\textsuperscript{37} \textit{Id.} at 295-96.

\textsuperscript{38} Aleinikoff, \textit{supra} note 23, at 963-83.

\textsuperscript{39} 438 U.S. 265, 287 (1978) (Powell, J., opinion); \textit{id.} at 328 (Brennan, J., joined by White, Marshall & Blackmun, JJ., concurring in the judgment in part and dissenting in part); \textit{id.} at 412-13 (Stevens, J., joined by Burger, C.J., and Stewart & Rehnquist, JJ.) (concurring in the judgment in part and dissenting in part).
the modern natural law greater willingness to adopt balancing tests. If one referred only to the traditional natural law approach, the order of Holmesian and natural law entries should be reversed.

Of course, this placement of the general predisposition of judges will not control the outcome of every doctrine. There are examples where formalist judges have been more supportive of using balancing tests, and instrumentalist judges have been more supportive of categorical approaches. This usually happens where other reasons determine outcomes. For example, as Professor Sullivan has noted, 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 reasons from their general predisposition with respect to a particular doctrine do not upset the general predisposition of the judicial decisionmaking styles as reflected above.

§ 4.2.2 Elements versus Factors

Once the issue is resolved of whether the doctrine will be phrased in categorical terms or as a balancing test, the next issue a judge must determine is whether the doctrine will consist of a set of elements, each of which must be independently met, or a set of factors, each of which must be considered against the others to form a total aggregation of interests.

When a doctrine is phrased as a set of elements, this means that for the doctrine to apply the court must conclude that each element of that doctrine is met independently of the other elements. This kind of approach typically appears if the doctrine is phrased in categorical terms. For example, the categorical rule against Bills of Attainder, discussed at § 23.2.2.1, 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. For each of these elements, there is naturally a test to determine whether the act is “legislative,” does it single out any “identifiable individuals,” and does it represent the kind of “punishment” within the constitutional proscription against bills of attainder.

Many common-law doctrines that are phrased as categorical rules also consist of a set of elements to meet. For example, in proving a defense of duress to contract enforceability, a party must prove four things: an improper threat, which deprived the party of free will, where the normal legal remedy was inadequate, and the claim of duress was brought within a reasonable time. These four requirements are phrased as elements, each of which independently must be met in order to have a valid defense of duress. Similarly, in tort law, to have a valid claim of false imprisonment, one must show three elements: the defendant intended to confine, the plaintiff was conscious of the

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40 See Sullivan, supra note 18, at 307-08.

41 See generally Nixon v. Administrator of General Services, 433 U.S. 425, 468-84 (1977), discussed § 23.2.2.1.

42 See generally Perillo, supra note 20, at 315-18.
However, doctrine phrased in categorical terms can also consist of a set of factors to weigh. An example of a categorical doctrine determined by a weighing of factors is the political questions doctrine, mentioned at § 4.2.1. The Court has stated as a categorical matter that the Court will not resolve issues which represent political questions. Whether something is a political question is determined, according to Baker v. Carr, by weighing six factors. As stated in Baker v. Carr, discussed at § 17.3.4.4, these factors are: (1) whether there is a textually demonstrable constitutional commitment to a coordinate branch of government; (2) whether there is a lack of judicially manageable standards; (3) whether the issue calls for resolution of a non-judicial policy decision; (4) whether the decision would represent a lack of respect for other branches of government; (5) whether there is need for finality; (6) and the potential for embarrassment from multifarious pronouncements on the particular issue.

A second example of a categorical approach to doctrine that uses factor analysis is the state action doctrine. As discussed at § 21.1.1, the Court has stated as a categorical manner state action is required before most constitutional rights are triggered. As phrased in Edmonson v. Leesville Concrete Co., Inc., discussed at § 21.1.2.5, the Court considers three factors to determine if state action exists: (1) “the extent to which the actor relies on governmental assistance and benefits”; (2) “whether the actor is performing a traditional governmental function”; and (3) “whether the injury caused is aggravated in a unique way by the incidents of governmental authority.” These factors are weighed together to determine in any individual case whether state action exists.

A common-law example of this same structure would be the contract doctrine of material breach. In contract law there is a categorical rule that a material breach of a contract entitles the party to suspend that party’s performance, absent exceptional circumstances that may apply. In determining whether any particular breach of a contract is a material or only a minor breach, most courts will weigh the five factors stated in Restatement (2d) of Contracts § 241 to make that determination.

As with doctrines phrased in categorical terms, doctrines phrased as balancing tests can also adopt either an approach of elements to meet or factors to weigh. However, unlike doctrines phrased in categorical terms, which are structured more often as elements to meet, balancing tests are structured more often in terms of factors to weigh.

This can happen both with respect to determining which balancing test to apply, and in the actual application of the balancing test. An example of factor analysis used to determine which balancing test to apply occurs under the Equal Protection Clause. As discussed at § 26.1.2.1 nn.57-67, in an Equal Protection case, the Court determines which standard of review to apply – minimum rational

43  See generally Prosser and Keeton, supra note 22, at 47-54.


46  See generally Perillo, supra note 20, at 430-33.
review, intermediate scrutiny, or strict scrutiny – by considering a myriad of factors that counsel the Court either substantially to defer to legislative judgment, in which case rational review is employed, or counsel the Court to be more suspicious of the legislative action, in which case some form of heightened scrutiny is applied.47

Two examples of factor analysis in the actual application of balancing tests are the procedural due process cases based upon Mathews v. Eldridge and the dormant commerce clause cases based on Pike v. Bruce Church, Inc., noted at § 4.2.1 nn.28-30. As discussed there, both the Mathews test and the Pike test involve balancing the factors of ends, benefits, and burdens. Despite this usual connection between balancing tests and factor analysis, doctrines phrased as balancing tests can also adopt the structure of elements to meet. For example, as discussed at §§ 26.1.1.1 & 26.1.1.2, under the Equal Protection Clause balancing tests the Court has organized the three inquiries into ends, benefits, and burdens as separate elements to meet. As noted at § 26.1.1.1 n.12, under minimum rational review, the legislation has to (1) advance legitimate government ends, (2) be rationally related to advancing these ends, and (3) not impose irrational burdens on individuals. As noted at § 26.1.1.2 n.52, under the intermediate review balancing test, 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. Under strict scrutiny, as noted at § 26.1.1.2 n.53, the statute must (1) advance compelling governmental ends, (2) be directly and substantially related to advancing these ends, and (3) be the least restrictive effective means of doing so. In each case, whether or not a statute is constitutional depends on whether the three individual elements in each standard of review are met.

In some cases, factor analysis can be used to determine whether or not an individual element under some doctrine is met. For example, as noted at § 23.2.2.1 nn.219-21, one element used to determine whether a legislative act is a Bill of Attainder is whether it is a “punishment.” To make this decision, the Court weighs various considerations of purpose, history, practice, and precedent.48

As might be expected, formalists tend to prefer doctrine to be stated as elements to meet. Doctrines stated as elements are more likely to be capable of mechanical application, reducing judicial discretion. 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 “situation-sense” of the case, to use Llewellyn’s terminology, discussed at § 3.3 nn.53-54.

The Holmesian preference for predictability and certainty in the law suggests to most Holmesian judges a predisposition in favor of doctrine phrased as 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 to weigh than the formalist or Holmesian styles of interpretation.

Given the principles embedded in the law at the time, which had few balancing tests, as discussed at § 4.2.1 nn.33-38, and few examples of factor analysis, traditional natural law was based more on elements to meet than is modern natural law. This fact is discussed with respect to constitutional decisionmaking at § 7.2.2 text following n.50. Table 4.1’s placement of the Holmesian style next to the formalist style reflects the modern natural law greater willingness to adopt factor tests.

§ 4.2.3 Rules versus Standards

A third issue that courts must confront when faced with the task of defining doctrine is whether to phrase some part of the doctrine as a rule or a standard. As typically defined, doctrines are phrased as rules when the elements or factors embody specific definitions capable of relatively mechanical application. In contrast, doctrines phrased as standards embody more general definitions, such as that behavior must be reasonable. For example, in the classic example from torts, Holmes took the view that automobile drivers should “stop, look, and listen” at railroad crossings. This was an example of a rule. In contrast, Cardozo took the view that the negligence of automobile drivers at railroad crossings should be based upon whether they acted “reasonably under the circumstances,” an example of a standard.49

In her classic article, *The Justices of Rules and Standards*, Dean Kathleen Sullivan said the following about rules versus standards:

A legal directive is “rule”-like when it binds a decisionmaker to respond in a determinate way to the presence of delimited triggering facts. Rules aim to confine the decisionmaker to facts, leaving irreducibly arbitrary and subjective value choices to be worked out elsewhere. A rule captures the background principle or policy in a form that from then on operates independently. A rule necessarily captures the background principle or policy incompletely and so produces errors of over- and under-inclusiveness. But the rule’s force as a rule is that decisionmakers follow it, even when direct application of the background principle or policy to the facts would produce a different result.

A legal directive is “standard”-like when it tends to collapse decisionmaking back into the direct application of the background principle or policy to a fact situation. Standards allow for the decrease of errors of under- and over-inclusiveness by giving the decisionmaker more discretion than do rules. Standards allow the decisionmaker to take into account all the relevant

factors or the totality of the circumstances. Thus, the application of a standard in one case ties the decisionmaker’s hand in the next case less than does a rule – the more facts one may take into account, the more likely that some of them will be different the next time.50

In her article, Professor Sullivan listed four arguments in favor of rules, and then four arguments in favor of standards. With respect to rules, Professor Sullivan noted: (1) rules advance a conception of fairness as formal equality, as rules “reduce the danger of official arbitrariness or bias”; (2) rules better “afford certainty and predictability to private actors, enabling them to order their affairs productively” and “promote economies for the legal decisionmaker by minimizing the elaborate, time-consuming, and repetitive application of background principles to facts”; (3) rules advance liberty “by ensuring that ‘government in all its actions is bound by rules fixed and announced beforehand’”; and (4) rules better “allocate roles or power among competing decisionmakers” because rules better “establish and constrain the jurisdiction of those decision-makers.”51

On the other hand, as Sullivan noted, “bright-line rules are arbitrary at the border” and may “force the decisionmaker to treat differently cases that are actually substantively [quite] alike”; by promoting certainty and predictability rules may “allow the ‘bad man’ to engage in socially unproductive behavior right up to the line”; supposed decisionmaking economies of rules may be “offset if decisionmakers spend time inventing end-runs around them”; and rules “cannot perform such role allocation without a theory that defines the relevant decisionmakers’ roles.”52

With respect to standards, Professor Sullivan noted: (1) standards promote a conception of fairness as substantive justice, as “standards allow decisionmakers to treat like cases that are substantively alike” and thus “spare individuals from being sacrificed on the alter of rules”; (2) “standards serve better than rules in maximizing productivity” because standards, unlike rules, are “flexible and permit decisionmakers to adapt them to changing circumstances over time”; (3) standards serve “substantive equality” better by better preventing “the shrewd, the calculating, and the wealthy to manipulate its forms [rules] to their own advantage”; and (4) standards “make visible and accountable the inevitable weighing process that rules obscure.”53

On the other hand, standards have their drawbacks. In a famous speech, Justice Scalia discussed six reasons why rules are better than standards: consistency and the appearance of consistency; uniformity among the lower courts; predictability; judicial restraint; judicial armor against public disapproval; and keeping matters of law separate from matters of fact.54


51 Id. at 62-64 (citations omitted).

52 Id. (citations omitted).

53 Id. at 66-67 (citations omitted).

Not surprisingly, given their focus on reducing judicial discretion through analytic, logical treatment of settled positive law, formalists have the greatest predisposition to frame doctrine as rules. As noted at a Symposium on *Formalism Revisited,* several participants in the Symposium “treated formalism and ‘rules’ interchangeably.”55 Professor Sullivan noted in her classic article, “Justice Scalia, more than any current Justice, favors operative rules and condemns operative standards.”56

Not surprisingly, instrumentalists, like Justice Cardozo in the tort example given above, tend to have a preference for standards. As Professor Sullivan noted about constitutional law, “If Justice Scalia leads the charge for rules on the current Court [1992], Justice Stevens is his most consistent, standard-bearing antagonist.”57 Reflecting the connections indicated in Table 4.1 among balancing tests, factor analysis, and standards, on the one hand, and categorical tests, elements, and rules, on the other hand, Professor Sullivan noted Justice Stevens’ “commitment to multi-factored contextual analysis and his opposition to rule-based or categorical decisionmaking.”58 Similarly, 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.59

Because of desire for certainty in the law, discussed at § 3.2 nn.26-31, Holmesians have a preference for doctrine to be phrased more in terms of rules, than standards. Holmes’ preference for the “stop, look, and listen” rule is just one of a number of possible examples of Holmes’ preference for rules over standards. For example, in a detailed look at the rules versus standards debate in the context of common-law, statutory, and constitutional adjudication, Professor Pierre Schlag noted in his article, *Rules and Standards,* that in the fields of tort, criminal, and regulatory law, “[R]ules mete out a fixed quantum of predetermined deterrent, ensuring that a certain penalty will be imposed for engaging in the prohibited conduct. . . . By predesignating and quantifying the magnitude of the penalty to be applied, rules allow Holmes’ proverbial bad man to treat the deterrent as a fixed cost of doing business.” Regarding the fields of contracts, civil procedure, and property law, Schlag noted that by “specifying routine means of communication, rules minimize the possibility of misunderstanding, making transactions more secure,” a goal of the Holmesian focus on certainty and predictability in the law. On the other hand, as Schlag noted, “Formalities cast in terms of rules can distort meaning and understanding and defeat authentic communication by favoring those most adept at manipulating legal boxes.”60


56 Sullivan, *supra* note 50, at 83.

57 *Id.* at 88.

58 *Id.*

59 Scalia, *supra* note 54, at 1179-82.

This 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.”

On the other hand, the analytic predisposition of the natural law style pushes natural law decisionmakers more in the direction of rules, rather than standards. As Schlag noted, “Rules draw a sharp line between forbidden and permissible conduct, allowing persons subject to the rule to determine whether their actual or contemplated conduct lies on one side of the line or the other.”

§ 4.2.4 Issues of Fact versus Issues of Law

The fourth issue that courts must confront when faced with the task of defining the content of any legal doctrine is whether the relevant rule or standard is phrased as an issue of fact or an issue of law. If the doctrine is phrased as an issue of law, it will be decided by the trial court judge as a question of law, and will not be entitled to deference on appeal. Instead, the appellate court will decide de novo if the trial court’s determination on the issue of law was “erroneous” or not. In contrast, if the doctrine is phrased as an issue of fact, resolution of that doctrine will be initially for the trier of fact.

When reviewing district court findings of fact, that deference will embody some variation of a “clearly erroneous” standard. Thus, an appellate court will overturn the district court’s fact determination only if, based upon evidence in the record, the decision of the trier of fact was “clearly erroneous” because the reviewing court is "left with the definite and firm conviction that a mistake has been committed." An even more deferential standard of review is reserved for jury fact-findings, which typically are reviewed for substantial evidence. Substantial evidence "means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." If a fact decision is found to be “clearly erroneous” or not based upon “substantial evidence,” the appellate court could then decide “as a matter of law” the state of the facts if the court concluded, based upon the record, that “no reasonable trier of fact could decide otherwise.” The most lenient standard of review is “abuse of discretion,” used for aspects of trial supervision or decisions of administrative

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62 Schlag, supra note 60, at 384.
agency tribunals. Abuse of discretion may be found when: (1) the tribunal's decision is clearly unreasonable, arbitrary, or fanciful; (2) the decision was based on an erroneous conclusion of law; (3) the tribunal's findings are clearly erroneous; or (4) the record contains no evidence upon which the tribunal rationally could have based its decision.\(^{63}\)

As an example, in contract doctrine, the elements that trigger some defenses are questions of fact for a trier of fact, like for duress, mistake, or misrepresentation.\(^{64}\) Other defenses, like unconscionability or illegality, are questions of law for the court.\(^{65}\) Some doctrines reflect a mixture of questions of facts and law. For example, under the doctrine of promissory estoppel, the questions of whether a promise was made, was it reasonably foreseeable that there would be reliance, and was there reliance, are questions of fact for the trier of fact. The fourth element of promissory estoppel, can injustice only be avoided by enforcement of the promise, is a question of law for the court.\(^{66}\)

The desire for certainty and predictability in the law 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.”\(^{67}\) 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 stated, “We should recognize that, at the point 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.”\(^{68}\)

In contrast, the instrumentalist style of interpretation, with its emphasis on the “situation-sense” of a case, often prefers issues 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 more in the instrumentalist direction, as reflected in Table 4.1. As with the other aspects of the form or shape of law, these observations


\(^{64}\) Perillo, *supra* note 20, at 315-18 (duress); 336-40 (misrepresentation); 361-74 (mistake).

\(^{65}\) *Id.* at 380-81 (unconscionability); 842-46 (illegality).

\(^{66}\) *Id.* at 253-57 (promissory estoppel).

\(^{67}\) Hurd & Moore, *supra* note 49, at 379 n.119.

\(^{68}\) Scalia, *supra* note 54, at 1182.
merely reflect general judicial predispositions that can be overridden for other reasons with respect to any particular doctrine. Examples of doctrines phrased as issues of fact versus rules of law in the context of constitutional adjudication are discussed at § 7.2.4.

§ 4.3 Use of Judicial Precedents

§ 4.3.1 General Observations on the Theory of Precedent

In a common-law system, a court decision interpreting a common-law, statutory, or constitutional provision fixes its meaning unless the court changes its mind. Thus, as a general matter, a later court should follow an earlier court’s precedent.69 In contrast, in a civil-law system, judicial precedents do not, as a theoretical matter, have any binding force on later courts. Each later court is free to determine for itself what the provisions of a particular code section mean in the current case.70

In practice, however, the two systems do not differ as much as may initially appear. In most common-law systems, precedents are not absolutely binding. As Professor Harry Jones noted in 1975 in his previously cited article, Our Uncommon Common Law, “There was a time in England when precedents were taken to be absolutely binding, as distinguished from generally binding, but that rigid conception never caught on in American courts and is now on the way out in England, too.”71 Thus, Professor Jones summarized the American doctrine of precedent, as follows:

(1) Precedents are generally binding for the decision of future cases.
(2) But a decision is a full-fledged precedent only for future “like” cases, that is, for future cases involving the same material facts.
(3) It is the court’s decision, not the court’s opinion, that is precedent for the future; anything said in the opinion that is not necessary to the decision of the case then before the court is a “dictum,” which may be “persuasive authority” in a future case, but is in no way binding. (Analytically, I suppose, this is a corollary of Proposition 2, but judicial usage is such that it is better to state it separately).
(4) Even a full-fledged precedent is only “generally” binding, not absolutely binding, for future cases.72

On the other hand, in a civil-law system, despite the theoretical view regarding precedents, in practice prior court opinions are given some weight. As Professor Steve Nickles noted:

In actual practice, an inferior court which continues to follow its own opinions against the decisions of a higher court is subject to reversal, and the fear of being reversed is a universally

69 See Jones, supra note 1, at 454-59; Rupert Cross, Precedent in English Law (3d ed. 1977).
70 See Nickles, supra note 4, at 28.
71 Jones, supra note 1, at 457.
shared one. Precedents also serve as a source of law under the civilian practice which accords the status of “custom” to a series of like decisions on the same point of law. . . . Yet th[is] authority . . . is not based on recognition of the binding force of precedent, but rather on the persuasiveness of the reasoning which is evidenced by its being adopted by a number of courts.73

In his book entitled Courts, Professor Martin Shapiro similarly noted:

The extent to which Continental jurists rely upon case law is evidenced by the publication of the opinions of the leading appellate tribunals. Almost invariably these are annotated reports. With that deference to academic authority which, as we have seen, so often characterizes civil law, these annotations, prepared by well-known legal scholars, are often as influential as the opinions themselves in building up legal doctrine. Few European law students would be so foolish as to believe that they could understand the law exclusively by direct reference to the code without reading passages of authoritative text, the leading decisions, and the annotations of decisions that surround nearly every clause of the code.74

Even in the American common-law system, some positivist judges have taken the position that as a theoretical matter precedents should have no force of law. The justification for this position, as is true in civil-law systems, is that the positive law exists independent of the judge, and thus any prior judicial opinion, if viewed as erroneous, should be entitled to no weight. Thus, formalist Justice Scalia has made it clear that any respect he gives to precedent “is not part of my originalist philosophy; it is a pragmatic exception to it.”75 As noted at § 4.1 n.6, Holmesian Justice Felix Frankfurter’s view was that the “ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it.” Reflecting a Holmesian functional perspective, Justice Brandeis observed, “[I]n cases involving the Federal Constitution, where corrections through legislative action is practically impossible, this Court has often overruled its earlier decisions. The Court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function.”76

Despite these observations, the positivist desire for certainty and predictability has led formalist and Holmesian judges to adopt a practical approach toward precedent. As Justice Scalia has stated, “[To] forswear stare decisis is essentially a demand that [such judges] alone render their methodology so disruptive of the established state of things that it will be useful only as an academic exercise and not as a workable prescription for judicial government.”77

73 Nickles, supra note 4, at 28 n.72.
75 Scalia, supra note 7, at 139.
77 Scalia, supra note 7, at 139-40.
As a theoretical matter, the normative judicial decisionmaking styles give greater respect to judicial precedents because of the judge’s normative role in developing legal doctrine. Particularly for natural law judges, as noted at § 3.4 nn.93-98, the natural law concern for “articulate consistency” as applied to society’s moral principles helps explain the special respect that natural law judges have for precedents. As discussed at § 3.3 nn.54, under the instrumentalist “Grand Style” of judicial decisionmaking “precedent” is carefully regarded, but if it does not make sense it is ordinarily re-explored.” This willingness to “re-explore” precedent based upon whether the judge concludes the precedent “makes sense” has meant that in practice instrumentalist judges tend to be the least faithful to following existing precedents, as discussed in the next section. For all judges, because precedent is not absolutely binding, there is no sound argument that following precedents denies litigants “due process” by enforcing “issue preclusion” upon them in cases where they were not parties, although that concern may affect how much weight a judge might give a precedent in practice.78

§ 4.3.2 Four Different Reasons to Follow Precedents: Precedent is Right, Is Settled Law, Substantial Reliance Exists, or No Special Reason Calls for Overruling

Just as there are four different basic styles of judicial decisionmaking, there are four approaches to the extent to which judicial precedents can fix the meaning of some common-law, statutory, or constitutional provision. Under one approach, a court will change its mind – that is, overrule a prior decision – if the court concludes that the earlier court's analysis "got it wrong." In such a case, the later court will feel free to overrule the prior decision as erroneous and to reinterpret the provision in question so that it represents an accurate reflection of what the relevant doctrine requires. Of course, because formalist, Holmesian, natural law, and instrumentalist judges approach questions of judicial decisionmaking differently, they often reach different conclusions about the extent to which some earlier precedent was rightly or wrongly decided. Thus, they may disagree about whether there is reason on the merits for any particular precedent to be followed or overruled.

This consideration of whether the prior precedent was rightly or wrongly decided, without further tests or conditions, carries greatest weight for instrumentalist judges. Because of their concern with advancing the correct social policies where leeways exist in the law, and because instrumentalist judges can often be persuaded that such leeways exist, instrumentalist judges have felt freer than judges in any of the other interpretive traditions to overrule prior decisions when they believe those decisions were wrongly decided. This is true even if the prior precedents appear to represent settled law, there has been substantial reliance on the precedents, and no special reason is present that calls for the precedents to be overruled. The amount of legal change in doctrine is thus likely to be greatest during an instrumentalist era of law, as is discussed with respect to constitutional law at § 7.3.2 nn.128-33, and with respect to common-law adjudication at § 13.1 nn.23-25.

A second variation affecting the treatment of precedent is how much weight a judge will give to whether the precedent has become an integral part of subsequent case law, that is, whether the case has become "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

78 On this concern, see generally Amy Coney Barrett, Stare Decisis and Due Process, 74 U. Colo. L. Rev. 1011 (2003).
were constitutionally required as an original matter).“79 Justice O’Connor has stated that precedents represent “settled law” when they have become “integrated into the fabric of the law.”80

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, and are also concerned with certainty and predictability, as discussed at § 3.2 nn.26-31, also evidence a willingness to follow precedents with which they disagree if the precedent represents settled law. Thus, formalist judges, such as Justices Scalia and Thomas; Holmesian Justices, such as Chief Justice Rehnquist or Justice White; and natural law judges, such as Justices O’Connor, Kennedy, or Souter, have been willing to follow a precedent if they view that precedent as settled law.

In deciding whether a precedent represents or has produced “settled law,” many factors may be relevant. The age of the precedent is certainly one factor, but it is not the sole determining factor. Erroneous decisions in constitutional cases are uniquely durable because it is so difficult to amend the Constitution. Therefore, the Court has been willing to reconsider constitutional interpretations, even if those interpretations are long-lasting. As Chief Justice Rehnquist noted in Planned Parenthood v. Casey,81 the major decisions of Plessy v. Ferguson and Lochner v. New York were overruled in Brown v. Board of Education and West Coast Hotel v. Parrish many decades after they had been decided.

Judges may also ask whether the precedent case was itself a departure from prior precedents and gave little weight to established traditions. As Justice O’Connor noted in Adarand Constructors, Inc. v. Pena, which overruled Metro Broadcasting, Inc. v. FCC,82 "Metro Broadcasting itself departed from our prior cases – and did so quite recently. By refusing to follow Metro Broadcasting, then, we do not depart from the fabric of the law; we restore it."

A third factor concerning whether a precedent can succeed in producing a settled body of law is whether or not it is susceptible of principled application. Expressing his unwillingness to follow a case that did not meet that test, Justice Scalia, joined by Justice Thomas, stated in BMW of North America, Inc. v. Gore,83 “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.”

79 Scalia, supra note 7, at 138.
As an example of “settled law,” Justices Scalia and Thomas indicated in *TXO Production Corp. v. Alliance Resources Corp.* that although they do not themselves believe that the framers and ratifiers of the 14th Amendment intended the Due Process Clause to incorporate selectively the Bill of Rights, since the text of the Due Process Clause is focused on procedure, and not substantive rights, they are “willing to accept” the instrumentalist-era view that has incorporated almost all of the Bill of Rights into the 14th Amendment Due Process Clause, discussed at § 27.2.4. More generally, as Justice Scalia phrased the point in *Planned Parenthood v. Casey*, “Justices should do what is legally right by asking two questions: (1) was *Roe* correctly decided? (2) Has *Roe* succeeded in producing a settled body of law. If the answer to both questions is no, *Roe* should undoubtedly be overruled.”

A third variation in the treatment of precedent arises from the extent to which individuals have “substantially relied” upon a precedent as a means to advance important ends in their lives. Because of their focus on 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. As stated by Chief Justice Rehnquist in *Payne v. Tennessee*, "Considerations in favor of stare decisis are at their acme in cases involving property and contract rights, where reliance interests are involved; the opposite is true in cases such as the present involving procedural and evidentiary rules." Under this approach, the concern with overruling a precedent is whether such overruling would upset settled expectations upon which people had relied in making serious financial, business, employment, or other kinds of important commitments.

Since this third variable 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 reasonable reliance. For the functional Holmesian approach, the functional concern with substantial reliance tends to be equally, if not more, important. For example, although both Justice Scalia and Chief Justice Rehnquist joined the other’s dissent in *Planned Parenthood v. Casey*, discussed at § 27.3.4.1 nn.240-41, Justice Scalia focused only on the aspect of “settled law” in deciding that *Roe v. Wade* should be overruled, while Chief Justice Rehnquist focused both on the aspect of “settled law” and on the aspect of “substantial reliance,” as discussed at § 7.3.2 nn.116-27. Further examples of Justices relying on “settled law” or “substantial reliance” in constitutional cases are discussed at § 7.3.2.

A fourth variation in how judges treat precedent concerns their views on the traditional common-law commitment to reasoned elaboration of the law and respect for the work-product of previous judges. Under this approach to precedents, a sequence of court decisions — that is, a reasoned elaboration...

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of precedents – can provide a gloss on meaning that changes what the common-law, statutory, or constitutional provision means. Thus, the question is not just what other sources of interpretation suggest about a provision's meaning. Instead, just as the common law changes over time in response to court decisions, the proper meaning of a constitutional or statutory provision can change over time in response to court decisions elaborating its meaning in a particular way. The judges who most often have this extra commitment to precedent are judges in the natural law tradition.

Judges who believe very strongly in this traditional common-law commitment to precedents 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 reasons are needed before the court should depart from a prior judicial opinion. Based upon recent cases, the additional special reasons that may call for a precedent to 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 (5) the precedent raises concerns about a commitment to the "rule of law." The natural law Justices on the Supreme Court – Justices O’Connor, Kennedy, and Souter – discussed these reasons in the context of constitutional interpretation in Planned Parenthood v. Casey, where they noted that “a decision to overrule should rest on some special reason over and above a belief that a prior case was wrongly decided.” Further examples in the context of constitutional adjudication of each of these five reasons that suggest a precedent should be overruled are discussed at §§ 7.3.3-7.3.4.

These same reasons have also been used in the context of statutory interpretation. For example, in Neal v. United States, in an opinion by Justice Kennedy, the Court stated, "We have overruled our [statutory construction] precedents when the intervening development of the law has 'removed or weakened the conceptual underpinnings from the prior decisions, or where the later law has rendered the decision irreconcilable with competing legal doctrines or policies.'" Earlier, in Patterson v. McLean Credit Union, another opinion by Justice Kennedy, the Court stated precedents may be overruled where "changes have removed or weakened the conceptual underpinnings from the prior decision, or where the later law has rendered the decision irreconcilable with competing legal doctrines or policies, [or] the precedent may be a positive detriment to coherence and consistency in the law, either because of inherent confusion created by an unworkable decision, or because the decision poses a direct obstacle to the realization of important objectives embodied in other laws, [or] the precedent becomes outdated and after 'being tested by experience, has been found to be inconsistent with the sense of justice or with the social welfare.'" Indeed, the Court has noted the even greater force of precedent in statutory construction because of the easier resort to amendment in such cases to correct faulty interpretations. As stated in Patterson, "Considerations of stare decisis have special force in the area of statutory interpretation, for here, [unlike constitutional law,] the legislative power is implicated, and Congress remains free to alter what we have done."

88  516 U.S. 284, 295 (1996) (Kennedy, J., for the Court) (citations omitted).
89  491 U.S. 164, 172-74 (1989) (Kennedy, J., for the Court) (citations omitted).
§ 4.3.3  Precedential Concerns and the Rule of Law

The fifth additional reason noted at § 4.3.2 n.87 on when to overrule a precedent involved whether the precedent raised concerns about the "rule of law." Unlike the other four reasons, which focus more on the substance of the precedent, this reason focuses more on procedural aspects surrounding the precedent. The concern with the "rule of law" raises at least four kinds of procedural concerns.

First, there is the issue of whether a newly announced rule of law should be applied to all pending cases or only prospectively, that is, only as to conduct in the future. Beginning in the original natural law period, and carrying through the formalist and Holmesian eras, the theory of judicial review was, as stated in Marbury v. Madison, that it is the duty of the judicial department to "say what that law is." That principle had been taken to imply that any rule of law stated in a case, even a newly discovered rule, should be applied not only in the future, but also to conduct that preceded the decision – at least to all cases not fully resolved. This rule was based on the belief "that the duty of the court was not to 'pronounce a new law, but to maintain and expound the old one.'" Before the instrumentalist era, the common law and the Court had recognized "a general rule of retrospective effect for the constitutional decisions of [the] Court . . . subject to [certain] limited exceptions." In contrast to this, some decisions in the instrumentalist era, between 1954-86, departed from that principle of retroactivity on social policy grounds. Discussion of these cases and the modern post-1986 approach to this issue of retroactivity is discussed at § 7.3.4.

A second issue concerning the rule of law is whether a court decision is based, or perceived to have been based, not upon proper legal argumentation, but as a response to political pressure. This reason was explicitly used by the joint opinion in Casey as one reason for not overruling Roe v. Wade. The joint opinion stated, "The Court must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in principle, not as compromises with social and political pressures having, as such, no bearing on the principled choices that the Court is obliged to make." As discussed at § 7.3.4, in their opinions in Casey, Chief Justice Rehnquist and Justice Scalia agreed that the Court should never make its decisions with a view toward such public pressures, but wondered whether the joint opinion met that test.

A third concern about the rule of law is whether the original precedent was decided only after full briefing and argument on the issue, or without the benefit of briefing and argumentation. A fourth concern is whether the reasoning in a precedent commanded the support of five or more members of the Supreme Court or whether it was only a plurality opinion, or whether even if a majority opinion it was accompanied by one or more concurrences that weakened the force of that majority opinion. These concerns are also discussed in the context of constitutional law at § 7.3.4.

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90  5 U.S. (1 Cranch) 137, 177 (1803).
91  Linkletter v. Walker, 381 U.S. 618, 622-23 (1965) (citing 1 W. Blackstone, Commentaries 69 (15th ed. 1809)).
§ 4.3.4 Narrow/Strict versus Broad/Loose Treatment of Precedent

Independent of the decision whether to follow or overrule a precedent, a court must first decide what the precedent means. In their treatment of precedent, 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.” On the other hand, when language in the prior case is welcomed by the present court, the court may refer not only to the core holding of the preceding case, but also to its “general reasoning.” The court may then use that general reasoning to help justify the result in the present case. Examples of such narrow versus broad use of precedent in the context of constitutional adjudication appear at § 7.3.1.1.

Professor Karl Llewellyn summarized these two uses of precedent in his classic work, The Bramble Bush.94 As discussed in The Bramble Bush, Professor Llewellyn explained that there are two recognized, legitimate, and honorable techniques for dealing with precedents. The strict view, used to whittle down unwelcome precedents, is to confine the earlier case to its rule or, in extreme form, to its particular facts. This permits skillful judges to free themselves from the precedent. The loose view, used to capitalize on welcome precedents, allows a conclusion that the prior court has decided authoritatively any point or all points on which it chose to rest the case, including *dicta* or *obiter dicta*. Deciding which view will be taken of a precedent, said Llewellyn, requires a lawyer to “use all that you know of individual judges, or of the trends in specific courts, or, indeed, of the trend in the line of business, or in the situation, or in the times are large – in anything which you may expect to become apparent and important to the court in later cases.” Therefore, everything said in an opinion must be read with primary reference to the particular question before the judge.

This being the nature of reasoning on precedents, Dean Edward Levi, of the University of Chicago School of Law, concluded in his famous book, An Introduction to Legal Reasoning,95 that the rules of law are created and change in a process of their application because the courts treat some different cases as though they were the same and cases with some facts in common as though they were different. In this sense, the categories used in the legal process remain ambiguous and form a moving classification system that makes new meanings possible. These new meanings typically arise in the following manner: (1) A statement of some relatively coherent theory; (2) The theory is seen to have undesirable consequences either because of unforeseen results or the situation has changed over time. Exceptions are adopted which create a conceptual muddle; (3) A new theory is developed, although lip service is paid to the old theory for a while.

Of course, despite the possibility of changing the law in more dramatic fashion by limiting, extending, or overruling a precedent, the most common result when a court considers a factually analogous precedent is that the court follows the precedent without clearly extending it. Naturally, every new fact situation to which a rule is applied is in some sense an extension of the rule. However, in common usage, if the facts in the new case are closely analogous to the facts of a prior case, normal legal terminology states that the precedent has been followed, not extended.


If the facts of a current case are perceived to be only somewhat similar to those of a precedent, however, instead of being closely analogous, then "following" the precedent may really be "extending" it, at least slightly. This way of treating a precedent involves building on a precedent with which the judge agrees. A second way to "follow or extend" a precedent involves targeting an aspect of the prior precedent with which the judge agrees, and then, as explained by Professor Llewellyn, emphasizing that part of the precedent. This can occur when the court focuses on some aspect of the reasoning in the prior opinion, and resolves the case according to that aspect without considering other things that the prior court said in its opinion. A third way to "follow or extend" a precedent is to elevate some general statement, that may have been dictum, into the status of a holding, or find implicit in the precedent a principle broader than anything stated in the case, and use it as a premise in the case at hand. When a court does this, the court is really manipulating the prior precedent to claim that today's court is merely following or extending prior law. Examples of each of these uses of precedent in the context of constitutional law are discussed at §§ 7.3.1.2-7.3.1.4.

The various judicial decisionmaking styles differ, of course, in their predispositions regarding narrow/strict versus broad/loose use of precedents. Because of their focus on mechanical rule-making based upon following the literal holdings in prior specific cases, formalist judges tend to approach interpreting precedents in light of their particular specific facts. Thus, they tend to adopt a narrow view of precedents. Because of their functional approach to law, viewing language in cases only as a means to justify the end result in the case, Holmesian and instrumentalist judges also tend towards a narrow or strict use of precedent. This is particularly true for instrumentalist judges who have less of a focus on certainty and predictability in the law, and more of a focus on the “situation-sense” of each case. As Karl Llewellyn stated in The Bramble Bush, “Everything, everything, everything, big or small, a judge may say in an opinion is to be read with primary reference to the particular dispute, the particular question before him. You are not to think that the words mean what they might if they stood alone. You are to have your eye on the case at hand, and to learn how to interpret all that has been said merely as a reason for deciding that case that way. At need.”

For this reason, just as instrumentalist judges are the most willing to overrule a precedent with which they disagree, as discussed at § 4.3.2 text following n.78, instrumentalist judges are the most willing to limit the applicability of a precedent by giving it a narrow reading. On the other hand, just as the Holmesian functional concern with parties’ reasonable substantial reliance has meant that Holmesian judges are slightly more willing to follow precedents than formalists, as discussed at § 4.3.2 n.86, Holmesian judges are slightly more willing than formalists to give a precedent a broader reading if that is consistent with the parties’ reasonable substantial reliance.

Of all the four judicial decisionmaking styles, natural law judges are more likely to see in precedents an embodiment of explicit or implicit principles which courts can use as a foundation for doctrinal development. Thus, despite the general preference for deciding cases on narrower grounds where possible, based upon, as cited at § 4.1 n.5, “the sure-footed Anglo-Saxon habit of dealing with things as they arise instead of anticipating them by abstract universal formulas,” natural law judges are the

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96 Llewellyn, supra note 94, at 43.
most willing to extend precedents in light of a general principle found therein, a broad/loose use of precedents, or as it is sometimes called, a “reasoned elaboration of the law,” discussed at § 12.2.2.2.

Despite this willingness to use general reasoning in prior cases more broadly than the other decisionmaking styles, *dicta* in prior opinions is still viewed as *dicta* by natural law judges. As Chief Justice Marshall noted in *Cohens v. Virginia*,97 “It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision.”

Table 4.3 encapsulates the approach to precedent of the various decisionmaking styles:

<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>

* Focus Predominantly on Core Holdings of Precedent  
** More Willing to Focus on Reasoned Elaboration of the Law

In England, judicial practice is that when courts sit in panels each judge delivers his or her own opinion, and thus the opinion of each judge who votes with the majority is as authoritative as each of the other opinions. American practice is that there is usually one majority opinion for the court. This was formalized at the United States Supreme Court by Chief Justice John Marshall, who authored 147 of the 171 majority opinions during his first decade on the Court, although the trend toward one majority opinion was begun by Marshall’s predecessor, Chief Justice Oliver Ellsworth.98

The American practice of having one majority opinion makes it more likely that American cases will stand for broader, general propositions stated in that majority opinion, including *dicta* in that opinion, since the opinion is an “institutionalized” opinion of the court, not merely the personal opinion of an individual judge. English cases, without any single majority opinion for the court, tend to stand more for the narrow particular result decided in the particular case.99

97 19 U.S. (6 Wheat.) 264, 399-400 (1821).


This fact helps explain how English courts could more easily indulge in the fiction, noted at § 4.3.1 n.71, that precedents are never overruled. It is much easier to distinguish a precedent that stands only for a particular result on particular facts than to distinguish a precedent based on the reasoning of a majority opinion for the court. English courts can therefore more easily distinguish troublesome precedents rather than have a need to overrule. In the American system, with a majority opinion for the court, there is a greater need for a blunt and obvious overruling rather than a sub silentio burial or an ambiguous limiting of a case to its precise facts.

An issue lower courts must face is what to do if a precedent of a higher court commands one result, but later cases from that court appear to undermine the reasoning of that precedent. The traditional view, reaffirmed by the Supreme Court in 1989 in *Rodriguez de Quijas v. Shearson/American Express Inc.*, is that “[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.”

On practical grounds of processing cases expeditiously, for many decisions today American courts issue “unpublished opinions” that resolve the case without a full, reasoned defense. The percentage for the federal Courts of Appeals was 11% unpublished in 1981, 68% by 1990, and 81% by 2005. These cases are usually held to have no “precedential” weight, since from a natural law perspective they do not represent a “reasoned elaboration of the law,” and from a Holmesian or instrumentalist pragmatic perspective they do not deserve precedent respect. Despite not having “precedential” weight, Federal Rule of Civil Procedure 32.1, effective for 2007, requires all federal appellate courts to permit such “unpublished opinions” to be cited as “persuasive authority.” In a case later vacated as moot on rehearing en banc, an Eighth Circuit Court of Appeals panel held in *Anastasoff v. United States* that such cases, which typically can be found online, must be given “precedential” weight since they are literally court decisions. This formalist focus on literalism has not been followed by other courts, although, as of 2006, the local rule in the District of Columbia Court of Appeals, and in a very few states, such as Utah, permit such opinions to be cited as “precedent.”

§ 4.4 Judicial Predisposition in the Reasoning Process

§ 4.4.1 General Interpretive Bias

As noted throughout Part I of this book, there have been four main judicial decisionmaking styles in American history: natural law, formalism, Holmesian, and instrumentalism. Although most judges do not self-consciously adopt one of these four styles, the approach of most judges to judicial

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100 490 U.S. 477, 484 (1989).
101 223 F.3d 898 (8th Cir.), vacated as moot on reh’g en banc, 235 F.3d 1054 (8th Cir. 2004).
decisionmaking is reflected more in one style than the others. While in theory a judge could adopt one style of interpretation for common-law decisionmaking, and a different style for statutory interpretation, and yet a different style for constitutional law, almost all judges adopt the same interpretive approach toward each. This fact is discussed at § 12.4.4, after each of the styles of interpretation have been discussed in depth in the remaining parts of Chapters 9-12.

Given the judge's interpretive style, whether a common-law provision, statute, or the Constitution, general interpretive bias refers to the fact that any judge is likely to view the relevant provisions of the law though the interpretive style generally favored by the judge. Thus, despite the fact that each judge is operating from a similar database concerning purposes or history, a formalist judge may view purposes or history somewhat differently than a natural law judge, a Holmesian judge, or an instrumentalist. Although no responsible judge consciously allows considerations of interpretive bias to influence the result or reasoning of any particular case, judges are human beings, and no human being is perfect. Individual bias in decisionmaking occurs. Thus, formalist judges may tend to see the framers and ratifiers as formalists, Holmesian judges see them as Holmesian, and so forth.

The differing views on the Court concerning the framers and ratifiers' intent regarding the Establishment Clause as expressed in *Lee v. Weisman* are a good example of this phenomenon. In that case, an instrumentalist opinion by Justice Blackmun concluded that the history of the framing and ratifying period was consistent with modern liberal notions of the need for a strict wall of separation between church and state. A natural law opinion by Justice Souter, grounded in the traditional 18th- and 19th-century judicial decisionmaking style, attributed to the framers and ratifiers James Madison’s and Thomas Jefferson's views, grounded in 18th- and 19th-century natural law Enlightenment philosophy, that "any official endorsement of religion can impair religious liberty." Another version of that insight, reflecting slightly greater deference to government, appeared in Justice Kennedy’s opinion, where he stated, "[T]he lesson of history that was and is the inspiration for the Establishment Clause [is] the lesson that in the hands of government what might begin as a tolerant expression of religious views may end in a policy to indoctrinate and coerce." Formalist and Holmesian judges concluded in a dissent by Justice Scalia that the framers and ratifiers shared their premises that the Establishment Clause prohibits governmental action only where (1) there exists clear, bright-line prohibitions grounded in clear text or specific historical traditions (the formalist premise), or (2) deference to the government is inappropriate because the unconstitutionality appears in clear text or clear inferences from historical evidence (the Holmesian premise).

Sometimes judges hold the positions they do even in the face of clear historical evidence to the contrary. For example, as noted at § 6.2.2.4, Justice Scalia's view that history supports his formalist, strict separation of powers approach to separation of powers issues is not well-grounded when compared to the Holmesian, natural law, and instrumentalist approaches that view history and the framers and ratifiers’ purposes as supporting a sharing of powers, checks and balances approach.

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103 505 U.S. 577, 599-601, 605-609 (1992) (Blackmun, J., joined by Stevens & O'Connor, JJ., concurring); *id.* at 609-18 (Souter, J., joined by Stevens & O'Connor, JJ., concurring); *id.* at 591-92 (Kennedy, J., opinion for the Court); *id.* at 631-36 (Scalia, J., joined by Rehnquist, C.J., and White & Thomas, JJ., dissenting).
A judge who generally favors one interpretive style may also be more likely to presume that clauses of the Constitution reflect that style. For example, a natural law judge may presume that more clauses of the Constitution were drafted in light of natural law principles than will formalist, Holmesian, or instrumentalist judges. Thus, although some provisions in the Constitution may not reflect a sound natural law position, as regarding slavery before the 13th Amendment, a natural law judge can be predicted to view more clauses of the Constitution as embodying natural law principles than judges who adopt the other interpretive styles. For example, natural law judges tend to hold the Eighth Amendment’s ban on “cruel and unusual punishments” embodies the natural law principle of proportionality of punishment, while formalist judges tend to reject that view.  

§ 4.4.2 Conservative versus Centrist versus Liberal Bias

Although the impact on interpretation is varied and complex, a number of commentators have suggested that the political views that judges bring to the courts typically have some impact (and perhaps great impact) on how the Constitution is interpreted. Such views may impact a judge's interpretation whether or not the judge intends there to be such an effect, or is aware that such political views may affect the judge's views. Particularly for a judge adopting an instrumentalist perspective, the greater ability to resort to what the judge believes are the background policies of contemporary society may lead conservative versus liberal judges in different directions.

As discussed at § 11.3.4.2, commentators who share many of the premises of the Critical Legal Studies Movement tend to place great weight on this proposed connection between law and politics. With regard to political considerations, a judge, like any citizen, may be leftist, liberal, centrist, conservative or on the extreme right. Because all federal court judges must be confirmed by the Senate, most federal judges tend not to be on the extremes of the political spectrum. It has been noted that “the ideological distance” between a Senator’s constituents and the nominee plays an important role in the confirmation process. This suggests that if the distance is great, as for nominees on the extremes of the political spectrum, confirmation is less likely. Federal court judges thus tend to be liberal, centrist, or conservative, and not either leftist or on the extreme right. This is particularly true given the historical fact that, until recently, virtually every federal court judge has been confirmed in the Senate by filibuster-proof majorities of at least 60% approval. How much this might change given the view that has emerged since 2000 that federal judges should be confirmed on bare 50 plus one majority vote, as discussed at § 7.4.2 nn.236-39, remains to be seen.

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104 See Hudson v. McMillan, 503 U.S. 1, 8-12 (1992) (Justices O'Connor, Kennedy, and Souter applying the principle of proportionality); id. at 17-29 (Thomas, J., joined by Scalia, J., dissenting) (rejecting that view). See generally Solem v. Helm, 463 U.S. 277, 284-85 (1983) (Powell, J., for the Court) ("The principle that a punishment should be proportionate to the crime is deeply rooted and frequently repeated in common-law jurisprudence.").


As an historical matter, the formalist approach is most often associated with a conservative political bias. This is based in part on the fact that the formalist era of American law, from 1873-1937, was an era of conservative formalism. This is discussed at § 14.2.2, as part of a discussion of the social and political forces behind the formalist era. In addition, modern formalist judges and Justices, such as Chief Justice Warren Burger and Justices Scalia and Thomas, have tended to be conservatives. However, for each of the decisionmaking styles, there is a conservative and a liberal version. For example, as discussed at § 9.3.3, Justice Hugo Black, appointed by President Franklin Delano Roosevelt, was an example of a liberal formalist judge. As discussed at § 7.1, some 18th-century progressives, like Thomas Jefferson in the United States, Jeremy Bentham in England, and the Jacobins during the French Revolution, also supported a more formalist model of decisionmaking.

As an historical matter, the instrumentalist style of interpretation is most often associated with liberal judges. This is based on the relative liberalism of major proponents of the instrumentalist style, like Cardozo and Llewellyn, and on the fact that the modern adherents to instrumentalism on the Supreme Court, from Chief Justice Warren, to Justices Douglas, Brennan, Fortas, Marshall, Blackmun, and Stevens, have had a liberal bent to their instrumentalism. However, as discussed at § 11.3.3, a judge like Richard Posner, of the Seventh Circuit Court of Appeals, styles his law and economics approach, which is decidedly conservative, as a variation of pragmatic instrumentalism.

Specific differences among conservative and liberal variations of the Holmesian style, such as the differences between conservative Chief Justice Rehnquist versus more liberal Justice White, are discussed at § 10.3.3. Specific differences among conservative and liberal variations of the natural law style of interpretation are discussed at § 12.3.3. This section notes that conservative natural law judges tend to ground their approach in a classic or Christian natural law tradition, while centrist and liberal natural law judges tend to ground their approach more in the 18th-century Enlightenment natural law tradition. This difference affects what background moral principles the judge thinks were embedded in the Constitution or are part of a reasoned elaboration of constitutional doctrine.

With regard to structural issues of constitutional interpretation, on issues of federalism, conservative judges tend to prefer states’ rights, while liberal judges tend to favor exercises of federal power, as discussed at § 6.2.2.3. On separation of powers issues, conservative judges tend to favor the executive, while liberal judges tend to favor the legislative branch, as discussed at § 6.2.2.4. On individual rights, conservative judges tend to focus on the protection of economic rights, while liberal judges tend to focus on the protection of non-economic, civil rights, as noted at § 21.2.1.2.

§ 4.4.3 Doctrinal Bias

Doctrinal bias refers to the fact that some judges, because of past experiences or idiosyncratic preferences, may have a view about a particular doctrine that is inconsistent with the judge's general interpretive style or general political predisposition. Nevertheless, the judge's views may be consistent within that particular doctrine, and thus more important in how that judge decides a particular case than are the judge's general views.

For example, among Holmesian judges, Justice White's beliefs regarding his strong commitment to civil rights, may have affected his decision to join Justice Brennan's more instrumentalist, pro-civil rights majority opinion in United Steelworkers v. Weber, discussed at § 3.3 nn.65-68, rather than
follow­ing his more typical Holmesian approach and joining Justice Rehnquist’s more judicial­ly restrained dissent, as discussed at § 10.4.107 Despite being a conserv­ative Holmesian judge, Justice Stewart often joined liberal instrument­alists in First Amendment free speech cases involving the free speech rights of the press, as noted at § 29.6.2.4 nn.340-44.

Among natural law judges, Justice O’Connor has decided a number of cases reflecting a stronger commitment to states rights than might be expected from a moderate conserv­ative natural law judge, even a judge with conserv­ative Holmesian deference-to-state-government leanings. On the other hand, in some cases involving women or children, Justice O’Connor has joined liberal instrument­alist judges. These cases are summarized at § 12.4.2. Justice Kennedy’s strong commitment to freedom of speech and the free interchange of ideas, perhaps based in part on his role as an Adjunct Professor at the University of the Pacific, McGeorge School of Law, may have influenced his free speech decisions. Justice Kennedy has adopted more of an absol­ulist, categor­i­cal, formal­ist approach in such cases, as noted at § 12.4.1, rather than a natural law interpretation style.

§ 4.4.4 Party Bias

Party bias refers to the fact that in some cases a judge may prefer a particular party, or that party’s lawyer, as opposed to the other party, or that party’s lawyer. Although such personal bias is inap­propriate for the judge to consider, and rules regarding judicial recusal are meant to prevent such bias from affecting case resolution, as discussed at § 7.4.4, nonetheless such party bias may occasionally affect the result in a particular case. Some commentators, for example, have suggested that the Court’s decision in Bush v. Gore was the product of such party bias. As stated in one such account, “Immediately after, it was widely said that no one could imagine the Court’s majority voting the same way if the identities of the parties had been reversed.”108 This may be particularly true regarding the procedural issues involved in Bush v. Gore of whether the case was ripe for resolution, or whether in any event the issues involved in the case represented political questions not appropriate for federal court intervention. Bush v. Gore is discussed at § 26.5.3 nn.525-44.

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107 See generally Kate Stith, Byron R. White, Last of the New Deal Liberals, 103 Yale L.J. 19, 26-28 & n.69 (1993).

PART II: THE FORM OR SHAPE OF CONSTITUTIONAL LAW

As discussed at § 1.2.1, Aristotle illustrated the use of four causes to explain any thing or situation with the famous silver bowl example. The material cause of a silver bowl was, of course, silver. Its efficient cause was the hammering of the silversmith and its final cause the purpose for which the bowl was intended. The fourth cause was the form or shape which identified the thing as a bowl rather than a plate or a vase.1 With respect to constitutional law, the form or shape of constitutional law is dependent primarily on interpretations of the Constitution produced by authorized government officials, particularly the Supreme Court of the United States. For this reason, although the impact of other governmental actors and citizens generally play some role in the form or shape of constitutional law, as discussed at §§ 17.1.2 & 17.1.4, Part II of this book focuses predominantly on an overview of the elements that combine to define an act of constitutional interpretation by courts.

Part II is comprised of four Chapters. Chapter 5 identifies the materials used to construct the form or shape of constitutional interpretation: text, context, history, practice, precedent, and prudential considerations. Chapter 6 builds on this discussion to address the differing views on the relevance and weight to be given to these various sources of constitutional interpretation, that is, the possible forms or shapes of constitutional interpretation. Chapter 7 deals with efficient causes of interpretation, that is, the kinds of reasoning brought to bear on the relevant materials and the manner in which constitutional doctrine emerges from the process of case-by-case adjudication. Chapter 8 considers the final cause or ends sought in constitutional interpretation.

CHAPTER 5: MATERIAL SOURCES OF CONSTITUTIONAL INTERPRETATION

§ 5.1 Introduction to the Material Sources of Constitutional Interpretation

As noted at § 1.2.1, under Aristotle’s categorization of sources, material sources are the building blocks of any situation or thing. Thus, for Aristotle, silver is the material source out of which a silver bowl is made. With respect to interpretation, the building blocks are the sources of meaning that the interpreter must consider during the act of interpretation. Focusing on constitutional interpretation, any interpreter must decide, among other things, how much weight to give arguments about the plain meaning of the Constitution's text; the text's purpose or spirit; the context of that text, including verbal or policy maxims of construction, related provisions in the Constitution or other related documents, like the earlier enacted Articles of Confederation, and the structure of government contemplated by the Constitution, including issues of federalism and separation of powers; historical evidence concerning the intent of the framers and ratifiers of the Constitution; legislative, executive, and social practice under the Constitution; judicial precedent interpreting the Constitution; 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 constitutional doctrine, more succinctly phrased as “embedded in the law,” or perhaps a principle of justice or social policy that is “not so embedded” in the Constitution or existing constitutional doctrine.

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These sources can be organized under two broad headings: contemporaneous sources of meaning and subsequent considerations. Contemporaneous sources are those sources that existed at the time a constitutional provision was ratified. These include the text of the Constitution; the context of that text, including verbal and policy maxims of construction, related provisions in the Constitution or other related documents, and the structure of government contemplated by the Constitution; and the history surrounding the provision's drafting and ratification. The term "contemporaneous sources" conforms to usage by Justice Powell in *Garcia v. San Antonio Metropolitan Transit Authority*, where he wrote, "As contemporaneous writings and the debates at the ratifying conventions make clear, the States' ratification of the Constitution was predicated on this understanding . . . ."

Subsequent considerations involve matters that occur after the constitutional provision is ratified. These include the sub-categories of (a) subsequent events, which involve legislative, executive, and social practice under the Constitution, and judicial precedent interpreting the Constitution, and (b) prudential considerations, which involve judicial speculation concerning the consequences of any particular judicial construction, including arguments of justice or sound social policy.

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. This difference between specific interpretive tasks and general kinds of reasoning will be explored during the rest of this Chapter. Preliminarily, however, Table 5.1 may help make clearer the discussion in the rest of this Chapter.

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This summary of sources of constitutional meaning owes its genesis to University of Texas School of Law Professor Philip Bobbitt and his book, *Constitutional Fate*. In that book, Professor Bobbitt described six main kinds of constitutional arguments: textual, structural, historical, doctrinal, prudential, and ethical. The first three of these arguments – textual, structural, and historical – form the main parts of the three sub-categories of meaning grouped under the heading contemporaneous sources of meaning: text; context, including arguments of structure; and history. Professor Bobbitt's fourth category, doctrinal argument, is the sub-category of subsequent events that deals with judicial precedents, that is, the doctrines developed by the Court in construing the Constitution. The other sub-category of subsequent events – subsequent legislative, executive, or social practice – is not specifically identified as a separate source by Professor Bobbitt in *Constitutional Fate*. However, he did touch upon aspects of legislative and executive practice in a later book, *Constitutional Interpretation*. Professor Bobbitt's fifth category, prudential argument, is reflected in the category of prudential considerations. As discussed at § 5.4.2, Professor Bobbitt’s discussion of prudential considerations focused mostly on considerations of consequences in light of text, context, history, practice, and precedent, and specifically structural arguments about the proper role of the judiciary, particularly the limited role mentioned in *Ashwander v. Tennessee Valley Authority* and favored by Holmesian Justices such as Justices Holmes, Brandeis, and Frankfurter, and commentators such as Professor Alexander Bickel. As indicated in Table 5.1, these considerations are part of prudential considerations analysis. As discussed at § 5.4.1, additional prudential considerations focus on background principles of justice or social policy, whether embedded in the law or not so embedded.

Discussion of Professor Bobbitt's sixth category, ethical argument, is a bit more complicated. As Professor Bobbitt’s colleague at the University of Texas School of Law, Professor Sanford Levinson, has noted, "[T]here are, within American law, cases illustrating a distinctive seventh 'modality' of 'natural law' or 'justice.' This differs quite radically from 'ethos' [or ethical argumentation], which I teach as a modality calling upon lawyers to exercise a certain kind of cultural-anthropological skill in discerning the underlying value commitments of a given social order." Upon this understanding, Bobbitt's ethical argument is reflected in part as the sub-category of history dealing with “general historical intent,” which elaborates the general concept (or "ethos") behind a constitutional provision, rather than the specific examples held by the framers and ratifiers about a provision. Professor Bobbitt indicated, however, that ethical argumentation also involves

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3 Philip Bobbitt, *Constitutional Fate* (1982).

4 Compare *id.* at 9-38, 74-92 with §§ 5.2.1-5.2.3.

5 Compare *id.* at 39-58 with § 5.3.3.

6 Compare Philip Bobbitt, *Constitutional Interpretation* 56-57 (1991) with § 5.3.2.

7 Compare Bobbitt, *supra* note 3, at 59-73 with § 5.4.2.


9 Compare Bobbitt, *supra* note 3, at 93-119 with § 5.2.3.3.
moving beyond “contemporaneous” historical evidence to consider background principles of justice or social policy embedded in the law. Argumentation based on such background principles is thus part of Bobbitt’s ethical argumentation as well. Professor Levinson’s seventh modality of "justice," which he defined as independent of any particular society’s “ethos,” is reflected in the sub-category of prudential considerations dealing with the consequences of an interpretation from the perspective of justice or social policy that is independent of, and thus not necessarily embedded in, the law.

Professor Wilson Huhn has also developed a taxonomy of arguments used in legal reasoning, which he stated can apply to common-law, statutory interpretation, or constitutional law analysis. His list involves five kinds of arguments: text, intent, precedent, tradition, and policy analysis. Professor Huhn’s category of “text” includes both what are called here arguments of “text” and “context.” For the sake of clarity, it seems better to separate “text” and “context” into two different categories, rather than treating them as different parts of the same category. For instance, under some versions of a plain meaning rule for statutory construction, or some versions of the Parol Evidence Rule in contract law, one cannot consider aspects of “context” but only aspects of “text” alone. Separating “text” and “context” into two different categories is more consistent with this doctrinal structure.

Professor Huhn’s final four categories track the remaining four categories used in this book, with only linguistic variations: intent = history; precedent = precedent; tradition = practice; and policy analysis = prudential considerations. The terms history, practice, and prudential considerations are used in this book principally because they are used more often in constitutional dialogue. For example, as Justice Kennedy stated in *Alden v. Maine*, “We continue our discussion of history, practice, precedent, and the structure of the Constitution.” The Court has used the term “prudential” when discussing the prudential factors in *Ashwander v. Tennessee Valley Authority*, discussed at § 17.1.3.2, and in the prudential factors governing whether a party has standing to sue, discussed at § 17.3.1.4. Use of the term “history” rather than “intent” is also more precise, since the standard view is that the overall goal of any act of interpretation is to determine the drafter’s “intent.” Thus, when referring to only one aspect of that interpretive process, “history” is a better term. Finally, structural arguments, like those related to federalism and separation of powers, are best understood as aspects of the context of the drafting of the Constitution, as they are listed in Table 5.1, rather than as arguments of policy analysis or prudential considerations, as they are categorized by Huhn.

10 Compare id. at 102 (ethical argument not “contemporaneous” history only) with § 5.4.2.


12 See § 9.2.2.1 (discussing different versions of a plain language approach to statutory or constitutional interpretation); Joseph M. Perillo, Calamari and Perillo on Contracts 124-25 (5th ed. 2003) (discussing the Parol Evidence Rule in contract law).

13 Compare Huhn, supra note 11, at 443-49 with §§ 5.2.3, 5.3 & 5.4.


15 Compare Huhn, supra note 11, at 453 with § 5.2.2.2.
A similar set of six sources for constitutional interpretation—text, context/structure, history, practice, precedent, and prudential/adjudicatory norms/value considerations—appears in Professor Richard H. Fallon, Jr.’s book, Implementing the Constitution. These six sources are discussed next.

§ 5.2 Contemporaneous Sources of Meaning

§ 5.2.1 Text

In considering the text of a constitutional provision, as in considering the text of a statute, any interpreter must consider two different questions. First, there is the general philosophic question of whether to seek the actual subjective intent of the drafter of the text or whether to ask only objectively what do the text’s words mean to a reasonable objective observer. Second, there is the interpretive question of how much weight to give the literal text under consideration versus what weight to give to the purposes behind why the text was adopted.

Regarding the general philosophic question, Professor Reed Dickerson, of the Indiana University School of Law, noted that subjective intent “refers usually to the actual intent of some human being, or group of human beings, respecting what he[,] she [or they] intended to say. It reflects the user’s expectation that the reader or hearer will take the language as referring to what the user had in mind. It is, therefore, the specific message that the user intended to convey.” In contrast, objective intent refers to “the intent objectively manifested by the language used. Because language has meaning independent of the actual intent of the user, the meaning actually carried may imply an intent that differs from the user’s actual intent. It will be useful, therefore, to distinguish actual intent from manifest intent.” Manifest intent refers to the objective manifestation of the words actually used. Such manifest intent is typically determined by asking what are the words’ ordinary meaning in light of prevalent dictionary definitions, coupled with any specific technical definition of words of which a reasonably well-informed observer would be aware. The debate surrounding whether to adopt a subjective or objective intent approach to constitutional interpretation is discussed at § 6.2.1.1.

Regarding the interpretive question, Professor Dickerson noted that purpose refers “primarily to an ulterior purpose that the legislature intends the statute to accomplish or help accomplish.” The same analysis naturally applies to the purposes the framers and ratifiers intended a constitutional provision to accomplish. One of the most famous phrasing of purpose described it as the “mischief to be remedied.” As Lord Coke stated in 1584 in Heydon’s Case, a judge should inquire into the

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17 Reed Dickerson, The Interpretation and Application of Statutes 69 (1975).

18 Id.

19 Id. at 88.

20 76 Eng. Rptr. 637, 638 (1584).
"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." As Karl Llewellyn noted, "If a statute is to make sense, it must be read in the light of some assumed purpose." So, too, with respect to constitutional provisions. In the 18th and 19th centuries, parties often spoke of the document's "spirit" or "object" as synonymous with what today we define as purpose. Chief Justice Marshall remarked in 1819 in *McCulloch v. Maryland*, “[The Constitution’s] nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects by deduced from the nature of the objects themselves.” In his 1833 book *Commentaries on the Constitution of the United States*, Justice Joseph Story noted, “In construing the Constitution of the United States, we are, in the first instance, to consider what are its nature and objects, its scope and design, as apparent from the structure of the instrument, viewed as a whole, and also viewed in its component parts.” The debate surrounding how much weight, if any, to give arguments of purpose versus literal text is discussed at § 6.2.1.2.

If an interpreter chooses to interpret a provision in light of both its literal meaning and purpose, the interpreter must then decide how to determine the purpose, or purposes, of the text. Some purposes are stated in the Constitution itself. For example, the preamble to the Constitution states that the Constitution was drafted "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." Such purposes, however, are very general and do not provide unequivocal guidance on how to interpret specific constitutional provisions. They may provide, however, some background understanding of the constitutional enterprise embarked on by the framers and ratifiers.

For example, in his 1953 book *Politics and the Constitution*, Professor William Crosskey argued that because 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 to act, subject to the specific limitations indicated by clear constitutional text. In his 1833 book, Justice Story discussed more limited inferences to be drawn from the preamble, stating that the preamble's

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24 U.S. Const. pmbl.

"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." Story emphasized that the "importance of examining the preamble, for the purpose of expounding the language ... has long been felt, and universally conceded. . . . [T]he preamble . . . is a key to open the mind of the makers, as to the mischiefs, which are to be remedied, and the objects, which are to be accomplished by the provisions of the statute."26 Justice Story then discussed how each of the clauses of the preamble are related to various mischiefs which had arisen under the Articles of Confederation that needed to be remedied, such as those discussed at § 20.1.1.2.27

A second way to determine a constitutional provision's spirit/purpose is to consult historical sources surrounding the provision's passage. These sources may aid in determining the provision's purpose, or purposes. An interpreter must decide which of these sources are appropriate to use, at what level of generality to view historical insights, and what weight to give each, as discussed at § 5.2.3.

Finally, some interpreters may be so convinced of the spirit or purposes that must have motivated the text under consideration that the interpreter may simply take "judicial notice" of these purposes without engaging in any textual or historical analysis.28

§ 5.2.2  Context

§ 5.2.2.1  Basic Elements of Context

Any interpreter must decide to what extent any particular provision of the Constitution must be read against the backdrop of the context in which the Constitution’s words were used. As has been noted about the related enterprise of statutory interpretation, "[A]ny serious effort on the part of judges to discover the thought or reference behind the language of a statute must be based on a painstaking endeavor to reconstruct the setting or context in which the statutory words were employed."

26  Story, supra note 23, §§ 459, 462.

27  Story, supra note 23, §§ 463-68 (discussing inferences to be drawn from "We the people", not "We the states"); §§ 469-81 ("more perfect union"); §§ 482-88 ("establish justice"); §§ 489-93 ("ensure domestic tranquility"); §§ 494-95 ("provide for the common defense"); §§ 496-505 ("promote the general welfare"); §§ 506-516 ("secure the blessings of liberty to ourselves and our posterity"). On use of the preamble in constitutional interpretation 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).


Similar to statutory interpretation, this inquiry into context as applied to constitutional interpretation can involve resort to verbal maxims of grammatical construction, policy maxims of construction, or related provisions in the same section or other parts of the Constitution, or in documents related to the Constitution. These arguments regarding verbal maxims, policy maxims, and related provisions are traditional considerations that form part of the 18th- and 19th-century judicial decisionmaking tradition. Justice Story noted in 1833, "[W]ords, from the necessary imperfection of all human language, acquire different shades of meaning . . . . We must resort then to the context, and shape the particular meaning." These contextual approaches are still part of contemporary interpretation techniques.

A. Verbal Maxims

Verbal maxims include those canons of construction that focus on specific grammatical rules of understanding. Some of the most famous of these verbal maxims are: construe technical words technically; the expression of one thing implies exclusion of others (expressio unius est exclusio alterius); where general words follow an enumeration of specific words, the general words are to be held as applying only to the same general kind or class as the specific words (ejusdem generis); and words are to be read in context (noscitur a sociis). Justice Scalia has summarized the expressio unius est exclusio alterius maxim as follows: "Expression of the one is exclusion of the other. What this means is this: If you see a sign that says children under twelve may enter free, you should have no need to ask whether your thirteen-year-old must pay. The inclusion of the one class is an implicit exclusion of the other." Regarding the ejusdem generis maxim, Justice Scalia stated, "For instance, if someone speaks of using 'tacks, staples, screws, nails, rivets, and other things,' the general term 'other things' surely refers to other fasteners." Justice Scalia also noted, "Another

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30 See generally Llewellyn, supra note 21, at 401-04 (canons of construction numbered 4-6, 9-11, 16-17, and their limitations). For a general overview to interpreting documents in light of their context, see Dickerson, supra note 17, at 103-16 ("The Statute and its Context").

31 Story, supra note 23, § 452. See also id. § 429 (discussing the policy maxim that "[w]here a power is remedial in nature, there is much reason to contend, that it ought to be construed liberally"); § 448 (discussing verbal maxims of construction, while noting "they are susceptible of being applied, and indeed are often ingeniously applied, to the subversion of the text, and the objects of the instrument."); § 451 ("Every word employed in the constitution is to be expounded in its plain, obvious, and common sense, unless the context furnishes some ground to control, qualify, or enlarge it.").


33 See Llewellyn, supra note 21, at 404-05 (canons of construction numbered 15, 18, 20 & 22).


35 Id. at 25.
frequently used canon is *noscitur a sociis*, which means, literally, ‘it is known by its companions.’ It stands for the principle that a word is given meaning by those around it. If you tell me, ‘I took the boat out on the bay,’ I understand ‘bay’ to mean one thing; if you tell me, ‘I put the saddle on the bay,’ I understand it to mean something else.’ 36 Another prominent maxim of construction is that qualifying or limiting words are to be referred to the last antecedent, that is, the words closest to them in the sentence that they appear naturally to modify. 37 As used by most judges, these verbal maxims of construction are merely rules of thumb that can be overridden if other considerations of intent or purpose suggest otherwise. 38 As Justice Story stated as far back as 1833, while “[t]hese maxims, rightly understood and applied, undoubtedly furnish safe guides to assist us in the task of exposition . . . they are susceptible of being applied, and indeed are often ingeniously applied, to the subversion of the text, and the object[s] of the instrument.” 39

B. Policy Maxims

Policy maxims involve rules of construction based upon general assumptions about the drafters and their intent. Because policy maxims thus involve more general reasoning about interpretation, rather than specific grammatical construction, some Justices, notably formalists, are more hesitant to resort to policy maxims than verbal maxims, as discussed at § 6.2.2.1. Some of the most famous policy maxims are: construe penal provisions strictly (the “rule of lenity” providing that ambiguities in criminal statutes should be resolved in favor of the defendant) and construe remedial provisions broadly; presume reasonableness of the drafters' action; require clear expression for provisions to have retroactive application; and permit no one to profit from his own wrong. 40 Other policy maxims include that waivers of sovereign immunity are to be narrowly construed; a clear statement is needed for a federal statute to eliminate state sovereign immunity; ambiguities in treaties and statutes dealing with Native Americans are to be resolved in favor of Native Americans; and the more controversial, and less often applied today policy maxim, statutes in derogation of the common law are to be narrowly construed. 41 Justice Scalia has noted that this last maxim was “used to devastating effect in the conservative courts of the 1920's and 1930's” and “seems like a sheer judicial power-grab.” 42 A classic example of the “rule of lenity” regarding the strict construction

36 *Id.* at 24-25.

37 Llewellyn, *supra* note 21, at 405 (canon numbered 23).

38 *Id.* at 404-06 (“parry” listed to counterbalance the “thrust” of each verbal maxim).


40 Llewellyn, *supra* note 21, at 401-04 (canons of construction numbered 2-3, 7-9).

41 *See* Scalia, *supra* note 34, at 27-29.

42 *Id.* at 27, 29. For an article sharing this concern, see Jefferson B. Fordham & J. Russell Leach, *Interpretation of Statutes in Derogation of the Common Law*, 3 Vand. L. Rev. 438 (1950).
of penal statutes appeared in an opinion by Justice Holmes in 1931 in *McBoyle v. United States*. In that case, a unanimous Court interpreted that word “motor vehicle” in a statute to exclude theft of an “airplane” because “in everyday speech ‘vehicle’ calls up the picture of a thing moving on land.”

C. Related Provisions and Other Contextual Considerations

Arguments concerning related provisions and other kinds of contextual considerations, such as section titles or section headings, involve using provisions in other parts of the Constitution, or in other related documents, to help establish the meaning of a particular constitutional provision.

A number of examples of such interpretation appeared in the classic case of *McCulloch v. Maryland*, discussed at § 18.1.2. One issue in *McCulloch* was whether Congress had the power to incorporate a national bank. Since there was no express provision in the Constitution granting Congress such power, the argument on behalf of Congress was that an “implied” power existed and was derived, in part, from the Necessary and Proper Clause of Article I, § 8, cl. 18, which grants Congress power to do all things "necessary and proper" to effectuate the other named powers in the Constitution.

In concluding that the framers and ratifiers intended Congress to have implied powers, the Court noted that while the related federalism provision in the earlier “articles of confederation, excludes incidental or implied powers [and] requires that everything granted shall be expressly and minutely described,” the 10th Amendment to the United States Constitution “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. . . .  The men who drew and adopted this amendment had experienced the embarrassments resulting from the insertion of this word [expressly] in the articles of confederation, and probably omitted it, to avoid those embarrassments.” Thus, reference to a related document, the Articles of Confederation, our constitutional document from 1781-89, as discussed at § 20.1.1.2, helped interpret federal power under Article I, § 8.

The Court also resorted to arguments of related provisions and section headings in the Constitution itself to interpret the Necessary and Proper Clause. One argument for the government was that to carry out effectively some of the named powers, like raising taxes, paying debts, and raising money to pay army and navy personnel, a national bank was "necessary and proper." Whether this argument would be accepted depended, in part, upon whether the Court would give a narrow or broad reading to the phrase "necessary and proper." A narrow reading would restrict the power to acts which are "absolutely necessary"; a broad reading would allow Congress to act as long as Congress thought it "proper." In adopting a broad reading, the Court considered related provisions in the Constitution, noting that the framers used the phrase "absolutely necessary" in Art. I, § 10, cl. 2, but chose not to use it in Art. I, § 8. The Court also considered arguments of section headings,

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43 283 U.S. 25, 26-27 (1931) (Holmes, J., for the Court).


45 *Id.* at 406-07.
noting, "1st. The clause is placed among the powers of Congress [in Art. I, § 8], not among the limitations on those powers [in Art. I, § 9]. 2nd. Its terms purport to enlarge, not diminish the powers vested in the government."46

An additional early example of related provisions occurred in *Gibbons v. Ogden*.47 In determining the narrowness or breadth of the term “commerce” for purposes of interpreting the phrase “commerce . . . among the several States,” the Court first interpreted the related provision in Art. I, § 8, cl. 3 regarding “commerce with foreign nations.” The Court noted, “The mind can scarcely conceive a system for regulating commerce between nations, which shall exclude all laws concerning navigation.” Since the same word “commerce” also modified “among the several States,” the Court concluded that “commerce” in that related provision must also include regulation of navigation.

The complete text of Article I, § 8, cl. 3 provides Congress with the power, “To regulate commerce with foreign nations, among the several States, and with the Indian tribes.” Thus, instead of viewing this argument as one of related provisions, one might view it an example of the verbal maxim *noscitur a sociis*, interpreting “commerce” in light of the words surrounding it – “foreign nations,” “among the several States,” and “Indian tribes.” Nothing important turns on this characterization, however. Both verbal maxims and related provision arguments exemplify specific interpretation tasks viewed by virtually all courts and commentators as equally appropriate to use. As discussed at § 6.2.2.1, the debate regarding context predominantly involves differences regarding the weight given to the general interpretation tasks of policy maxims and arguments of structure, discussed next.

§ 5.2.2.2 Structure

As Professor Reed Dickerson noted, at its broadest level, resort to general contextual considerations of interpretation can involve "the totality of relevant factors in the general cultural environment external to the specific language being interpreted that are shared by the users of the language in the particular speech community and taken account of by the particular communication."48 In the realm of constitutional interpretation, this “general cultural environment” is predominantly determined by background theories of constitutional structure that influenced the drafting of the Constitution. Stated more simply, arguments of structure form a background context within which constitutional interpretation takes place. As noted by Justice Kennedy in *United States v. Lopez*,49 there are four main elements of constitutional structure: judicial review, federalism, separation of powers, and checks and balances.

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46 Id. at 413-15 (discussion of “absolute necessity” in Art. I, § 10); id. at 419-20 (discussion of placement of the Necessary and Proper Clause under Art. I, § 8 dealing with government powers).

47 22 U.S. (9 Wheat.) 1, 190 (1824).

48 Dickerson, *supra* note 17, at 110.

A. Judicial Review

Any interpreter must decide what role the courts should play in enforcing constitutional mandates, that is, the issue of judicial review. For example, one might take the view, stated in 1893 by Harvard University Law School Professor James B. Thayer, that courts should defer to governmental action out of respect for the other branches of the federal government, or out of respect for state governments, unless the unconstitutionality of the governmental action is “so clear that it is not open to rational question.”50 Under this view, the Court should find action unconstitutional only if contemporaneous sources and subsequent considerations clearly indicate that the government's action is unconstitutional, rather than merely on balance leading the Court to that conclusion. A slightly less deferential view counsels judges to exercise caution and restraint before deciding cases on the merits, including the view that courts should construe statutes to avoid constitutional problems if possible. As discussed at § 5.4.2, this view is reflected in Professor Alexander Bickel’s passive virtues approach to judicial decisionmaking, and in what are called the Ashwander factors regarding judicial restraint. As noted at § 6.2.2.2, some version of this approach is favored by most Holmesian jurists, based upon their functional deference-to-government posture, discussed at § 3.2 nn.35-40.

At the other extreme from this posture of judicial deference, a judge might conclude that courts have a special role to play in our democratic system in protecting certain kinds of constitutional rights. For example, some interpreters might believe that courts have special obligations to provide protection for the disadvantaged or unempowered in society. As Justice Brennan remarked, "[H]undreds of thousands of Americans live entire lives without any real prospect of the dignity and autonomy that ownership of real property could confer. Protection of the human dignity of such citizens requires a much modified view of the proper relationship of individual and state. . . . [I]t has been well said that there is no better test of a society than how it treats those accused of transgressing against it. . . . The constitutional vision of human dignity [also] respects the rights of each individual to form and express political judgments, however far they may deviate from the mainstream and however unsettling they might be to the powerful or the elite."51 Some interpreters may believe that courts have special obligations to protect individuals' civil rights or civil liberties. Justice Thurgood Marshall argued for the need to view the Constitution as a living document, with special focus on "the Bill of Rights and the other amendments protecting individual freedom and human rights."52 University of California-Berkeley School of Law Professor and former Dean Jesse Choper argued that courts should treat separation of powers and federalism cases as political questions, and thus refuse to decide them, so that courts can reserve their institutional capital for


individual rights cases.\textsuperscript{53} Professor Philip Bobbitt asked to what extent the structural relationship between the citizen and his government can account for proper court scrutiny of individual rights.\textsuperscript{54} As noted at § 6.2.2.2, some version of this “special role” approach is favored by most instrumentalist jurists, based upon their functional social policy perspective, discussed at § 3.3 nn.51-61, 76-77.

A third possible approach takes an intermediate position between these two approaches. This approach counsels that courts should be willing to rule that certain governmental action is unconstitutional if indeed the other sources of meaning support that finding, without any policy of special deference to legislative or executive action. On the other hand, this approach states that courts do not have any special role in protecting certain kinds of constitutional rights, but should apply the same general approach toward judicial review to any constitutional provision. As stated by Justice Scalia, “[T]he context of the Constitution tells us not to expect nit-picking detail, and to give words and phrases an expansive rather than narrow interpretation – though not an interpretation that the language will not bear. . . . [This] is not strict construction, but it is reasonable construction.”\textsuperscript{55} As discussed at § 6.2.2.2, some version of this more neutral approach toward judicial review is favored by most formalist and natural law jurists, based upon their more analytic approach to law, which does not involve the kind of functional considerations that affect Holmesian or instrumentalist decisionmaking.

Each of these approaches assumes that the courts will be the ultimate interpreters of the meaning of constitutional provisions. It would be possible, of course, to take the view that judicial review of the constitutionality of governmental action is impermissible, as historically has been true in England. It would also be possible to take the view that each branch is responsible for determining the constitutionality of its own action. Thus, the legislative branch would determine its powers under Article I of the Constitution; the executive branch would determine its powers under Article II; the judicial branch would determine its powers under Article III. A third alternative would permit the legislature to determine the constitutionality of action only if the legislature invoked a special power, like the “notwithstanding clause” of § 33 of the Canadian Charter of Rights and Freedoms, discussed at § 17.1.4 n.67.\textsuperscript{56}

Since \textit{Marbury v. Madison} in 1803, these alternatives to judicial review have been rejected by the United States Supreme Court, and, with few exceptions, the other branches of the federal and state governments have acquiesced in the Court’s assertion of power in \textit{Marbury} that “[i]t is emphatically

\textsuperscript{53} Jesse Choper, Judicial Review and the National Political Process 175, 201-03, 263 (1980).

\textsuperscript{54} Bobbitt, \textit{supra} note 3, at 85-92.

\textsuperscript{55} Scalia, \textit{supra} note 34, at 37-38.

the province and duty of the judicial department to say what the law is.”

Discussion of these, and other, possible alternatives to judicial review do appear, however, at §§ 17.1.2 & 17.1.4. Detailed discussion of a broad range of issues concerning judicial review appears in Chapter 17.

**B. Federalism**

Any interpreter must also consider the relative power of the federal government versus the power of state governments in our constitutional system. In general, there are three main approaches one could adopt. The first approach, argued by the state of Maryland in the 1819 case of *McCulloch v. Maryland*, is that the states created the federal union through state-by-state ratification, and thus the structure of sovereignty in our system of government is that the people created the states, which created the federal government.

At the other extreme, one could adopt an approach, similar to France and other European countries, where the people created the federal government, and then the states (or provinces, or whatever similar term is used), are mere administrative subdivisions of the central government. It has been noted, “The federal form of the U.S. government is often contrasted with the highly centralized government that followed the other major revolutionary movement in the late 18th century, that of France. European thought emphasized the idea of ‘indivisible sovereignty,’ with a legislative power that essentially reflects the sovereign will and thus must control exercise of other powers. The French Revolution’s emphasis on equality was conceived to require a national, and uniform, concept of citizenship, incompatible with the internal differences associated with strongly decentralized federal unions.” This unitary model of sovereignty places the federal government on top.

A third approach, adopted by Chief Justice Marshall in *McCulloch v. Maryland*, and reaffirmed by the Supreme Court in *U.S. Term Limits v. Thornton*, discussed at § 20.2.3, is that the framers and ratifiers of the Constitution of the United States adopted a dual theory of sovereignty. As stated by Justice Kennedy in his concurrence in *Thornton*, under this approach the framers and ratifiers established “two orders of government, each with its own direct relationship, its own privity, and its own set of mutual rights and obligations to the people who sustain it and are governed by it.” This view is also supported by noting that the Constitution begins, “We, the People,” not “We, the States,” and that special state ratifying conventions ratified the Constitution, not the existing state legislatures, as noted at § 18.4.5 n.237. Thus, as discussed generally at § 18.4.5, under the dual theory of sovereignty, neither the states, nor the federal government, are structurally supreme over

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57 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

58 17 U.S. (4 Wheat.) 316, 403 (1819).


60 17 U.S. (4 Wheat.) 316, 403-05 (1819).


62 Id. at 838 (Kennedy, J., concurring).
the other, although, of course, the Supremacy Clause of Article VI provides that in case of a conflict between state and federal enactments, the Constitution of the United States, along with laws and treaties made pursuant thereto, are “the supreme Law of the Land.”

As discussed at § 6.2.2.3, some judges in our history have tended to have a "states' rights" orientation, similar to that of the state of Maryland in *McCulloch v. Maryland*. Other judges have been oriented towards viewing our Constitution as sanctioning stronger federal governmental power, either under the dual theory of sovereignty or the unitary model with the federal government on top. Detailed discussion of issues of federalism appears in Chapter 18.

C. Separation of Powers

With regard to separation of powers, any interpreter must ask whether the framers and ratifiers adopted a strict separation of powers approach, with legislative, executive, and judicial powers strictly separate, or whether they adopted a constitution that focuses more on sharing of powers. For example, a judge following a strict separation of powers approach would be reluctant ever to permit judges to exercise the executive power of appointing a prosecutor, as happened under the Ethics in Government Act, between 1978-1998, for independent prosecutors. That law expired in 1998. A sharing of powers approach would be more likely to permit such an arrangement.

As discussed at § 6.2.2.4, a clear majority of Supreme Court Justices have concluded that the sharing of powers approach best represents the framers and ratifiers' intent. However, a formalist judge, placing greater reliance on aspects of literal text, may adopt a strict separation of powers approach. Detailed discussion of separation of powers issues appears in Chapter 19.

D. Checks and Balances

Related to this separation of powers issue of a strict versus a sharing of powers approach is the question of what kinds of additional checks and balances were adopted by the framers and ratifiers. This question is prominent in resolving issues such as congressional and executive immunities from legal action, or the scope of the congressional impeachment power. In addition, there are additional checks and balances in the Constitution related to federalism issues, such as the ability of the federal government to preempt state laws, or state laws being rendered invalid under dormant commerce clause analysis. Discussion of these kind of issues appears in Chapter 20.

63 U.S. Const. Art. VI.

64 *See Morrison v. Olson*, 487 U.S. 654, 673-97 (1988) (majority adopted a sharing of powers approach); *id.* at 705-23 (Scalia, J., dissenting) (adopting a strict separation of powers approach).

65 *See id.* at 705-23 (Scalia, J., dissenting).
§ 5.2.3  History

§ 5.2.3.1  Introduction

The history surrounding the adoption of a constitutional provision is naturally relevant to determine that provision’s meaning. The most direct use of history is to help determine the framers and ratifiers’ intent, what has been called “forensic” history. That is the use of history discussed here. History can also be used to help think prudentially about the likely consequences of various courses of current action based on prior experiences. Such “deliberative” use of history is discussed as part of prudential considerations at § 5.4.2 n.116. Arguments of history raise three main problems: what historical sources are appropriate to use; what level of generality should these sources be viewed; and what weight to give each source versus the other sources of interpretation. Consistent with the discussion at § 5.1 and Table 5.1, all the sources considered here existed at the time of ratification. Events occurring after ratification are best termed “practice,” and are discussed at § 5.3.1.66

§ 5.2.3.2  Specific versus General Historical Evidence

Any interpreter must first decide what sources of history are appropriate to consider in determining the meaning of a constitutional provision. A number of possible historical sources exist. Some are specifically connected to the drafting and ratification of the Constitution: (1) legislative history of the provision in question, like notes of the Constitutional Convention, records of state ratifying conventions, or House or Senate statements made during consideration of constitutional amendments; and (2) thoughtful contemporaneous statements during ratification of the Constitution, like The Federalist Papers. These kinds of sources are termed in this book examples of “specific historical evidence,” because specifically related to the drafting and ratification of the Constitution. Other historical sources involve more general background to the drafting and ratification. They involve: (3) existing legislative and executive practice, and existing judicial precedents, at the time the provision was drafted and ratified, mostly in the United States, but also English practice and precedent, to the extent history suggests that the English experience is relevant to understanding the choices made by the framers and ratifiers; and (4) other typical sources of historical inquiry (evidence of general social practice on a particular issue, newspaper accounts, statements of respected organizations, reliable evidence of public opinion generally, etc.). These kinds of sources are termed in this book “general historical evidence.” As a matter of terminology, one author has called use of history from other countries, such as England, which is directly relevant to choices made by the framers and ratifiers, “genealogical comparativism.”67

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66 On the dichotomy between “forensic” versus “deliberative” uses of history, see Mitchell Gordon, Adjusting the Rear-View Mirror: Rethinking the Use of History in Supreme Court Jurisprudence, 89 Marq. L. Rev. 475, 476-81 (2006). On use of historical sources for “forensic” purposes, see generally Bobbitt, supra note 3, at 9-25 (Chapter on "Historical Argument"); Brest, Levinson, Balkin & Amar, supra note 21, at 140-43 ("Discovering the Adopters' Purposes"); Fallon, supra note 21, at 1198-99 ("Arguments About the Framers' Intent").

There is an issue regarding the extent to which source (1) mentioned above, legislative history of the provision in question, should be used to determine a provision’s meaning. Similar to the debates that have taken place with regard to the permissibility of using legislative history in statutory interpretation, there is a question whether material internal to the deliberations surrounding the adoption of a particular constitutional provision is properly used to interpret the provision. This issue of the use of such constitutional history is discussed at § 6.2.3.1.

In contrast, use of material external to the adoption of the Constitution, like The Federalist Papers, listed in source (2) above, is more routinely viewed as appropriate to use. For example, Justice Scalia has criticized use of internal deliberations to aid in interpreting the Constitution, but he has embraced use of The Federalist Papers. Justice Scalia has indicated a willingness to use such evidence not because Madison and Hamilton were at the Constitutional Convention, but “because their writings, like those of other intelligent and informed people of the time, display how the text of the Constitution was originally understood. Thus, I give equal weight to Jay’s pieces in The Federalist, and to Jefferson’s writings, even though neither of them was a Framer.”

Use of existing legislative and executive practice, and existing judicial precedents, source (3) listed above, has also been viewed as relatively uncontroversial. This material is clearly related to the general background historical context of the Constitution’s drafting and ratification. However, there is an issue regarding the extent to which the material mentioned in source (4) above should be used to determine a provision’s meaning. Some Justices have suggested that relevant historical evidence may be established from sources of legislative enactments and their application, as listed in source (3) above, but not from other kinds of indicia, such as public opinion polls, the views of interest groups, and the positions adopted by professional associations. Other Justices have been willing to consider evidence of social practice and community views. This issue is discussed at § 6.3.3.

§ 5.2.3.3 Specific versus General Historical Intent

In addition to the issue of which sources of history are appropriate to use, an interpreter must also decide at what level of generality to view historical insights. This applies to both specific and general kinds of historical evidence. For example, regarding specific historical evidence, a judge could remain focused on the specific views seemingly held by the framers and ratifiers about a particular provision of the Constitution that emerge from Notes of the Constitutional Convention or The Federalist Papers. On the other hand, a judge could focus on some general concept held by the framers and ratifiers about a provision as revealed by those materials.

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68 Scalia, supra note 34, at 38.

69 See generally Stanford v. Kentucky, 492 U.S. 361, 377 (1989) (plurality opinion of Scalia, J., joined by Rehnquist, C.J., and White & Kennedy, JJ.) (rejecting use of such evidence); id. at 389-90 (Brennan, J., joined by Marshall, Blackmun & Stevens, JJ., dissenting) (rejecting Justice Scalia's proposed approach to permit a broad inquiry into legislative, executive, and social practice); id. at 382 (O'Connor, J., concurring) (not willing to adopt Justice Scalia's approach, at least with respect to this Eighth Amendment case applied to the states through the 14th Amendment).
Similarly, with regard to general historical evidence, a judge focused on specific historical intent regarding, for example, the question of whether officially organized prayer in schools is constitutional, would focus on the specific tradition of permitting such prayer in schools at the time of ratification, as noted in the dissent in *Lee v. Weisman*, discussed at § 4.4.1 n.103. On the other hand, a judge focused on the general concept of separation of church and state as revealed by general historical evidence might conclude that such prayer is unconstitutional. This view appeared in the majority and concurring opinions in *Lee v. Weisman*, discussed at § 4.4.1 n.103.

This difference between the specific examples of an idea versus broader, more abstract concepts is explored by Professor Ronald Dworkin in his book *Law's Empire*. As he discussed there, 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.”

In thinking about what level of generality to view historical evidence, Justice Scalia, joined by Chief Justice Rehnquist, stated in 1989 in *Michael H. v. Gerald D.* that the Court should start historical analysis with, and never disregard, the “most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified.” A majority of Justices on the Court at the time rejected that approach. One professor has cautioned that “a judge should not try to

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71 *Id.* at 591-92 (1992) (Kennedy, J., for the Court); *id.* at 609-18 (Souter, J., joined by Stevens & O’Connor, JJ., concurring); *id.* at 599-601 (Blackmun, J., joined by Stevens & O’Connor, J., concurring).


73 See also Fallon, *supra* note 21, at 1198-99.

74 491 U.S. 110, 127 n.6 (1989) (Scalia, J., joined by Rehnquist, C.J., announcing the judgment of the Court), discussed at § 9.2.1.3.

75 See *id.* at 138-39 (Brennan, J., joined by Marshall & Blackmun, JJ., dissenting) (explicitly rejecting Justice Scalia’s approach in *Michael H.*); 491 U.S. at 132 (O’Connor, J., joined by Kennedy, J., concurring) (refusing to join Justice Scalia’s specific tradition approach in *Michael H.*, stating that they were not willing to "foreclose the unanticipated" by adopting Justice Scalia's
articulate the most general aspect of the original understanding of a constitutional provision at a level of generality any broader than the relevant materials (‘words, structure and history’) warrant.”

Of course, indeterminacy exists in interpreting particular clauses of the Constitution depending upon what level of generality is adopted. For purposes of the discussion here, it is sufficient to note that historical sources can provide some guidance as to the level of generality intended by the framers and ratifiers upon their adoption of particular text, and that, as a matter of historical argument, the framers and ratifiers' intended level of generality should control. To the extent that the framers and ratifiers expected judges to resort to “general” or “abstract” concepts lying behind certain constitutional provisions, that would legitimate on historical grounds judicial consideration of “general historical intent.” Part of Professor Bobbitt’s discussion of ethical argumentation, including “the ethic expressed by the First Amendment” in The Pentagon Papers Case, discussed at § 29.6.1.1 n.208-12, or the “constitutional ethic . . . that finds partial expression in some of the passages of the Bill of Rights and that restrains the police from physically degrading an individual who is in their custody,” which is applicable to the Fifth Amendment case of Rochin v. California, discussed at § 23.2.1.2.D n.142, seem best understood as examples of such general historical intent reasoning. Of course, if a judge adopts a non-interpretive prudential approach toward constitutional interpretation that permits resort to principles of justice or social policy not embedded in the law, as discussed at § 5.4.1, the judge would have to decide what level of generality is best in some justice or public policy sense. The indeterminacy associated with choosing such a level would then come critically into play.

§ 5.2.3.4 What Weight to Give Each of These Sources

Once an interpreter has resolved the issues of which sources of history are appropriate to consider, and what level of generality to give them, the interpreter must then decide what weight to give historical insights in light of other sources of constitutional interpretation: text, context, practice, precedent, and prudential considerations. Naturally, there is no exact science to determine how much weight to give each historical source, or how to balance evidence gleaned from historical sources against evidence derived from text, context, practice, precedent, and prudential considerations. Indeed, as Professor Bobbitt has noted, the indeterminacy of this question creates the possibility of moral choice. Nonetheless, judges have balanced considerations of text, context, practice, precedent, and prudential considerations.


\[78\] See Bobbitt, supra note 3, at 101-05.

\[79\] Id. at 237-42.
history, practice, precedent, and prudential considerations for more than 200 years in deciding cases under the Constitution. As noted generally in Chapters 9-12, and with respect to specific doctrines in Part IV of this book, Chapters 17-32, each judge's balancing turns out to be relatively predictable over time, and each judge's balancing tends to reflect one of the four main judicial decisionmaking styles discussed in this book: natural law, formalism, Holmesian, or instrumentalism.

§ 5.3 Subsequent Events as Sources of Meaning

§ 5.3.1 Introduction

One view of constitutional interpretation is that the meaning of any constitutional provision should be fixed at the time that provision is ratified. This understanding leads to a “static” Constitution, where the meaning of a constitutional provision, fixed at the time of ratification, can only be changed by later formal constitutional amendment. Followers of this view, typically formalist jurists, like Justice Scalia, believe that interpreters of the Constitution should predominantly use sources contemporaneous with a provision’s ratification in order to interpret that provision, since they existed at the time the provision was ratified. Subsequent events can only be used to the extent they help illuminate what the provision meant at the time of ratification, as discussed at § 5.3.2.1.

In contrast, an alternative theory of constitutional interpretation proposes that the meaning of the Constitution can evolve over time in response to events subsequent to ratification. This understanding leads to a “living” Constitution that changes from age to age. Jurists in this tradition make fuller use of subsequent events in order to help guide constitutional interpretation, since under this view the use of subsequent events does not have to be related back to determining the meaning of the constitutional provision at the time of ratification, but only to determining the meaning of the constitutional provision today. Justice Scalia has remarked, “The ascendant school of constitutional interpretation affirms the existence of what is called The Living Constitution, a body of law that (unlike normal statutes) grows and changes from age to age, in order to meet the needs of a changing society. And it is the judges who determine those needs and ‘find’ that changing law.”

Subsequent events can be divided into two kinds: subsequent juridical events and subsequent non-juridical events. Subsequent juridical events can be defined as acts which take place after a provision's ratification that the legal order recognizes as official acts. Such juridical acts include legislative or executive practice under a provision, and judicial decisions interpreting a provision. Subsequent non-juridical events are non-official acts, such as an evolving community consensus or social tradition. In this book, such acts are grouped under the generic term, “social practice.”

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80 Scalia, supra note 34, at 44 (supporting such a “static” model), discussed § 3.1 nn.21-22.

81 Id. at 38.

82 See John Henry Merryman, The Civil Law Tradition 77 (2d ed. 1985) (”[T]he juridical act is a declaration of intention directed towards legal effects that the legal order recognizes and guarantees.”).
Some interpreters draw a distinction between the weight to be given subsequent juridical acts versus non-juridical acts. For example, in *Stanford v. Kentucky*, a plurality of four Justices stated that, for them, whether a right was so “deeply rooted in this Nation’s history and tradition” as to be “implicit in the concept of ordered liberty” under due process analysis, discussed at §§ 27.1.1, depended upon whether that tradition was established from consideration of legislative enactments and their application (that is, juridical acts of legislative and executive practice), and not from other indicia, such as public opinion polls, the views of interest groups, and the positions adopted by various professional associations (that is, non-juridical acts of social practice). Four Justices in *Stanford* rejected this suggestion in order to permit an inquiry into traditions from whatever source. Indeed, these four Justices indicated they would consider not only legislative, executive, and social practice in the United States, but also legislative, executive, and social practice of other countries as part of an evolving community consensus among nations in the world. One Justice rejected the more limiting approach in the particular case, but left open the broader issue for later resolution.

This issue of the use of comparative social practice from around the world is discussed at § 6.3.3.

Without regard to whether subsequent non-juridical acts are ever appropriate to consider, it is clear that subsequent juridical acts are given much greater weight by almost all interpreters. For this reason, the remainder of this section will be divided as follows: subsequent juridical acts of legislative and executive practice will be discussed at § 5.3.2; subsequent juridical acts of judicial precedents, and how they are used by courts, will be discussed at § 5.3.3; subsequent non-juridical acts, involving various kinds of social practices, however measured, will be discussed at § 5.3.4.

§ 5.3.2 The Subsequent Events of Legislative and Executive Practice

§ 5.3.2.1 Practice as Gloss on Meaning versus No Gloss on Meaning

One approach toward subsequent legislative and executive practice under a constitutional provision states that a court should be sensitive to legislative and executive practice only to the extent such practice adds understanding of, and is faithful to, the meaning of the constitutional provision at the time of ratification. This approach embraces the concept of a static Constitution. For example, the Court has cited “the enactments of early Congresses as indicative of the original understanding of constitutional provisions.” As the Court stated in 1926 in *Myers v. United States*:

> We have devoted much space to this discussion and decision of the question of the Presidential power of removal in the First Congress, not because a Congressional conclusion on a constitutional issue is conclusive, but, first, because of our agreement with the reasons upon which it was avowedly based; second, because this was the decision of the First Congress, on

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84 *Id.* at 389-90 (Brennan, J., joined by Marshall, Stevens & Blackmun, JJ., dissenting).

85 *Id.* at 382 (O’Connor, J., concurring).

86 Brest, Levinson, Balkin & Amar, *supra* note 21, at 142.
a question of primary importance in the organization of the Government, made within two years after the Constitutional Convention and within a much shorter time after its ratification; and, third, because that Congress numbered among its leaders those who had been members of the Convention.87

Cases from the founding era of constitutional law also made the same point. As stated in *McCulloch v. Maryland*, 88 "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." Similarly, in *Martin v. Hunter's Lessee*, 89 the Court noted, "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."

A second approach toward legislative and executive practice states that such legislative or executive practice under a constitutional provision can also provide a “gloss” on meaning to the Constitution, in addition to illuminating the meaning at the time of ratification. Such a gloss changes the meaning of the Constitution from what it was before, and thus is embraced by those who adopt the living Constitution as their model of constitutional interpretation. As Justice Story observed in 1833, "[T]he most unexceptional source of collateral interpretation is from the practical exposition of the government itself in its various departments upon particular questions discussed, and settled upon their single merits."90 Similarly, James Madison had noted about interpretation in 1830, "[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.91 Indeed, though as a congressman in 1791 Madison had opposed Congress creating a national bank as unconstitutional, in 1815 and 1816, when Madison was President, he supported the bank's constitutionality based upon "repeated recognitions under varied circumstances of the validity of such an institution."92 Thus, as discussed when considering *McCulloch v. Maryland* at § 18.1.2 nn.24-27, for Madison Congress' power to create a bank changed from 1791, when Madison considered it unconstitutional, to 1815 and 1816, when it became constitutional, based in part upon legislative and executive practice.

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87 272 U.S. 52, 136 (1926).
88 17 U.S. (4 Wheat.) 316, 401-02 (1819).
89 14 U.S. (1 Wheat.) 304, 351 (1816).
90 Story, *supra* note 23, § 408.
92 See Brest, Levinson, Balkin & Amar, *supra* note 21, at 17 (quoting Madison).
In the twentieth century, Justice Frankfurter made this same point in the specific context of referring to subsequent executive action. As stated by Justice Frankfurter in his concurrence in *Youngstown Sheet and Tube Co. v. Sawyer*, "[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."

§ 5.3.2.2 Levels of Generality and Arguments of Legislative and Executive Practice

As with arguments of history, any interpreter must decide what level of generality to consider with respect to arguments of legislative and executive practice. For example, as noted at § 5.2.3.3 nn.74-75, Justice Scalia, joined by Chief Justice Rehnquist, proposed in *Michael H. v. Gerald D.* that under 14th Amendment substantive due process analysis the Court should focus primarily on “the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified.” Justices Brennan, Marshall, and Blackmun explicitly rejected this approach and stated that the Court must remain sensitive to the fact that terms like “liberty” or “property” in the 14th Amendment are “broad and majestic” terms, and thus must be given a more general reading. Justices O’Connor and Kennedy, while not reaching a final conclusion on this issue, were “not willing to foreclose the unanticipated” by adopting the specific level approach in this case, noting that it was “somewhat inconsistent with our past decisions in this area”; Justices Stevens and White also did not embrace Justice Scalia’s methodology, although they did not directly address it in their opinion. This issue is discussed at § 6.2.3.2, as part of the related discussion of what level of generality to adopt when considering historical sources of meaning.

§ 5.3.2.3 Weight to be Given Arguments of Legislative and Executive Practice

As with the other sources of constitutional interpretation, any interpreter must decide how much weight to give arguments of practice versus the other arguments of text, context, history, precedent, and prudential considerations. As discussed at § 6.3.1, some interpreters, particularly Holmesian judges with their deference-to-government posture, give great weight to arguments of legislative and executive practice.

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93 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring).

94 491 U.S. 110, 127 n.6 (1989) (Scalia, J., joined by Rehnquist, C.J., announcing the judgment of the Court).

95 *Id.* at 138-39 (Brennan, J., joined by Marshall & Blackmun, JJ., dissenting).

96 *Id.* at 132 (O’Connor, J., joined by Kennedy, J., concurring); *id.* at 133 (Stevens, J., concurring in the judgment); *id.* at 157-58 (White, J., joined by Brennan, J., dissenting).
§ 5.3.3 The Subsequent Events of Judicial Precedents

§ 5.3.3.1 Precedent as Gloss on Meaning versus No Gloss on Meaning

As stated by Chief Justice Marshall in *Marbury v. Madison*, "It is emphatically the province and duty of the judicial department to say what the law is." Thus, court decisions interpreting a constitutional provision fix the meaning of the Constitution for the jurisdiction covered by that court, unless the court changes its mind or is reversed by a higher court.

In theory, there are two different approaches to when a court may change its mind. Under one approach, a court will change its mind, that is, overrule a prior decision, if the court decides that the earlier court "got it wrong." In such a case, the later court will typically feel free to overrule the prior decision as erroneous and to reinterpret the provision so that it represents an accurate reflection of how the court believes the Constitution should always have been interpreted. As discussed at § 6.3.2, formalist, Holmesian, and instrumentalist theories each follow this approach, although to varying extents.

A second approach to judicial precedents holds that a sequence of court decisions can provide a gloss on meaning to the Constitution. This can change what the Constitution means in the same fashion as legislative and executive practice can provide a gloss on meaning. Thus, the question is not just what the other sources of meaning 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. It has been suggested, "[T]he Framers may have realized the futility of writing a bunch of specific answers in the stone of the Constitution. In that event, their 'specific intent' would have been to provide no hard-and-fast answers in the constitutional text, and to let the answers develop over time in a common-law fashion. After all, the Framers were common-law lawyers." As discussed at § 6.3.2, it is the natural law style of interpretation, grounded in the 18th-century and 19th-century approach to interpreting documents, that most fully embraces this approach toward precedent.

Under this view, a sequence of court decisions can provide a gloss on meaning that may alter a constitutional provision's interpretation as gleaned from examining other sources of meaning. Thus, it would take something more to overrule a prior decision than just a later court deciding that the earlier court "got it wrong." There would have to be some reason to overturn this new "gloss" on constitutional meaning. As noted at § 4.3.2 n.87, and discussed in greater depth with respect to constitutional adjudication at §§ 7.3.3-7.3.4, some factors that courts have used to provide this extra impetus to overrule a prior decision include: (1) the precedent is unworkable in practice; (2) the precedent creates an inconsistency or incoherence in the law; (3) a changed understanding of facts

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97 5 U.S. (1 Cranch) 137, 177 (1803).

has undermined the factual basis of the precedent; (4) the precedent represents a substantially wrong or substantially unjust interpretation of the law; or (5) the precedent raises concerns about a commitment to the "rule of law."

Despite this theoretical model of the force of judicial precedent, as a practical matter most judges will give some respect to precedent either as a matter of following "settled law" or following decisions on which there has been "substantial reliance," as discussed at § 4.3.2 nn.79-87. As phrased, this approach does not view precedent as providing any gloss on meaning to the Constitution. Rather, the respect for precedent is focused on not being so disruptive as to prevent a workable prescription for judicial government. Cases examples respecting following "settled law" or decisions on which there has been "substantial reliance" are discussed at § 7.3.2.

§ 5.3.3.2 Levels of Generality and Precedent

In deciding how to follow a judicial precedent, an interpreter must decide whether to follow only the specific "core holding" of the previous precedent, or whether to follow also the precedent’s more "general reasoning" about a particular constitutional provision. A specific "core holding" approach limits each precedent more to its particular facts, a narrow approach to the precedent. Following the "general reasoning" of the precedent expands the approach of that precedent to control new, but related, factual circumstances, a broad use of precedent. This topic of narrow versus broad use of precedent is discussed at § 4.3.4. Specific case examples of narrow versus broad use of precedent in the context of constitutional adjudication appear at § 7.3.1.

§ 5.3.3.3 Weight to be Given Arguments of Precedent

Where precedent is viewed as having a gloss on meaning, the precedent will obviously be given great weight. However, it is perhaps a hyperbole to conclude, as did Justice Scalia, that such a gloss on meaning approach will have "no regard for how far that logic, thus extended, has distanced us from the original text and understanding." Even when a precedent is not treated as having a gloss on meaning, the precedent still has some weight, particularly if it represents "settled law" or is a precedent upon which individuals have "substantially relied." Some jurists, however, give prior precedents very little weight. Perhaps apocryphally, Justice William Douglas once said that he preferred to make precedents rather than follow them. This statement would be consistent with an instrumentalist predisposition, which is the least likely to follow precedents, as discussed at § 4.3.2 text following n.78.

In addition to the considerations discussed here of the impact on constitutional interpretation of precedent alone, or legislative and executive practice alone, there is the related issue of how to resolve a tension between existing precedent and proposed legislative and executive action that would conflict with that precedent. The standard view, reflected in Marbury v. Madison's statement that it is the "duty of the judicial department to say what the law is," is that the legislative and executive branches should follow clear judicial precedents on point. Under this view, "[A]s long as it satisfied the Article III case or controversy requirements, then judicial precedents should be

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99 Scalia, supra note 34, at 138-39.
treated as the enunciation of a positive rule of law.”

An alternative view, once stated by then-Attorney General Edwin Meese in 1987, but later revised, is that 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 remainder of the public – at least until officials are once again taken to court.” An intermediate view, eventually adopted by Attorney General Meese, is based upon President Abraham Lincoln’s views as set out in his First Inaugural Address. Against the backdrop of the Supreme Court’s flawed decision in 1857 in *Dred Scott v. Sandford*, discussed at § 25.1, Lincoln stated that “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.” Under this view, while still respecting the Court’s decisions as a matter of law under *Marbury*, non-judicial actors in our democratic society, such as federal and state legislators, the President, state Governors, or just plain citizens, are not required to accept the Court's judgments uncritically in making their own political and policy decisions. This issue is discussed in greater depth at § 17.1.2.1 nn.21-24.

§ 5.3.4 The Subsequent Events of Social Practice

As discussed at § 5.3.1, subsequent non-juridical acts involve various kinds of social practices, social traditions, and evolving community consensus, however measured. Some jurists in our history have taken the view that such social practices are never appropriate for judges to consider in determining the meaning of constitutional provisions. For example, as noted at § 5.3.1 n.83, in *Stanford v. Kentucky*, a case involving the constitutionality of the death penalty for persons under 18, a plurality of four Justices stated that whether a right is “deeply rooted in this Nation’s history and tradition” should not be based upon public opinion polls, the views of interest groups, and the positions adopted by various professional associations (that is, non-juridical acts of social practice).

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Other jurists have rejected this suggestion in order to permit a broad inquiry into traditions from whatever source. For example, in *Stanford v. Kentucky*, four Justices supported their view that the death penalty for minors was unconstitutional by noting, “The American Bar Association has adopted a resolution opposing the imposition of capital punishment upon any person for an offense committed while under the age 18, as has the National Council of Juvenile and Family Court Judges. The American Law Institute’s Model Penal Code similarly includes a lower age limit for 18 for the death penalty. And the National Commission on Reform of the Federal Criminal Laws also recommended that 18 be the minimum age.” These Justices added, “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.”

This issue of whether evidence of social practice is ever appropriate for the Court to consider is discussed at § 6.3.3.

§ 5.4 Prudential Considerations

§ 5.4.1 Kinds of Prudential Considerations: Interpretive versus Non-Interpretive Review

Prudential consideration can involve arguments concerning the consequences of a particular judicial decision from the perspective of: (1) the contemporaneous sources of constitutional text, purpose, context, and history; (2) the subsequent event sources of practice and precedent; (3) the mainstream normative concern with whether the decision would advance a particular background principle of justice or social policy that the judge believes is embedded in the law; or (4) the more radical normative concern with whether the decision would advance a principle of justice or social policy that is not so embedded in existing legal doctrine. Each of these kinds of prudential considerations are treated differently by judges.

Judicial consideration of arguments of justice or social policy that are not embedded in existing legal doctrine, category (4) listed above, involve what is often termed “non-interpretive” review. As defined by Professor Michael Perry, a court engages in non-interpretive review when "it makes the determination of constitutionality by reference to a value judgment other than the one constitutionalized by the Framers. Such review is 'non-interpretive' because the Court reaches [the] decision without really interpreting, in the hermeneutical sense, any provision of the constitutional text (or any aspect of governmental structure) – although, to be sure, the Court may explain its decision with rhetoric designed to create the illusion that it is merely 'interpreting' or 'applying' some constitutional provision.”

This kind of "non-interpretive" constitutional interpretation can be contrasted with arguments of text, context, history, practice, precedent, or resort to background principles of justice or social policy.

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104 *Id.* at 388-89 (Brennan, J., joined by Marshall, Blackmun & Stevens, JJ., dissenting).

that the judge believes are embedded in text, context, history, practice, or precedent. As opposed to
these other sources of meaning, non-interpretive review involves a judgment about the impact of
a particular constitutional interpretation in light of value considerations that the judge determines
should be part of the Constitution, rather than the values being embedded in the Constitution, or in
subsequent practice, precedent, or background principles of justice or social policy embedded in
constitutional doctrine. These non-interpretive sources of value can derive from a supposed
community consensus or societal tradition, or values the judge thinks the community eventually will
hold, or the judge's own values. As discussed at §§ 6.4.1 & 6.4.2, only “radical” instrumentalist or
“Platonic Guardian” natural law jurists feel comfortable engaging in non-interpretive review.106

Some commentators have suggested all interpretation must, of necessity, be non-interpretive, and
thus must take into account contemporary judicial notions of justice or sound social policy.107 The
approach to constitutional interpretation adopted in this book rejects that premise, and agrees with
those commentators who argue that it is possible to draw distinctions between: (1) “interpretive”
review based upon such sources of meaning as the original intent of the framers and ratifiers as
determined by arguments of text, context, and history, and (2) “non-interpretive” review based upon
contemporary judicial notions of justice and social policy not embedded in the law.108

The “non-radical” or mainstream approach to constitutional interpretation holds that courts should
refuse to engage in non-interpretive review of consequences. Under this "interpretive" approach,
a judge should consider consequences only to the extent such considerations can help illuminate the
other sources of constitutional meaning: contemporaneous sources and subsequent events. Thus,
just as judges may look into the purposes behind adoption of a constitutional provision to illuminate
constitutional text, judges must be sensitive to the consequences of a particular interpretation in
order to ensure that the framers and ratifiers' purposes are adequately carried out. However, under
this "interpretive" theory, a judge should not read into the Constitution the values the judge
determines should be part of the Constitution. No matter how bad the judge thinks the consequences
are of a particular interpretation, if consideration of contemporaneous sources and subsequent events
suggest a particular meaning, that meaning should be adopted.109 For example, under this approach,
where constitutional provisions do not reflect a just moral position, as in the case of slavery under

106 The literature discussing "interpretive" versus "non-interpretive" review is voluminous. For a brief introduction to the "interpretive" versus "non-interpretive" debate, see Perry, supra note 105, at 264-84 and sources cited therein. For additional articles on point, see Symposium on Constitutional Interpretation, 6 Const. Comm. 19-113 (1989); Ronald D. Rotunda, Original Intent, the View of the Framers, and the Role of the Ratifiers, 41 Vand. L. Rev. 507 (1988).


the United States Constitution before the 13th Amendment, judges should follow the clear meaning of the Constitution until the just moral position is added to the document.110

Of course, judges may well disagree about the meaning of a constitutional provision that emerges from consideration of contemporaneous sources and subsequent events. As indicated in the preceding material in this Chapter, different judges may well view arguments of text, context, history, practice, and precedent very differently. In addition, judges may disagree about the extent to which these sources suggest that judges should pay attention to certain consequences.

In contrast to these views, the defenders of "non-interpretive" review argue that, to some extent, judges must update the Constitution to deal with contemporary community problems and to achieve sound social results. As Professor Perry has stated, "The justification for the practice, if there is one, must be functional: if noninterpretive review serves a crucial governmental function that no other practice realistically can be expected to serve, and if it serves that function in a manner that . . . accommodates the principle of electorally accountable policymaking, then that function constitutes the justification for noninterpretive review."111

A number of commentators have phrased this debate over non-interpretive review as being a debate among "originalist" versus "non-originalist" perspectives.112 Despite this use by some commentators, the terms "interpretive" and "non-interpretive" are used in this book to describe this debate for the following reason: virtually all commentators, and all judges, claim that their approach to constitutional interpretation is consistent with the original intent of how the framers and ratifiers would have wanted the Constitution interpreted, and thus is an "originalist" approach. Because of disagreements about exactly how the framers and ratifiers intended the Constitution to be interpreted, virtually all judges and commentators are able to make non-frivolous arguments that their approach is consistent with the framers and ratifiers' intent. For example, Professor Perry has noted that even Justice Brennan's liberal instrumentalist approach toward constitutional interpretation, discussed in Chapter 11, can be plausibly argued to be a version of "originalism."113 For this reason, the term "originalist" does not serve to distinguish any of these approaches from each other. As Perry stated, “That difficulty helps explain why it is so hard to locate a real, live nonoriginalist, whether a judge or, even, academic theorist."114 However, the terms "interpretivism" and "non-interpretivism" can be used in a way to distinguish among competing approaches to constitutional interpretation. Accordingly, the terms “originalist” and “non-originalist” are used in this book only to describe the difference between constitutional interpretation that does claim the


111 Perry, supra note 105, at 275.


113 Id. at 687 n.54.

114 Id. at 687.
goal of interpretation is to follow what the framing and ratifying generation intended, as virtually all judges and most commentators claim, and the possibility of a claim that constitutional interpretation should not be only about what they intended by their words and actions. This issue is discussed at § 8.4 ("originalism versus non-originalism" discussed), § 8.4.1 ("originalism") & § 8.4.2 ("non-originalism").

§ 5.4.2 Interpretive Prudential Considerations

As noted at § 5.4.1, interpretive prudential consideration can involve consideration of consequences from three different perspectives: (1) the contemporaneous sources of constitutional text, purpose, context, and history; (2) the subsequent event sources of practice and precedent; and (3) the mainstream normative concern with whether the decision would advance a particular background principle of justice or social policy that the judge believes is embedded in the law.

One example of “contemporaneous” prudential consideration, category (1) listed above, comes from Professor Bobbitt’s discussion of prudential considerations in Constitutional Fate. Specifically, Professor Bobbitt focused most of his attention on prudential considerations in terms of contextual structural arguments about the proper role of the judiciary, particularly the limited role favored by Holmesian Justices such as Justices Holmes, Brandeis, and Frankfurter, and commentators such as Professor Alexander Bickel. As Bobbitt stated, “The devices that Bickel contended the Court had used and should continue to use in the service of prudence include discretionary standing, the grant of certiorari and the dismissal of appeal, the doctrines of vagueness, ripeness, and political questions, and others.” Many of these prudential arguments are summed up in the famous case of Ashwander v. Tennessee Valley Authority, discussed at § 17.1.3.2, which also included the prudential arguments that courts should construe statutes to avoid constitutional problems if possible, and courts should not formulate a rule of constitutional law broader than required by the precise facts of the case. The prudential principles that help structure the political questions doctrine, in addition to the textual concern with whether there exists a textually demonstrable constitutional commitment to a coordinate branch of government, are discussed at § 17.3.4.4 nn.553-55.

A second example of “contemporaneous” prudential consideration involves the Court’s creation of a number of specific prudential principles to govern the issue of whether a party has standing to sue, the case is ripe for resolution, and whether the case is moot. Even if a party has satisfied the textually-mandated Article III requirements for standing, ripeness, and mootness, a party’s case still may not be justiciable based upon the Court’s prudential consideration of the consequences of hearing the case. The prudential principles on standing are discussed at § 17.3.1.4; ripeness at § 17.3.2; and mootness at § 17.3.3. These prudential principles are all best viewed as based on the text of Article III that the Court will only hear “cases” and “controversies.”

A third example of “contemporaneous” prudential consideration suggests that judges must be sensitive to consequences in order to ensure that the framers and ratifiers’ purposes, revealed in part by history, are adequately carried out. As phrased by Justice Breyer, courts must often be sensitive

to “the purposes, the effects, the practical virtues” of some governmental action, understood in part by “deliberative” use of past historical experiences, and interpret the Constitution giving deference to those virtues, in addition to the formal “logic” of the “language of the Constitution.”  

In general, these three examples of prudential considerations, based upon consideration of consequences in light of constitutional text, context/structure, and purpose/history, promote an approach to judicial interpretation of judicial restraint. In contrast, prudential consideration of consequences can also take place against a background of practice and precedent, category (2) listed above, or “mainstream normative” prudential consideration, category (3). Such use more often leads to a charge of judicial activism. An example of such “subsequent event” prudential consideration occurred in Planned Parenthood v. Casey, discussed at § 27.3.4.1. In Casey, the joint opinion of Justices O’Connor, Kennedy, and Souter noted that abortion is “an act fraught with consequences” both for the pregnant woman and others, and it is relevant that it is “intimate and personal” because the constitutional definition of liberty arrived at by a reasonable elaboration of precedents protects “the most intimate and personal choices a person may make in a lifetime.” For this reason, despite certain arguments of social practice about the role of women as bearer of children, “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.”

An example of “mainstream normative” prudential consideration, category (3) listed above, also occurred in Planned Parenthood v. Casey. The joint opinion in Casey noted, “At the heart of liberty is the right to define one’s own concept of existence, of meaning, or 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.” The joint opinion did not defend this passage based on specific sources of reasoning, like text, specific history, legislative and executive practice, or the core holdings of precedents. As Justice Scalia observed in dissent regarding the issue of abortion, "(1) the Constitution says absolutely nothing about it, and (2) the longstanding traditions of American society have permitted it to be legally proscribed." The core holdings of precedent do not directly support the result in Casey, Chief Justice Rehnquist noted in dissent, because, "Unlike marriage, procreation, and contraception, abortion involves the purposeful termination of potential life.” Instead, the joint opinion used general interpretive sources of reasoning, like a reasoned elaboration of the general reasoning in the Court’s precedents, to elaborate the background moral principle embedded in the law concerning what is at “the heart of liberty.” As the joint opinion noted, “Our law affords constitutional protection to personal decisions relating to marriage,


118 Id. at 851.

119 Id. at 980 (Scalia, J., joined by Rehnquist, C.J., and White & Thomas, JJ., dissenting).

120 Id. at 952 (Rehnquist, C.J., joined by White, Scalia & Thomas, JJ., dissenting).
procreation, contraception, family relationships, child rearing, and education. . . . 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.”

A second example of “mainstream normative” prudential consideration concerns the heightened intermediate scrutiny used in modern cases involving discrimination against illegitimate children. As the Court said in Weber v. Aetna Casualty & Surety Co., cited at § 26.3.2 n.111, “[I]mposing disabilities on the illegitimate 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 illegitimate child is ineffectual – as well as an unjust – way of deterring the parent.” This background moral principle embedded in the law was used in Plyler v. Doe, discussed at § 26.2.2.1.B, to support heightened scrutiny in a case involving the denial of the children of illegal immigrants the right to a public school education. Not surprisingly, Plyler v. Doe, like Casey, was decided over the dissents of formalist and Holmesian judges, whose positivist perspective on the nature of the judicial task rejects such normative resort to background principles embedded in the law, as discussed at § 2.3.2.2, and reflected in Table 3.4.

A third example of such “mainstream normative” prudential consideration has occurred in the recent sequence of cases dealing with the unconstitutionality of “grossly excessive” punitive damage awards under a substantive due process analysis, as reflected in cases like State Farm Mutual Automobile Insurance Co. v. Campbell and BMW of North America, Inc. v. Gore, discussed at § 27.1.2.4. As Justices Scalia and Thomas noted in dissent in these cases, the results in the cases are not supported by any specific text of the 14th Amendment, or specific historical evidence surrounding the adoption of the 14th Amendment, or any specific legislative or executive practice in the states or federal government regarding the issue of punitive damages. Instead, the majority in these cases based their decision on general reasoning concerning background moral principles involving “[e]lementary notions of fairness enshrined in our constitutional jurisprudence,” involving in part “harkening back to the Magna Carta” and the “basic unfairness of depriving citizens of life, liberty, or property, through the application not of law and legal processes, but of arbitrary coercion.”

In his book, Constitutional Fate, Professor Bobbitt also discussed examples of ethical argumentation based upon background moral principles or social policies embedded in the law. For example, in Moore v. City of East Cleveland, discussed at § 27.3.3.1.B, the Court struck down a city ordinance

121  Id. at 851 (joint opinion of O’Connor, Kennedy & Souter, JJ.).


124  State Farm, 538 U.S. 408, 429 (2003) (Scalia, J dissenting); id. (Thomas, J., dissenting);

125  State Farm, 538 U.S. at 416-18, citing BMW v. Gore, 517 U.S. at 574-75.
limiting occupancy of a dwelling unit to members of a nuclear family. Professor Bobbitt noted, “Justice Powell placed the decision on an ethical ground – one based on the American ethos and not shared by all cultures – that values and utilizes extended kinship. [Powell wrote:] ‘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.’”126

Professor Bobbitt also noted that the early Contracts Clause opinion in *Fletcher v. Peck*, discussed at § 22.1.1, was an example of such reasoning. Bobbitt noted, “In *Fletcher* the Supreme Court confronted a more than ordinarily corrupt legislature that had enacted by statute a series of land grants giving away vast tracts of state lands to its patrons. When the legislature was turned out by an enraged electorate, its successor proceeded to revoke the land grants. The Court held invalid the later, revoking statute. Marshall’s opinion offers both textual and ethical grounds. The statute was unconstitutional, he wrote, ‘either by general principles which are common to our free institutions, or by the particular provisions of the Constitution.’”127

One of the most prominent examples of such background normative reasoning occurred in Justice Douglas’ opinion for the Court in *Griswold v. Connecticut*.128 In *Griswold*, Justice Douglas noted that while no specific text in the Bill of Rights or 14th Amendment supported a generic right to privacy, inferences drawn from the penumbras of the First, Third, Fourth, and Fifth Amendments, which protect various aspects regarding privacy of associations, privacy in not having soldiers’ quartered in one’s home, privacy against unreasonable searches and seizures, and privacy in the form of a privilege against self-incrimination, supported recognizing a right of privacy for married couples using contraceptives in their home. Justice Douglas also based a right of marital privacy on the fact that marriage “is a coming together for better or worse, hopefully enduring, and intimate to the degree of being sacred.” Justice Goldberg’s concurrence also found a constitutional right of marital privacy based on “the traditional relation of the family – a relation as old and as fundamental as our entire civilization,” even though such a right is not mentioned in the Constitution.129

§ 5.4.3 Non-Interpretive Prudential Considerations

As noted at § 5.4.1, one approach to prudential considerations holds that courts should go beyond the first three categories of prudential considerations to consider a fourth, more radical, category of normative concern with whether the decision would advance a principle of justice or social policy that is not embedded in existing legal doctrine. Under this fourth, non-interpretive approach, the judge should balance the principles of justice or social policy embedded in the Constitution against the consequences of such an interpretation for the judge’s sense of what principles of justice or social

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127 *Id.* at 106-07, *quoting* Fletcher, 10 U.S. (6 Cranch) 87, 135 (1810).

128 381 U.S. 479, 482-86 (1965) (Douglas, J., opinion for the Court).

129 *Id.* at 495-96 (Goldberg, J., joined by Warren, C.J., and Brennan, J., concurring).
policy should be part of the Constitution. As described by Professor John Hart Ely, these non-interpretive sources of value can derive from a supposed community consensus or tradition, or values that the judge thinks the community eventually will hold, or the judge's own values.\textsuperscript{130}

Two main kinds of non-interpretive prudential considerations can influence a judge's views about the meaning of a constitutional provision if non-interpretive review is permissible. One approach holds that courts should consider principles of justice that the judge believes should be part of the Constitution in deciding how to interpret a particular constitutional provision. The other approach focuses upon arguments of sound social policy. As discussed at §§ 2.4 nn.42-43 & 3.4 nn.93-106, general differences can be noted between principles of justice and social policy argumentation. As Professor Ronald Dworkin wrote, "[T]he 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."\textsuperscript{131} A similar discussion of principles versus policies was done by Yale Law School Professor Harry Wellington.\textsuperscript{132} Of course, a judge following a non-interpretive theory of prudential considerations might decide that the judge should take into account both principles and policies, and thus adopt both approaches toward non-interpretive review.

The case of \textit{Atkins v. Virginia} provides an example of non-interpretive review in practice. In \textit{Atkins},\textsuperscript{133} Justice Stevens wrote for a 6-3 Court that the execution of mentally retarded persons is cruel and unusual punishment under the Eighth Amendment. In so doing he relied in part on non-interpretive considerations, saying that the Constitution contemplates that "in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment." Not surprisingly, this more extreme use of normative reasoning, going beyond principles or policies embedded in existing legal doctrine to considering norms based upon the judge’s own views, provoked a particularly angry dissent from the formalist and Holmesian judges on the Court, whose positivist perspective on the nature of the judicial task rejects normative reasoning of any kind. Justice Scalia, dissenting with Chief Justice Rehnquist and Justice Thomas, objected in strong terms to this approach, stating, "Seldom has an opinion of this Court rested so obviously upon nothing but the personal views of its members."\textsuperscript{134}

A more limited justification for the result in \textit{Atkins} may be possible based upon “mainstream normative” prudential consideration alone, prudential category (3) listed above. As Justice Stevens stated in his majority opinion, consideration of contemporary American legislative and executive

\begin{footnotes}
\item\textsuperscript{131} Ronald Dworkin, \textit{The Model of Rules}, 35 U. Chi. L. Rev. 14, 23 (1967). This passage appears in full at § 2.4 n.42.
\item\textsuperscript{132} Harry Wellington, \textit{The Nature of Judicial Review}, 91 Yale L.J. 486, 509-19 (1982). A passage from this article summarizing Professor Wellington’s approach appears at § 3.4 n.101.
\item\textsuperscript{133} 536 U.S. 304, 312 (2002).
\item\textsuperscript{134} \textit{Id.} at 338 (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., dissenting).
\end{footnotes}
practice suggests that the practice of executing mentally retarded persons “has become truly unusual, and it is fair to say that a national consensus has developed against it,” and additional evidence makes it clear “that this legislative judgment reflects a much broader social and professional consensus.”

This use of legislative, executive, and social practice to elaborate a general background norm against execution of the mentally retarded is consistent with mainstream normative prudential consideration.

If one rejects background normative prudential consideration, and sticks to prudential arguments based upon text, context, history, practice, and precedent alone, prudential categories (1) and (2) only, the result in *Atkins* is much harder to justify. As Chief Justice Rehnquist noted in his dissent:

The Court pronounces the punishment cruel and unusual primarily because 18 States recently have passed laws limiting the death eligibility of certain defendants based upon mental retardation alone, despite the fact that 19 other States besides Virginia continue to leave the question of proper punishment to the individuated consideration of sentencing judges or juries familiar with the particular offender and his or her crime. I agree with Justice Scalia that the Court’s assessment of the current legislative judgment regarding the execution of defendants like petitioner more resembles a *post hoc* rationalization for the majority’s subjectively preferred result rather than any objective effort to ascertain . . . an evolving standard of decency.

135 *Id.* at 316 & n.21.

136 *Id.* at 321-22 (Rehnquist, C.J., joined by Scalia & Thomas, J., dissenting).
CHAPTER 6: THE FORM OR SHAPE OF CONSTITUTIONAL INTERPRETATION

§ 6.1  Introduction to Defining Constitutional Interpretation

As discussed at § 1.2.1, formal causes for Aristotle are the “form or definition” of the object to be studied. Thus, the “formal” cause of a “silver bowl” is the “shape” that the bowl is to take. With respect to constitutional interpretation, that shape depends upon how the formal constitutional doctrine is defined. This depends, in turn, on how an interpreter chooses to balance the various material sources of interpretation. This must be done for each material source: text, context, history, practice, precedent, and prudential considerations.

As will be seen, just as different makers of silver bowls may have different and distinctive shapes to their bowls, yet each represents a kind of bowl, unless it becomes so flat that the shape becomes a plate, or so round that it becomes a vase, different interpreters may choose to balance the material sources of interpretation somewhat differently, and yet within broad guidelines each represents a legitimate kind of constitutional interpretation, that is, is still a kind of bowl, not a plate or a vase. It should be noted that the intent in this Chapter is not to resolve the question raised by these interpretive differences of which interpretive theory should be adopted by the Court in some ultimate normative sense. Rather, the intent is to focus on the different choices that interpreters confront, to note how different judges in the formalist, Holmesian, instrumentalist, and natural law traditions have resolved these choices in different ways, and to note some strengths and weaknesses of each.

§ 6.2  Treatment of Contemporaneous Sources of Interpretation

§ 6.2.1  Treatment of Text

§ 6.2.1.1  The Debate Between Subjective versus Objective Interpretation of Text

For all judges and all styles of interpretation, the text of the Constitution is the starting point in determining the intention of the framers and ratifiers of the Constitution. As noted at § 5.2.1, there is a debate within constitutional interpretation, as within statutory interpretation, whether text should be given a subjective or an objective interpretation.

The case for subjective interpretation is that it attempts to reflect accurately the actual subjective intent of the drafters of any instrument to be interpreted. That, after all, is what interpretation attempts to do. However, two major criticisms have been leveled against subjective interpretation. First, as stated in its classic form in 1930 by Professor Max Radin, of the University of California-Berkeley School of Law, there is no “single” person whose subjective intent we are endeavoring to discover when interpreting a statute. Applied to constitutional interpretation, the same objection would be that the framers and ratifiers were a large and heterogeneous group, each member of which may have had a different subjective intent. Further, even if one could surmount this problem, there

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2 Max Radin, Statutory Interpretation, 43 Harv. L. Rev. 863, 870-72 (1930).
is the additional problem of how to determine the actual subjective intent of even a single drafter or ratifier. Evidentiary problems with determining internal mental intent pose problems for a subjective theory of interpretation. This is particularly true the farther one moves from the document’s initial drafting, so that the judge does not necessarily share, or have experienced, the contextual background of the drafting.3

While acknowledging such theoretical objections, supporters of subjective interpretation have responded from a pragmatic perspective. In 1930, Harvard University Law School Professor Jerome Landis responded to Radin’s attacks on determining “intent” or “motive.” Professor Landis’ response, as well as Radin’s attack, focused on the problem of determining legislative intent in the context of statutory interpretation. However, as noted above, the same concern exists with the determining the intent of any representative assembly, including the framers and ratifiers of the Constitution. Professor Landis responded:

The assumption that the meaning of a representative assembly attached to the words used in a particular statute is rarely discoverable has little foundation in fact. The records of legislative assemblies, once opened and read with a knowledge of legislative procedure, often reveal the richest kind of evidence. To insist each individual legislator beside his aye vote must also have expressed the meaning he attaches to the bill as a condition precedent to predicting an intent on the part of the legislator, is to disregard the realities of legislative procedure. Through the committee report, the explanation of the committee chairman, and otherwise, a mere expression of assent becomes in reality a concurrence in the expressed views of another. A particular determination thus becomes the common possession of the majority of the legislature, and as such a real discoverable intent.4

More recently, Justice Breyer has responded to a Radin-like attack in similar terms. His comments were again focused on the legislative intent of Congress, but they are equally relevant to determining the intent of the framers and ratifiers of the Constitution. He stated:

Conceptually, however, one can ascribe an “intent” to Congress in enacting the words of a statute if one means “intent” in its, here relevant, sense of “purpose,” rather than sense of “motive.” One often ascribes “group” purposes to group action. A law school raises tuition to obtain money for a new library. A basketball team stalls to run out the clock. A tank corps feints to draw the enemy’s troops away from the main front. Obviously, one of the best ways to find out the purpose of any action taken by a group is to ask some of the group’s members about it. But, this does not necessarily mean that the group’s purposes and the members’ motives or purposes must be identical. The members of the group participating in the group activity – indeed, whose actions are necessary conditions for its action – may have different, private motives for their own actions; but that fact does not necessarily change the proper characterization of the group’s purpose. Perhaps several key members of the faculty voted for the tuition increase in order to please the Dean. Is a better library any the less the object of the

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3  Id.

**law school’s action? . . .** All this is to say that ascribing purposes to groups and institutions is a complex business, and one that is often difficult to describe abstractly. But that fact does not make such ascriptions improper. In practice, we ascribe purposes to group activities all the time without many practical difficulties.5

The second major criticism leveled against subjective interpretation focuses on constitutional grounds. As phrased by Radin, even if legislative intent were knowable, that should not be viewed as having the power to bind courts, because the legislators’ function is not to impose their respective wills, but to pass statutes.6 As phrased more recently by Justice Scalia:

[D]espite frequent statements to the contrary, we do not really look for subjective legislative intent. We look for a sort of “objectified” intent – the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the corpus juris. As Bishop’s old treatise nicely put it, elaborating upon the usual formulation: “[T]he primary object of all rules for interpreting statutes is to ascertain the legislative intent; or, exactly, the meaning which the subject is authorized to understand the legislature intended.” And the reason we adopt this objectified version is, I think, that it is simply incompatible with democratic government, or indeed, even with fair government, to have the meaning of a law determined by what the lawmaker meant, rather than by what the lawgiver promulgated. . . . It is the law that governs, not the intent of the lawgiver.7

Justice Breyer has responded to this critique as follows:

The “statute-is-the-only-law” argument misses the point. No one claims that legislative history [or other evidence of congressional “intent”] is a statute, or even that, in any strong sense, it is “law.” Rather, legislative history [and other evidence] is helpful in trying to understand the meaning of the words that do make up the statute or the “law.”8

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6 Radin, *supra* note 2, at 870-72.


In many cases, of course, practically speaking there will be little difference between the two approaches. Both subjective and objective evidence of the text will support the same interpretation in the case before the court. This is particularly true to the extent that the same sources of meaning are consulted to determine either subjective intent or objective meaning.

For example, Justice Holmes always spoke of searching for objective meaning, not subjective intent. As Holmes noted, “[W]e ask not what this man meant, but what those words mean in the mouth of a normal speaker of English, using them in the circumstances in which they were used.” Justice Felix Frankfurter, a follower of Holmes, similarly noted, “We are not concerned with anything subjective. We do not delve into the minds of the legislators or their draftsmen, or committee members... Legislation has its aim. ... That aim, that policy is... evinced in the language of the statute, as read in light of other external manifestations of purpose.” However, as discussed at § 10.2.1.3 nn.19-22, despite this view both Justices Holmes and Frankfurter welcomed use of legislative history to determine the meaning of a statute, an approach more consistent with a concern about the subjective intent of the drafters, rather than a pure objective approach to the words’ meaning. Thus, in practice, the Holmesian approach to interpretation follows more closely the Landis/Breyer approach to interpretation stated above rather than the Radin/Scalia approach. As a matter of terminology, this approach can be denominated a “practical objective” approach toward determining the drafters’ purpose, rather than the “pure objective” approach of Radin and Scalia.

Reflecting the natural law concern with the drafters’ purposes in interpreting documents, discussed at § 3.4 nn.88-91, interpretation at traditional common law reflected the Holmesian/Landis/Breyer practical, objective focus on purpose, although, as discussed at § 6.2.3.1, the weight of the evidence suggests that legislative history was inappropriate for the court to consider at traditional common law. Professor Leslie Goldstein has observed that for Chief Justice Marshall, and most judges in the founding era, the “intent” of the Constitution was not the subjective “intent” of the minds of the framers, but rather the “intent” gleaned from applying traditional modes of interpretation and canons of construction to the document’s text. Similarly, with respect to issues like contract interpretation, judges followed a practical, objective approach to determining issues of offer and acceptance.

In the 19th century, Immanuel Kant’s “will theory” provided the intellectual backdrop to issues of interpretation. As Justice Holmes remarked in 1897, “To an imagination of any scope the most far-reaching form of power is not money, it is the command of ideas. ... Read the works of the great...

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German jurists, and see how much more the world is governed today by Kant than by Bonaparte.”¹³
From Kant’s perspective, the individual’s will was critical, and thus the subjective theory rose in
prominence. This happened for common-law, statutory, and constitutional interpretation with the
rise of the formalist era’s “deductive reasoning reminiscent of Enlightenment rationalism.”¹⁴

For example, in contract cases during the 19th century, there was an increased use of subjective “will
theory” rhetoric, including the so-called “meeting of the minds” approach to contract formation.¹⁵
This subjective approach to contract formation completely triumphed in some countries, like France,
where the Enlightenment rationalist approach, based not only on Kant but also on Rousseau, was
stronger.¹⁶ In the Slaughter-House Cases,¹⁷ which ushered in the formalist era on the Supreme Court
in 1873, the Court focused more on the subjective intent of the framers and ratifiers of the 14th
Amendment, rather than the traditional common-law modes of interpretation. The Court asked,
“Was it the purpose of the fourteenth amendment . . . to transfer the security and protection of all
the civil rights which we have mentioned, from the States to the Federal government . . . [T]hese
consequences are so serious, . . . so great a departure from the structure and spirit of our institutions
[that w]e are convinced that no such results were intended by the Congress which proposed these
amendments, nor by the legislatures of the States which ratified them.”

This subjective interpretation approach “reminiscent of Enlightenment rationalism” differs from the
traditional common-law style of reasoning of Chief Justice Marshall and most courts of the founding
era, as noted above at § 6.2.1.1 n.11. It also differs from modern approaches to constitutional
interpretation that have predominated since 1937.¹⁸ However, such a traditional formalist approach,
grounded in the search for the specific, subjective intent of the drafter, did reflect Thomas
Jefferson’s approach to constitutional interpretation, as discussed at § 7.1, and has continued to be
supported by some contemporary formalist commentators, like Raoul Berger, as discussed at § 9.3.4.

In the 20th century, the critiques of subjective interpretation have been viewed more strongly. Some
critics have adopted a strong rejection of anything subjective, as indicated in the “pure objective”
approach of Max Radin and Justice Scalia, which reflects a modern formalist approach to issues of
interpretation, as discussed at § 9.2.1.1. A more practical critique of subjective interpretation is
reflected in Justice Breyer’s quote above, where he indicated that defenders of some consideration
of subjective intent in interpretation have moved away from legislative “motive” toward the more
practical objective search for legislative “purpose,” the approach of courts at traditional common

¹³ Oliver Wendell Holmes, Jr., The Path of the Law, 10 Harv. L. Rev. 457, 478 (1897).
¹⁵ Perillo, supra note 12, at 429-32.
¹⁶ Id. at 430.
¹⁷ 83 U.S. (16 Wall.) 36, 77-78 (1873). See also Hans v. Louisiana, 134 U.S. 1, 15 (1890)
(focus on subjective intent, asking “can we imagine that it would have been adopted by the States”).
¹⁸ See generally Powell, supra note 14, at 88-173.

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law. Professor Perillo noted the same dynamic in the context of contract interpretation, stating that even when the courts in the 19th century spoke of the subjective theory, in practice they often still focused on practical objective evidence of intent. While the “pure objective” approach of Radin and Scalia is not the majority approach today, a majority of judges have opted for the “practical objective” approach to interpretation represented by Breyer, Landis, and Holmes. As stated by Professor John Kernochan, in the context of an article about statutory interpretation:

Some scholars prefer to abandon the concept of intent and to substitute an “objective” concept of legislative purpose so as to avoid the suggestions of subjective design thought to inhere in the term “intent.” In this latter view, purpose is to be elicited from the Act and its context, not from the minds of legislators. But intent is a concept which has historically been used and is still in use in the courts. It is viable if it is steadily recognized that intent must be related to the enacted words of the statute, that one must be on guard as to the attenuated sense of the term when foresight is limited or nonexistent, and that aside from judicial notice of pertinent social facts, it is generally to be established from the text and documented context. Whichever rubric is adopted – legislative intent or “objective” purpose – the role of the legislature’s purpose, as far as we can establish it, is preeminent. In the end, if the problems are understood and articulated, the difference in these rubrics does not seem to be one of overriding importance.

In contract interpretation, this practical objective approach has also triumphed. As Professor Perillo has noted, “At the turn of the twenty-first century, although the objective theory still dominates, subjective elements are more freely considered.” Justice Scalia complaints about contemporary constitutional interpretation also reflect majority rejection of his “pure objective” approach there.

As Professor Kernochan indicated, the debate between subjective versus objective approaches to interpretation may make little difference in practice. In most cases, subjective focus on the interpretive community of the framers and ratifiers, or objective focus on the text adopted from the perspective of a reasonable person, will yield similar results, particularly to the extent the framers and ratifiers were reasonable people and used words in that way. Reflecting a similar view about constitutional interpretation, Justice Scalia has acknowledged, “But the Great Divide with regard to constitutional interpretation is not that between Framers’ intent and objective meaning, but rather between original meaning (whether derived from Framers’ intent or not) and current meaning.” This is the issue on whether to adopt a “static” or “living” model for constitutional interpretation, discussed at §§ 6.3.1-6.3.2 & 6.3.4. The other contemporary critical debates regarding constitutional

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19 See Perillo, supra note 12, at 432-35.


22 See Scalia, supra note 7, at 17-20.

23 Id. at 38.
or statutory meaning turn on whether two sources of meaning are ever appropriate to consider in the act of interpretation: constitutional or legislative history, discussed at § 6.2.3.1, and social practice, discussed at § 6.3.3.

§ 6.2.1.2 \textbf{The Debate Between Literal and Purposive Interpretation of Text}\n
In considering constitutional text, as in considering statutory text, a judge must decide whether to read the text only literally, and thus risk missing the spirit, or purpose, behind why the text was adopted, or whether to interpret the provision in light of both its letter and spirit. Judge Learned Hand once wrote that there is "no surer way" to misread a document than "to read it literally."\textsuperscript{24} Justice Holmes wrote, "[T]he general purpose is a more important aid to the meaning than any rule which grammar or formal logic may lay down."\textsuperscript{25} Professor Lon Fuller once asked, "[I]s it really ever possible to interpret a word in a statute without knowing the aim of the statute?"\textsuperscript{26} On the other hand, it has been noted that purposes are elusive, and that judges may see purposes in text that reflect the judge's own views, rather than the views of the drafters. As Justice Kennedy stated in \textit{Public Citizen v. United States Department of Justice},\textsuperscript{27} "The problem with spirits is that they tend to reflect less the views of the world whence they come than the views of those who seek their advice."

Skepticism with use of purposes to help determine the drafters' intent appears most prominently among formalist jurists. Formalists are most concerned that attempting to determine a provision's purpose, or purposes, is not a clear, mechanical process that can yield unambiguous results.\textsuperscript{28} For this reason, many formalist jurists will consider arguments of purpose only if the provision's literal meaning is either ambiguous or absurd.\textsuperscript{29} In such a case, since consideration of literal meaning alone has failed to produce an adequate result, resort to arguments of purpose become justified.

A different concern with purposes is that purposes not be used to override clear text. Placed in context, this is the specific concern of the sentence quoted above from \textit{Public Citizen}. In \textit{Public Citizen},\textsuperscript{30} Justice Kennedy objected to cases where "the Court overrode the plain language, drawing

\begin{itemize}
  \item \textsuperscript{24} Guiseppi v. Walling, 144 F.2d 608, 624 (2d Cir. 1944) (Hand, J., opinion).
  \item \textsuperscript{25} United States v. Whitridge, 197 U.S. 135, 143 (1905) (Holmes, J., for the Court).
  \item \textsuperscript{26} Lon Fuller, \textit{Positivism and Fidelity to Law – A Reply to Professor Hart}, 71 Harv. L. Rev. 630, 664 (1958).
  \item \textsuperscript{27} 491 U.S. 440, 473 (1989) (Kennedy, J., joined by Rehnquist, C.J., and O'Connor, J., concurring).
  \item \textsuperscript{28} See generally Frederick Schauer, \textit{Formalism}, 97 Yale L.J. 509, 532-34 (1988).
  \item \textsuperscript{29} See generally Nicholas S. Zeppos, \textit{Justice Scalia’s Textualism: The “New” New Legal Process}, 12 Cardozo L. Rev. 1597, 1627 (1991), and sources cited therein.
  \item \textsuperscript{30} 491 U.S. at 474.
\end{itemize}
instead on the background and purpose of the statute” to reach a different result. This concern is shared not only by formalist judges, but is typical also of a natural law approach, as discussed below with respect to Justice Story’s and William Blackstone’s views on not allowing the spirit or purpose of a text to override clear textual meaning, and a Holmesian approach, as discussed below with respect to Judge Learned Hand’s and Justice Felix Frankfurter’s views on purposes and legislative history not being used to override clear textual meaning. Thus, it is not surprising that Chief Justice Rehnquist and Justice O’Connor joined in Justice Kennedy’s concurrence in Public Citizen.

Once the spirit or purposes of a constitutional provision are determined, the judge must decide to what extent these purposes will be allowed to override the literal meaning of the text when conflicts arise. Factors which might be relevant in making this determination include the clarity of the textual language (the more clear the language, the more weight it is given); how much conflict exists between the letter and spirit of the provision (a clear conflict between letter and spirit suggests either that the language’s text was not well-drafted or the judge has misidentified the provision's purposes); and does the literal meaning trample on fundamental rights otherwise protected (suggesting that the literal meaning is not well-drafted, given the commitment to protect the fundamental right).

In terms of the theories of interpretation prevalent when the Constitution was drafted, Professor Crosskey noted in his book Politics and the Constitution, “[T]he over-all purpose of a document was stated carefully in general terms; details were put in, only where, for some particular reason, details seem required; and the rest was left to the rules of interpretation customarily followed by the courts. [This mode of interpretation was] calculated to give a just and well-rounded interpretation to every document, in the light of its declared general purpose; or, if its purpose is not declared, then, in light of its apparent purpose, so far as this could be discovered. . . . ’[T]he reason and spirit [of a law]; or the cause which moved the legislator to enact it’ – it is, says Blackstone, ‘the most universal and effectual way of discovering the true meaning of a law, when the words are dubious.’” Blackstone’s caveat, however, is important to remember. If the words are not “dubious,” the words themselves, and not the law’s reason or spirit, are the most “effectual way” to determine meaning.

In his 1833 book Commentaries on the Constitution of the United States, Justice Story similarly reflected this balanced approach toward literal versus purposive interpretation. He noted, "No construction of a given power is to be allowed, which plainly defeats, or impairs its avowed objects. . . . This rule results from the dictates of mere common sense; for every instrument ought to be so construed, ut [res] magis valeat, quam pereat [so that the venture at hand may succeed, not fail]."

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32 William Crosskey, Politics and the Constitution 363-66 (1953). While certain aspects of Professor Crosskey’s constitutional critique were controversial at the time of publication, and remain so today, see Robert C. Power, The Textualist: A Review of the Constitution of 1787: A Commentary, 84 Nw. U. L. Rev. 711, 713-16 (1990), and sources cited therein, Professor Crosskey’s summary of the natural law theory of interpretation, cited here, is not particularly controversial.

33 Joseph Story, Commentaries on the Constitution of the United States § 428 (1833).
Further, Story stated, "While, then, we may resort to the meaning of single words to assist our inquiries, we should never forget, that it is an instrument of government we are to construe; and, as has been already stated, that must be the truest exposition, which best harmonizes with its design, its objects, and its general structure." On the other hand, as Story noted, "It has been observed with great correctness, that although the spirit of an instrument, especially of a constitution, is to be respected not less than its letter; yet the spirit is to be collected chiefly from the letter. It would be dangerous in the extreme, to infer from extrinsic circumstances, that a case, for which the words of an instrument expressly provide, shall be exempted from its operation."

Holmesian jurist Judge Learned Hand made a similar point about considering background purposes in constitutional interpretation in his 1958 Oliver Wendell Holmes, Jr. Lecture at Harvard. He stated, “For centuries it has been an accepted canon of interpretation of documents to interpolate into the text such provisions, though not expressed, as are essential to prevent the defeat of the venture at hand [ut res magis valeat quam pereat]; and this applies with especial force to the interpretation of constitutions, which, since they are designed to cover a great multitude of necessarily unforeseen occasions, must be cast in general language, unless they are constantly amended.” Holmesian jurist Justice Felix Frankfurter described the interpretation theory of Holmes under the headings “Proliferation of Purpose” and “Search for Purpose,” while simultaneously noting that courts should only use such evidence of purpose, or evidence of legislative history, to advance the intent of the drafters of a document, not to enlarge or narrow it. As Justice Frankfurter stated, “While courts are no longer confined to the language, they are still confined by it.”

The Supreme Court addressed this approach toward interpretation in a number of early 19th-century cases. For example, in the famous and important case of McCulloch v. Maryland, Chief Justice Marshall stated, "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. . . . 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." Similarly, Justice Story stated in Martin v. Hunter's Lessee,40 "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." In the famous case of Gibbons v. Ogden,41 the Court also relied on the purposes behind adoption of the Commerce Clause. The Court stated, "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."

This natural law and Holmesian resort to arguments of purpose in every case, with the caveat that purposes should not be allowed to override clear, textual commands of the Constitution or a statute, is the majority approach in the courts today.42 Any formalist-inspired limitation on resorting to arguments of purpose only if the literal, or plain, meaning of the text is ambiguous or absurd, discussed at § 9.2.1.1, is not the current majority approach. Equally, any instrumentalist view that purpose can override clear textual meaning, particularly if the purpose is supported by background principles or policies embedded in the law, discussed at § 11.2.1.1, is not part of the current majority approach either. Even more so, any “radical” instrumentalist or “Platonic Guardian” natural law view, noted at § 3.3 nn.57-58, whose radicalism might suggest that arguments of purpose should trump clear constitutional or statutory text if that would advance arguments of justice or sound social policy that are not even embedded in the law, is naturally no part of the current majority approach.

§ 6.2.2 Treatment of Context

Context refers to material associated with a text, including the general background structures that surround the text’s drafting and ratification. The structures traditionally recognized as being critical to the Constitution’s drafting and ratification are judicial review, federalism, separation of powers, and checks and balances. All judges have at some time consulted context. The basic question is whether to give context a restrictive or receptive use.

§ 6.2.2.1 Treatment of Context: Restrictive versus Receptive Use

Any interpreter must decide whether to give arguments of context a restrictive or receptive use. The differences among judges relate to relative weight, particularly with respect to use of the various verbal and policy maxims of construction that were noted at § 5.2.2.1.

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40 14 U.S. (1 Wheat.) 304, 326 (1816).
41 22 U.S. (9 Wheat.) 1, 190 (1824).
42 See generally § 6.2.3.1 nn.77-90.
An example of receptive use of context appears in Justice Story’s *Commentaries on the Constitution of the United States*. He stated, "In construing the constitution . . ., we are, in the first instance, to consider, what are its nature and objects, its scope and design, as apparent from the structure of the instrument, viewed as a whole, and also viewed in its component parts." Even those receptive to contextual interpretation, however, recognize limitations on its use. For example, the view that verbal maxims of construction must be used cautiously is an old, traditional view of the common law. As Justice Story reminded us, while "[t]hese maxims, rightly understood, and rightly applied, undoubtedly furnish safe guides to assist us in the task of exposition . . . they are susceptible of being applied, and indeed are often ingeniously applied, to the subversion of the text, and the objects of the instrument." As with verbal maxims, policy maxims are also mere rules of thumb that can be overridden by other considerations.

While most judges fully embrace contextual review, some judges, notably formalists, may minimize elements of context, particularly policy maxims, on grounds of promoting certainty and predictability in the law. For example, Justice Scalia has questioned the value of the policy maxim that remedial statutes are to be liberally construed on grounds that determining what non-penal statutes are sufficiently “remedial” for purposes of this maxim of construction is indeterminate. Focusing on the problem of indeterminacy more generally, Justice Scalia has noted:

> How “narrow” is the narrow construction that certain types of statute are to be accorded; how clear does a broader intent have to be in order to escape it? Every statute that comes into litigation is to some degree “ambiguous”; how ambiguous does ambiguity have to be before the rule of lenity or the rule in favor of Indians applies? How implausible an implausibility can be justified by the “liberal construction” that is supposed to be accorded remedial statutes? And how clear is an “unmistakably clear” statement? . . . [T]hese artificial rules increase the unpredictability, if not the arbitrariness, of judicial decisions.

[Nevertheless, Justice Scalia does acknowledge:] Perhaps for some of the rules the price is worth it. There are worse things than unpredictability and occasional arbitrariness. Perhaps they are a fair price to pay for preservation of the principle that one should not be criminally liable for an act that is not clearly prescribed; or the principle that federal interference with state sovereign immunity is an extraordinary intrusion.

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43 Story, supra note 33, § 405.

44 Id. § 448.


47 Scalia, supra note 7, at 28.
Even judges who embrace contextual interpretation recognize that the farther one moves from specific interpretive tasks to engage in more general interpretive reasoning, contextual interpretation becomes more problematic. As Professor Reed Dickerson noted, “Despite the importance of context, however, the document remains central, because it is the main instrumentality that the author relies on to carry his message. . . . Under normal circumstances, nothing else has equal dignity or significance in marking out the content of his communication. At best, context plays a supporting, subordinate role.”

As with the debate between text and purpose, the intent here is not to resolve questions regarding when, or how much, weight should be given to various elements of context, including verbal and policy maxims. Rather, the intent is to note that such considerations have always played a part in constitutional interpretation, and different judges are more or less receptive to such use.

§ 6.2.2.2 Treatment of Judicial Review

With respect to the Constitution, the Supreme Court has asserted explicitly a power of authoritative interpretation since 1803 in Marbury v. Madison, discussed at § 17.1.2.1. The existence of that structural feature immediately raises the question of what degree of deference the Court might give, during judicial review, to the actions and views of other departments of government.

For more than a century after Marbury, the Court took the view that courts should be willing to rule that certain governmental action was unconstitutional if the Court concluded that the other sources of meaning supported that finding. There was no policy of any special deference to legislative or executive action. For example, in Dred Scott v. Sandford, toward the end of the natural law period in 1857, the Court approached the constitutionality of the Missouri Compromise regarding slavery without giving any special deference to Congress, as discussed at § 25.1 text following n.13. During the formalist era, the Court routinely struck down legislative attempts to regulate economic matters under the doctrine of Lochner v. New York, as discussed at § 27.3.2.1. On the other hand, during this time the courts did not take the view that they had a special role in protecting certain kinds of constitutional rights that called for a special interpretive technique when considering these rights. They applied the same approach toward judicial review to any constitutional provision.

This remains the basis of the formalist and natural law approach today, as discussed at §§ 9.2.2.2 & 12.2.2.2. For example, after quoting Chief Justice Marshall’s admonition in McCulloch v. Maryland regarding constitutional interpretation and deducing “objects” from constitutional text, cited above at § 6.2.1.2 n.39, Justice Scalia continued in his book, A Matter of Interpretation, supra note 7, at 37-38.
“[T]he context of the Constitution tells us not to expect nit-picking detail, and to give words and phrases an expansive rather than narrow interpretation – though not an interpretation that the language will not bear. . . . [This] is not strict construction, but it is reasonable construction.”

The flaws represented by the specific decisions of the Court in *Dred Scott*, and later in *Lochner v. New York*, did call into question for some judges and commentators the general interpretive technique of the natural law and formalist courts regarding judicial review. For example, as noted at § 5.2.2.2.A n.50, in 1893 Professor Thayer took the view that courts should defer to governmental action out of respect for the other branches of the federal government, or out of respect for state governments, unless the unconstitutionality of the governmental action is "so clear that it is not open to rational question." Under this approach, only if contemporaneous sources and subsequent events clearly indicate that the government's action is unconstitutional – rather than merely on balance leading to that conclusion – should the Court find the governmental action unconstitutional.

This approach, warmly embraced by Holmes and other Holmesian jurists, was the basis for Justice Holmes’ dissent in *Lochner*, and Holmes’ repeated dissents in later formalist-era cases which followed *Lochner*, discussed at § 27.3.2.1, and dissents by Holmes in formalist-era cases limiting Congress’ power to regulate under the Commerce Clause, discussed at § 18.2.2. An approach related to Thayer’s, but slightly less deferential to the other branches of government, counsels judges to exercise caution and restraint in deciding cases. This approach is reflected in Justice Brandies’ opinion for the Court in *Ashwander v. Tennessee Valley Authority*, discussed at § 17.1.3.2. This latter approach reflects a moderate version of Holmesian decisionmaking, as opposed to the more extreme Holmesian deference to government represented by the approach of Thayer. Some version of this Holmesian deference represented the approach of a majority of Justices on the Supreme Court between 1937-1954, as discussed at § 14.2.3.

At the other extreme from this posture of judicial deference, a judge might conclude that courts have a special role to play in our democratic system in protecting certain kinds of constitutional rights. For example, as discussed § 5.2.2.2.A, some judges may believe that courts have special obligations to provide extra protection for the disadvantaged or unempowered in society. Other judges may believe that courts have special obligations regarding protecting individuals' civil rights or civil liberties. This is the approach adopted by most instrumentalist jurists, who perceived flaws in the Holmesian deference-to-government approach when applied to issues of civil rights and civil liberties. As a reaction against Holmesian deference, this approach predominated on the Court between 1954-86, as discussed at §§ 11.2.2.2 & 14.2.4.

As discussed at § 14.2.5, a reaction against this kind of instrumentalist judicial activism has resulted in a majority of the Supreme Court returning to either a natural law, Holmesian, or formalist approach toward judicial review in the years following 1986.


§ 6.2.2.3 Treatment of Federalism

With regard to federalism, a judge must consider the relative power of the federal government versus the power of state governments in our constitutional system. Some judges in our history have tended to have a "states' rights" orientation. They have pointed to the 10th Amendment’s reservation of power to the states and other provisions in the Constitution that recognize the existence and power of states. This approach is reflected in *National League of Cities v. Usery*, 55 where a 5-4 Court held in 1976 that Congress could not apply federal wage and hour provisions to state employees. Other judges have been oriented toward viewing the Constitution as sanctioning stronger federal power. They note that the 10th Amendment reserves to the states or the people only those powers not delegated to the federal government. Thus, if the power is delegated, no 10th Amendment challenge should be possible. In this view, the states are adequately protected from excessive federal power by such structural features as the composition of Congress, with two Senators from each state and House of Representative members elected on a state by state basis, and the power of Governors to lobby Congress on matters of state concern. This approach is reflected in *Garcia v. San Antonio Metropolitan Transit Authority*, 56 which in 1985 overruled *National League of Cities v. Usery*. As detailed at §§ 18.4.1-18.4.5, the Supreme Court has had a wavering line of authority on this matter.

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 and civil rights legislation, as part of a conservative pro-business and conservative pro-traditional right 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.

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. 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. This trend was dramatically emphasized in the presidential election in 2000, with the Democratic candidate, Vice-President Al Gore, winning most of the Northern and Pacific states that formed the base of President Abraham Lincoln’s election as

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a Republican in 1860, while the Republican candidate, Governor George W. Bush, won most of the Southern and Western States, that were the base of the Democratic Party in 1860. As reflected at §§ 17.2.4.2-17.2.4.3 regarding 11th Amendment state sovereign immunity doctrine, and Chapter 18 on federalism issues generally, since the 1960s conservative judges, typically Republican, more often have favored states’ rights than liberal judges, typically Democrats, who have favored federal power.

§ 6.2.2.4 Treatment of Separation of Powers and Checks and Balances

With regard to separation of powers, a judge must ask whether the framers and ratifiers adopted a strict separation of powers approach, or whether they adopted a constitution that focuses more on sharing of powers and checks and balances. In an opinion joined by all Justices on the Court except Justice Scalia, Justice Blackmun wrote in *Mistretta v. United States*:

In applying the principle of separated powers in our jurisprudence, we have sought to give life to Madison’s view of the appropriate relationship among the three coequal Branches. Accordingly, we have recognized, as Madison admonished at the founding, that while our Constitution mandates that ‘each of the three general departments of government [must remain] entirely free from the control or coercive influence, direct or indirect, of either of the others,’ *Humphrey’s Executor v. United States*, 295 U.S. 602, 629 (1935), the Framers did not require – and indeed rejected – the notion that the three Branches must be entirely separate and distinct.

... In adopting this flexible understanding of separation of powers, we simply have recognized Madison’s teaching that the greatest security against tyranny – the accumulation of excessive authority in a single branch – lies not in hermetic division between the Branches, but in a carefully crafted system of checked and balanced power within each Branch.57

Additional Court opinions, as well as the opinions of most commentators, have supported this view that the framers and ratifiers adopted a sharing of powers approach to the issue of checks and balances.58 For example, as Justice Kennedy has noted, “This is not to say that each of the three Branches of government must be entirely separate and distinct, for that is not the governmental structure of checks and balances established by the Framers.”59 In contrast, as commentators have noted, a formalist approach, focused more on the literal text of the Constitution and developing “bright-line rules” to foster “restraint in judging,” and less on purpose, context, and history, is likely to adopt more of a strict separation of powers approach.60 The text of the Constitution provides in


Article I, § 1, “All legislative Powers herein granted shall be vested in a Congress of the United States”; Article II, § 1, “The executive Power shall be vested in a President of the United States of America”; and Article III, § 1, “The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.” Thus, dissenting from the Court’s adoption of a sharing of powers approach in Morrison v. Olsen, Justice Scalia stated, “[The majority’s opinion] is not analysis; it is ad hoc judgment. And it fails to explain why it is not true – as the text of the Constitution seems to require, . . . all purely executive power must be under the control of the President.” This difference between these two approaches to separation of powers issues is explored at §§ 19.1-19.2 & 19.4.

A second 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. This aspect of separation of powers doctrine is explored in terms of Court decisions at § 19.3 nn.35-36.

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.

§ 6.2.3 Treatment of History

§ 6.2.3.1 Legislative History versus Other Historical Sources

As noted at § 5.2.3.2, any interpreter must decide which historical sources to use: (1) legislative history of the provision in question, like notes of the Constitutional Convention, records of state


ratifying conventions, or House or Senate statements made during consideration of constitutional amendments; (2) thoughtful contemporaneous statements during ratification of the Constitution, like The Federalist Papers; (3) existing legislative and executive practice, and existing judicial precedents, at the time the provision was drafted and ratified, mostly in the United States, but also English practice and precedent, to the extent history suggests that the English experience is relevant to understanding the choices made by the framers and ratifiers; and (4) other typical sources of historical inquiry (evidence of general social practice on a particular issue, newspaper accounts, statements of respected organizations, reliable evidence of public opinion generally, etc.).

Sources (2) and (3) listed above are routinely viewed by judges as appropriate to use. For example, as noted at § 5.2.3.2 n.68, even in the context of criticizing the use of legislative history, Justice Scalia embraced use of The Federalist Papers to help guide constitutional interpretation. 63 With regard to legislative history, source (1) listed above, most commentators have stated that in the late 18th and early 19th century the prevailing mode of interpretation, in both England and the United States, was that the legislative history of a provision should not be considered in determining its meaning. Thus, notes of the Constitutional Convention, or statements made on the floor of the Congress while considering constitutional amendments, were not proper to consider, while contemporaneous statements about the meaning of the Constitution, like The Federalist Papers, were proper to consider. 64 There is some evidence, however, that traditional common law courts in England and courts in the early post-revolutionary period in the United States did rely, to some extent, on drafting history, as did the First Congress in debating issues of constitutional power. 65

All commentators agree, however, that any limitation on using documents like notes of the Constitutional Convention gradually died out during the 19th century in America. Thus, notes of the Constitutional Convention, or House or Senate statements about amendments, became proper to use as history to determine the framers and ratifiers' intent during the second half of the 19th century. 66 This use likely reflects the increased prominence during the 19th century of Kant’s subjective “will theory” of interpretation, discussed at § 6.2.1.1 nn.13-18, and thus resort to materials of legislative or constitutional history to determine better the framers and ratifiers’ actual subjective intent.


66 See Baade, supra note 64, at 1043-62.
The “practical objective” approach of the 20th century in America, discussed at § 6.2.1.1, agrees with this use of material intrinsic to drafting. As stated in the famous 1940 statutory interpretation case of United States v. American Trucking Associations, Inc.,67 "When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'" Indeed, even the English rule has been modified to permit limited use of “statements by a minister or other proponent of the bill” where “the legislative language is ambiguous or obscure, or if it would lead to an absurd result.”68

During the 1950s, Justice Jackson questioned the result in American Trucking in his concurring opinion in Schwegmann Bros. v. Calvert Distillers Corp.69 He supported an approach reflected in the modified English rule cited above. In a case focused on statutory interpretation, he stated:

Resort to legislative history is only justified where the face of the Act is inescapably ambiguous, and then I think we should not go beyond Committee reports, which presumably are well considered and carefully prepared. . . . [T]o select casual statements from floor debates, not always distinguished for candor or accuracy, as a basis for making up our minds what law Congress intended is to substitute ourselves for the Congress in one of its most important functions. . . . It is the business of Congress to sum up its own debates in its legislation. . . .

Moreover, there are practical reasons why we should accept whenever possible the meaning which an enactment reveals on its face. Laws are intended for all our people to live by; and the people go to law offices to learn what their rights under those laws are. Here is a controversy which affects every little merchant in many States. Aside from a few offices in the larger cities, the materials of legislative history are not available to the lawyer who can afford neither the cost of acquisition, the cost of housing, or the cost of repeatedly examining the whole congressional history. Moreover, even if he could, he would not know any way of anticipating what would impress enough members of the Court to be controlling.70

During his service on the Court, Justice Jackson’s critique of legislative history was not adopted by a majority of the Court, or a majority of commentators. A sample response was as follows:

[Justice Jackson’s argument represents] a neat bundle of specious reasoning. The first [few] sentences are an argument that statutory clarity is preferable to judicial resort to legislative history. Of course it is. But the court that is confronted with an unclear statute cannot choose between statutory clarity and the use of legislative history; the choice having to do with legislative history is to use it or to guess about legislative intent.

67 310 U.S. 534, 543-44 (1940).


70 Id. at 395-97.
Even if the time and energy of counsel and of judges is in some cases expended on legislative history that fails to throw useful light on specific issues, the pursuit is not wholly wasted. Throughout the English-speaking world during the present century, dissatisfaction has often been expressed about the inadequate understanding by judges of social purposes behind major enactments. Can it be that the judges . . . of the United States, by reason of frequent resort to legislative histories, have benefitted in some measure, even when the particular legislative history has been found unhelpful on the immediate problem? Does extensive use of legislative history force the judges to keep in closer touch with democratic desires?  

Of course, the practical problems mentioned by Justice Jackson are less acute for constitutional interpretation than for statutory interpretation. The number of such sources are relatively limited to sources like notes of the Constitutional Convention, records of state ratifying conventions, and House or Senate statements made during consideration of constitutional amendments. Particularly today, such sources are more readily available to attorneys in small and large offices alike, with many accessible through the Internet. Even for statutory interpretation issues, Internet searches have the capacity to make legislative history materials more readily available than in the past, though the cost of such access, if access is limited to fee-based services such as Westlaw or Lexis, may still pose problems for small law firms, solo practitioners, and members of the general public.

Justice Scalia's appointment to the Supreme Court in 1986 reinvigorated questioning the use of legislative history, in both statutory and constitutional cases. Justice Scalia has stated, “My view that the objective indication of the words, rather than the intent of the legislature, is what constitutes the law leads me, of course, to the conclusion that legislative history should not be used as an authoritative indication of a statute’s meaning.” Under this approach, interpretation should focus on the plain meaning of text, augmented by consideration of the text of related provisions, traditional maxims of statutory construction, plus any objective historical evidence of meaning, such as for the Constitution, The Federalist Papers. In its most extreme form, this view suggests that use of legislative history is unconstitutional, as it gives effect to statements by congressional committees or statements on the floor by individual legislators, not Congress as a whole.

During the 1980s, Justice Scalia's “New Textualism” approach gained some support, particularly among Chief Justice Rehnquist and Justices O'Connor and Kennedy, although their support was not


72 Scalia, supra note 7, at 29-30.


During the 1990s, Justice Thomas also indicated support for the New Textualism model of interpretation.75 During the 1990s, however, support waned on the Court for Justice Scalia's New Textualism model of interpretation. Only Justice Thomas remained a consistently faithful ally.77 Justices Stevens, Souter, Ginsburg, and Breyer clearly rejected the New Textualism model of interpretation.78 Although initially sympathetic to Justice Scalia's approach, Chief Justice Rehnquist, and Justices O'Connor and Kennedy, typically rejected it as well.79 The one limitation on this rejection may be for cases where the statutory or constitutional text is crystal clear. Just as natural law and Holmesian judges are reluctant to let arguments of purpose override clear text, discussed at § 6.2.1.2 nn.30-42,


77 See, e.g., Holder v. Hall, 512 U.S. 874, 932-35 & n.28 (1994) (Thomas, J., joined by Scalia, J., concurring) (criticizing use of legislative history and citing with approval Justice Jackson's admonition that "[r]esort to legislative history is only justified when the face of the [statute] is inescapably ambiguous."); United States v. Carlton, 512 U.S. 26, 39 (1994) (Scalia, J., joined by Thomas, J., concurring) ("The Court attempts to minimize the amendment's harshness . . . , quoting some post-amendment legislative history (another oxymoron) to show that despite the uncontested plain meaning of the statute, Congress never meant it to apply . . . .")

78 See, e.g., Holly Farms Corp. v. NLRB, 517 U.S. 392, 399 & n.6 (1996) (Ginsburg, J., for the Court) (legislative purpose and legislative history critical in making sure statutory exemptions are not "expansively interpreted" contrary to legislative intent); Bank One Chicago N.A. v. Midwest Bank & Trust Co., 516 U.S. 264, 276-77 (1996) (Stevens, J., joined by Breyer, J., concurring) (legislative history is "useful to conscientious and disinterested judges trying to understand the statute's meaning"); American National Red Cross v. S.G., 505 U.S. 247, 252-64 (1992) (Souter, J., for the Court) (precedent, purpose, and legislative history used to augment the ordinary meaning).

they are reluctant to let legislative history “cloud” a text that is “clear.”

Currently, a majority of the Court seems to follow an approach to the use of legislative history sketched out by Justice Breyer. Under that approach, literal text, purpose, context, and precedent are all initially considered. Legislative history may be used to move beyond literal interpretation of a text and to aid consideration of purpose. Prudential considerations can be used as long as they reflect aspects of text, context, history, practice, and precedent, and are not an attempt by the judge to impose the judge’s own sense of justice or sound social policy in the decision. Legislative history is particularly useful, Justice Breyer has noted, in five kinds of cases: "(1) avoiding an absurd result; (2) preventing the law from turning on a drafting error; (3) understanding the meaning of specialized terms; (4) understanding the 'reasonable purpose' a provision might serve; and (5) choosing among several possible 'reasonable purposes for language in a politically controversial law.'”

This approach also permits use of executive or administrative agency practice to help guide interpretation of a provision. This is supported by *Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc.*, which held that the Court will defer to a reasonable construction of a statute by the agency charged with its implementation if the statute is “silent or ambiguous,” although such construction will not overcome the “expressed intent of Congress.” It is also supported by *Auer v. Robbins*, which held that an administrative rule may receive substantial deference if it interprets the issuing agency's own ambiguous regulation. As discussed at § 9.2.2.1 nn.48-51, the principle of *Chevron* deference is limited by *United States v. Mead Corp.*, citing *Skidmore v. Swift & Co.*, where the Court said that *Chevron* deference applies only when the agency has been delegated authority by Congress to make rules of law.

Justice O'Connor's opinion in *Bailey v. United States* represents a good example of this approach. In the context of a statutory interpretation case, Justice O'Connor noted, “We start, as we must, with the language of the statute. . . . We consider not only the bare meaning of the word but also its

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See e.g., O'Neal v. McAninch, 513 U.S. 432, 437, 441-43 (1995) (Breyer, J., for the Court) (after considering text and context, the opinion continued, "First, precedent supports our conclusion. . . . Second, our conclusion is consistent with . . . basic purposes. . . . [O]ur rule has . . . administrative virtues [which] are not determinative, but offer a practical caution against a legal rule that, in respect to precedent and purpose, would run against the judicial grain."); Milwaukee Brewery Workers' Pension Plan v. Jos. Schlitz Brewing Co., 513 U.S. 414, 416, 425-31 (1995) (Breyer, J., for the Court) (reliance on statutory text, purpose, and legislative history to interpret the statute).

Breyer, supra note 5, at 861.


519 U.S. 452, 461-64 (1997).

placement and purpose in the statutory scheme. ‘The meaning of statutory language, plain or not, depends on context.’ ... [C]anon[s] of construction [are also used]. ... The amendment's [legislative] history ... casts further light on Congress' intended meaning."

If statutory text is clear, however, a 5-4 majority of the Court held in 2005 in Exxon Mobil Corp. v. Allapattah Services, Inc. that legislative history should not be consulted at all. This occurred over the dissents of Justices Stevens, O’Connor, Ginsburg, and Breyer. The majority opinion also indicated that the legislative history, even if consulted, would not change the majority’s result. Given Justice Souter’s consistent willingness in prior cases to resort to legislative history in all cases, it is difficult to believe Exxon Mobil represents a break from the majority of the Court being willing to consider legislative history, but just not let it “cloud” a text otherwise “clear.” This seems confirmed by Zedner v. United States, where in 2006 all members of the Court, except Justice Scalia, joined an opinion making reference to legislative history, even though the text of the statute, standing alone, was not held to be ambiguous, although at least one district court has concluded that Exxon Mobil represents such a clear break from prior practice.

Most modern jurists, except formalists, tend to favor rejection of the New Textualism approach. This result is consistent with the basic premises of the natural law model of interpretation of the 18th and 19th centuries, updated to reflect contemporary use of legislative history as an aid in statutory or constitutional interpretation. For example, as Chief Justice Marshall noted in United States v. Fisher, “Where the mind labours to discover the design of the legislature, it seizes everything from which aid can be derived.” This is true even though Justice Marshall might well be "shocked" by the contemporary use of legislative history. As indicated above, at § 6.2.3.1 nn.64-66, Chief Justice Marshall lived in the traditional natural law age when resort to legislative history to aid interpretation was not the norm. Even at that time, however, Chief Justice Marshall pushed the limits of the traditional non-use of legislative history, for example using statements in a legislative committee report as “part of the record” in the case, a fact used by Justice White to support his belief in the use of legislative history generally. In that case, Wisconsin Public Intervenor v. Mortier.

86 125 S. Ct. 2611, 2625-27 (2005); id. at 2628 (Stevens, J., joined by Breyer, J., dissenting); id. at 2631 (Ginsburg, J., joined by Stevens, O’Connor, & Breyer, JJ., dissenting).

87 Id. at 1976, 1985-86 (2006); id. at 1990-91 (Scalia, J., concurring in part and concurring in the judgment); Jacobs v. Bremner, 378 F. Supp. 2d. 861, 865-66 (N.D. Ill. 2005).


89 6 U.S. (2 Cranch) 358, 386 (1805). On use of legislative history as an aid to understanding the context of statutory and constitutional enactments, see McGreal, supra note 8, at 1255-73.

Justice Scalia criticized Justice White’s extension of Marshall’s use of legislative history as part of the factual record in a case to support use of legislative history in an act of interpretation.

§ 6.2.3.2 Specific versus General Historical Intent

A second issue with respect to history is determining the level of generality within which historical insights should be viewed. For example, a judge engaged in an historical inquiry could remain focused on the specific examples seemingly held by the framers and ratifiers about a particular provision of the Constitution. On the other hand, a judge could focus on the general concept held by the framers and ratifiers about a provision. An intermediate position holds that whether the interpreter should focus on the specific examples held by the framers and ratifiers about a provision, or their general concepts, depends on the provision in question. To the extent a provision is "relatively direct, specific, and focused," this may suggest that the framers and ratifiers intended the provision to reflect only detailed, specific choices. If so, judges should naturally remained focused on those choices. Where history suggests instead that the framers and ratifiers embedded in the Constitution broad concepts, like those dealing with the First Amendment, Equal Protection Clause, and Due Process Clause, history may suggest that the framers and ratifiers intended "to provide no hard-and-fast answers . . . , and to let the answers develop over time in common-law fashion."

For example, as noted at § 4.4.1 n.103, natural law judges tend to view the Establishment Clause as reflecting an Enlightenment-based natural law concept of separation of church and state. Justice Kennedy stated in *Lee v. Weisman*, ""[T]he lesson of history that was and is the inspiration for the Establishment Clause [is] the lesson that in the hands of government what might begin as a tolerant expression of religious views may end in a policy to indoctrinate and coerce." That concept would likely counsel a judge to find unconstitutional such practice as officially organized prayer in public schools, despite the fact that such prayer was a specific example thought constitutional by the framers and ratifiers as determined by "historical practices and understandings."

Similarly, as Justice Ruth Bader Ginsburg noted during her confirmation hearing, 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

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92 505 U.S. 577, 591-92 (1992) (Kennedy, J., opinion, for the Court).

93 *Id.* at 631-32 (Scalia, J., joined by Rehnquist, C.J., and White & Thomas, JJ., dissenting).

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."

In addition, sometimes changed social practice will require an individual to change views because the general concept in which the individual believes now interacts with the social environment in a different way. For example, Justice Ginsburg has noted that one of the main reasons the Supreme Court changed its specific views in gender discrimination cases in the 1970s was the Court's newly-formed conclusion that the differential treatment of women and men in certain statutes was "burdensome to women," and thus violated the Court's concept of equality.95 She attributed this result in part to the "rapid growth in women's employment outside the home, attended and stimulated by a revived feminist movement; [and] changing patterns of marriage and reproduction," all of which made the Court better able to see that women were being "unfairly constrained" by laws "ostensibly to shield or favor" them. This result required an interplay among "change in society's practices, constitutional amendment, and judicial interpretation."96

Such reasoning from general moral concepts to specific conclusions is, of course, a mainstay of much philosophic inquiry, particularly in the Enlightenment tradition. The goal of such reasoning is to convince a person who wishes, consistent with the Enlightenment tradition, to apply consistently a general concept in which the individual believes, that the person may have to adjust one or more specific views that currently are not consistent with that general concept. Through this process, a dynamic is created whereby over time more of an individual's specific views will be a reflection of reasoned elaboration of general moral concepts applied to current social practices, rather than the individual's specific views merely being the product of the individual's past experiences, unthinking adherence to custom or tradition, idiosyncratic preferences, or prejudice. This tension between moral reasoning based upon reason versus adherence to custom or tradition is discussed in greater depth at §§ 15.4.1 & 16.1-16.2.

Given their normative approach to the nature of the judicial task, natural law and instrumentalist judges are the most likely to embrace such general use of concepts. This is particularly true for natural law judges, given their special commitment to precedent and reasoned elaboration of the law, discussed at §§ 3.4 nn.93-106 & 4.3.2 nn.87-89. Applied to constitutional interpretation, this process would require the Court to adopt a reasoned elaboration of the general moral concepts placed into the Constitution, such as the moral principles of equal protection and due process of law. Justice Kennedy has remarked, "[R]eason, which is the distinguishing mark of the human race, must be embodied in the law if our civilization is to aspire to excellence."97 In this way, the understanding of a constitutional concept may evolve over time.


96 Id. at 17, 20-21.

97 Anthony Kennedy, Commencement Address, University of the Pacific, McGeorge School of Law (May 21, 1988).
From an instrumentalist perspective, Justice Brennan similarly showed a preference for resort to such general concepts in constitutional reasoning. In a 1986 article, he stated, "A position that upholds constitutional claims only if they were within the specific contemplation of the Framers in effect establishes a presumption of resolving textual ambiguities against the claim of constitutional right. It is far from clear what justifies such a presumption." Indeed, Justice Brennan noted about specific history, "Typically, all that can be gleaned is that the Framers themselves did not agree about the application or meaning of particular constitutional provisions and hid their differences in cloaks of generality.” And in terms of general historical intent, Justice Brennan said, “As augmented by the Bill of Rights and the Civil War amendments, this text is a sparkling vision of the supremacy of the human dignity of every individual. . . . It is a vision that has guided us as a people throughout our history,” that vision animating criminal defendant’s rights, equal protection rights, due process rights, and “broad and deep rights of expression and of conscience.”

At times, even Holmesian judges have evidenced a willingness to interpret constitutional provisions in light of general concepts. For example, regarding the issue of the Equal Protection Clause and the constitutionality of segregated schools, Judge Robert Bork wrote, “The Court cannot conceivably know how [the framers and ratifiers] would have resolved [specific] issues had they considered, debated and voted on each of them. Perhaps it was precisely because they could not resolve them that they took refuge in the majestic and ambiguous formula: the equal protection of the laws. But one thing the Court does know: [the Equal Protection Clause] was intended to enforce a core idea of black equality against governmental discrimination.”

With respect to the issue of incorporation of the Bill of Rights under the 14th Amendment Due Process Clause, Holmesian Justice Frankfurter made a similar point. Justice Frankfurter concluded that due process involves "those canons of decency and fairness which express the notions of justice of English-speaking peoples . . . . These standards are not authoritatively formulated anywhere as though they were prescriptions in a pharmacopoeia. But [judges] must move within the limits of accepted notions of justice." Justice Frankfurter made a similar point when discussing statutory interpretation, noting that "the purpose which a court must effectuate is not that which Congress should have enacted, or would have. It is that which it did enact, however inaptly, because it may fairly be said to be imbedded in the statute, even if a specific manifestation was not thought of, as is often the very reason for casting a statute in very general terms." Regarding the Equal Protection Clause issue in Brown v. Board of Education, Justice Frankfurter’s position was similar


99  Id. at 435, 439, 442.

100 Robert H. Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L.J. 1, 14 (1971). For discussion of Judge Bork as adopting Holmesian interpretation theory, see § 10.2.1.3.


102  Frankfurter, supra note 10, at 538-44.
to that expressed by Judge Bork above, concluding that while the specific intent of the framers and ratifiers was not unambiguously clear, the core ideal of equal protection meant that segregated schools denied African-American children equal protection of the laws. 103

Despite this occasional resort to general historical reasoning, most Holmesian judges are more comfortable with primary reliance on specific historical intent, as discussed at § 10.2.1.3. Given their preference for legal decisionmaking to be as predictable, certain, and mechanical as possible, formalist judges are the most resistant to using general historical intent, as discussed at § 9.2.1.3.

§ 6.3  Treatment of Subsequent Developments

§ 6.3.1  Treatment of Legislative and Executive Practice

One approach toward subsequent legislative or executive practice under a constitutional provision states that a court should be sensitive to subsequent legislative and executive practice only to the extent such practice aids understanding of, and is faithful to, the meaning of the constitutional provision at ratification. This is the approach adopted by those who believe in the static Constitution whose meaning does not change over time, typically formalist jurists. From this perspective, as Justice Scalia has stated, the alternative view of a living Constitution is incompatible with the “antievolutionary purpose of a constitution.” 104 For such jurists, events occurring after ratification are relevant only to the extent they illuminate what the Constitution meant at the time of ratification. For example, the views of the First Congress in 1789, filled with persons who played a large role in drafting the Constitution, have been held to have special relevance in determining constitutional meaning, as stated by the formalist-era Court in Myers v. United States, cited at § 5.3.2.1 n.87.

A second approach toward legislative or executive practice states that later legislative or executive practice under a particular constitutional provision can provide a gloss on meaning. For example, James Madison “consistently thought that 'itusus,' the exposition of the Constitution provided by actual governmental practice and judicial precedents, could 'settle the meaning and the intention of the authors.'” 105 Indeed, Madison himself 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. 106 As noted at § 5.3.2.1 n.92, though as a congressman in 1791 Madison opposed Congress creating a national bank as unconstitutional, in 1815 and 1816,


104  Scalia, supra note 7, at 44.

105  Powell, supra note 64, at 939.

when Madison was President, Madison supported the bank's constitutionality. 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{107}

Throughout constitutional history, this approach has been adopted by natural law, Holmesian, and instrumentalist jurists. The classic case of \textit{McCulloch v. Maryland} provides a good example of this principle at work during the original natural law era. As indicated, President Madison changed his position between 1791 and 1816 on the constitutionality of Congress incorporating a national bank based upon legislative, executive, and social practice ("a concurrence of the general will of the nation"), as well as judicial precedents. The Supreme Court noted this practice, as well as judicial precedents, stating in \textit{McCulloch},\textsuperscript{108} "[T]his can scarcely be considered 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 recognized by many successive legislatures, and has been acted upon by the judicial department, in cases of peculiar delicacy, as a law of undoubted obligation."

The Court also referred to paying deference to a course of legislative and executive practice in other important early 19\textsuperscript{th}-century cases. In \textit{Martin v. Hunter's Lessee},\textsuperscript{109} the Court stated, "Hence [the Constitution's] 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 mold and model the exercise of its powers, as its own wisdom and the public interests should require." In \textit{Gibbons v. Ogden},\textsuperscript{110} one issue was how to interpret the phrase "commerce among the states" regarding Congress' power to regulate traffic on navigable rivers. In defining the word "commerce" to include navigation, the Court noted a history of legislative and executive action so defining commerce. As the Court stated, "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."

In the 20\textsuperscript{th} century, Holmesian Justice Frankfurter made this same point in the context of subsequent executive action. As noted at § 5.3.2.1 n.93, Justice Frankfurter stated in his concurrence in \textit{Youngstown Sheet and Tube Co. v. Sawyer},\textsuperscript{111} "[A] systematic, unbroken, executive practice, long pursued by the knowledge of Congress and never before questioned, engaged in by Presidents who

\textsuperscript{107} See Paul Brest, Sanford Levinson, J.M. Balkin & Akhil Reed Amar, \textit{Processes of Constitutional Decisionmaking} 17 (4\textsuperscript{th} ed. 2000), \textit{quoting} Madison's letter to Congress on the matter.

\textsuperscript{108} 17 U.S. (4 Wheat.) 316, 401 (1819).

\textsuperscript{109} 14 U.S. (1 Wheat.) 304, 326-27 (1816).

\textsuperscript{110} 22 U.S. (9 Wheat.) 1, 190 (1824).

\textsuperscript{111} 343 U.S. 579, 610-11 (1952).
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."

Justice Holmes also underscored this point in *Missouri v. Holland.* Justice Holmes stated there, "[W]hen we are dealing with words that are also 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 light of our whole experience and not merely in that of what was said a hundred years ago."

As discussed at § 10.2.2.1, because the Holmesian style of interpretation involves a strong component of deference to the other branches of government, this view that legislative and executive practice can create a gloss on meaning to the Constitution is embraced more strongly by Holmesian judges than by judges in any of the other judicial decisionmaking traditions. On the other hand, even for Holmesian judges, a pattern of legislative and executive action typically cannot create a gloss on meaning that can override the framers and ratifiers' clear intent. For example, in *INS v. Chadha,* discussed at § 19.4.2.1 nn.76-79, Justice Rehnquist joined the majority opinion which held that Congress may not act legislatively through a one-house veto, despite congressional practice of including such veto provisions in many statutes for 50 years prior to *Chadha,* because the one-house veto violated the literal text of the bicameralism and presentment clauses of Article I. However, as noted at § 19.4.2.1 nn.81-82, Holmesian Justice White did find a way, in his solo dissent in *Chadha,* to defer to the legislative practice of a one-house veto by concluding that the purposes of the bicameralism and presentment clauses were met in *Chadha,* even if not their literal terms.

Instrumentalist judges have also been willing to use legislative and executive practice as a gloss on meaning to guide constitutional interpretation. For example, in *Griswold v. Connecticut,* Justice Goldberg, joined by Chief Justice Warren and Justice Brennan, enthusiastically embraced the view that in determining what rights are fundamental under substantive due process analysis the Court should look to the “traditions and collective conscious of our people” and “from experience with the requirements of a free society.” Similarly, in *Bowers v. Hardwick,* Justice Stevens, joined by Justices Brennan, Marshall, and Blackmun, noted that “Georgia’s prohibition on private, consensual sodomy has not been enforced for decades” and that the “record of nonenforcement, in this case and in the last several decades, belies the Attorney General’s representations about the importance of the State’s selective application of its generally applicable law.”

112 252 U.S. 416, 433 (1920).


§ 6.3.2  **Treatment of Judicial Precedents**

As noted at § 5.3.3.1 nn.97-98, court decisions interpreting a constitutional provision fix the meaning of the Constitution for the jurisdiction covered by that court, unless the court changes its mind or is reversed by a higher court. In theory, there are two different approaches to when a court may change its mind. Under one approach, a court will change its mind, that is, overrule a prior decision, if the court decides that the earlier court "got it wrong." A second approach holds that a sequence of court decisions can provide a gloss on meaning to the Constitution. This can change what the Constitution means in the same fashion as legislative and executive practice can provide a gloss on meaning.

This “gloss on meaning” approach is grounded in the way documents had been interpreted for centuries under the English common law, and was so understood by the framers and ratifiers of our Constitution. Professor Jefferson Powell has written about James Madison, "He 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.' Here, too, [Madison] was building on a traditional foundation: the common law had regarded usage as valid evidence of the meaning of ancient instruments, and had regarded judicial determinations of that meaning even more highly." 116 James Madison stated in a letter to Judge Spencer Roane that a constitution's meaning, "so far as it depends on judicial interpretation," is established by "a course of particular decisions." 117

Justice Scalia has said about this approach, “Yes, it is the common law returned, but infinitely more powerful than what the old common law ever pretended to be, for now it trumps even the statutes of democratic legislatures. . . . The starting point of the analysis will be Supreme Court cases, and the new issue will presumptively be decided according to the logic that those cases expressed." 118

The natural law style of interpretation, grounded in the 18th- and 19th-century traditional way of interpreting documents, embraces this approach toward precedent, as discussed at § 12.2.2.2.

Under this approach, a sequence of court decisions can provide a gloss on meaning that alters a constitutional provision's interpretation as gleaned from examining the other sources of constitutional meaning. Thus, it would take something more to overrule a prior decision than just a later court deciding that the earlier court "got it wrong." As noted at § 4.3.2 n.87, the factors that might be used to provide this extra impetus to overrule a precedent include: (1) the prior decision turns out to be unworkable in practice; (2) the decision has been rendered inconsistent or irreconcilable with related doctrines or its conceptual underpinnings have been removed or weakened by later decisions, or later legislative or executive action; (3) a changed understanding of facts has undermined the factual basis of the precedent; (4) the decision is inconsistent with some strongly held principle of justice or social welfare policy; and (5) the decision is inconsistent with the “rule of law.” The natural law Justices on the Supreme Court – Justices O’Connor, Kennedy, and Souter – discussed these factors in *Planned Parenthood v. Casey*, where they noted that "a decision to overrule should rest on some special reason over and above a belief that a prior case was

116 Powell, *supra* note 64, at 939.

117 *Id.* at 939 n.280.

wrongly decided.”119 Specific examples in the context of constitutional adjudication of each of these five factors which suggest a precedent should be overruled are discussed at §§ 7.3.3-7.3.4.

To varying extents, formalist, Holmesian, and instrumentalist judges reject this “gloss on meaning” approach towards precedents. This rejection naturally occurs under the formalist approach, which embraces the view of a static Constitution that has one, fixed correct meaning. This rejection also occurs by those who believe that while legislative, executive, or social practice may appropriately create a “gloss” on meaning, judicial precedents should not have that force. This is true for Holmesian judges, who emphasize legislative and executive practice as part of the Holmesian predisposition to defer to government, discussed at § 10.2.2.1, and instrumentalist judges, who also emphasize social practice, as noted at §§ 6.3.3 & 11.2.2.1.

As discussed at § 4.3.1 nn.75-77, for positivist judges, as a theoretical matter, precedents should have no force of law, as the positive law exists independent of the judge. Thus, any prior judicial opinion, if viewed as erroneous by a current judge, should be entitled to no weight. Despite this theoretical model, as a practical matter most positivist judges will give some respect to the core holdings of precedent either as a matter of following “settled law” or following decisions on which there has been “substantial reliance,” as discussed at § 4.3.2 nn.79-86. Specific examples in the context of constitutional adjudication of formalist and Holmesian judges following precedents based on “settled law” or “substantial reliance” are discussed at § 7.3.2 nn.104-27.

For instrumentalist judges, the normative nature of the judicial task means that as a theoretical matter the judge should give some “gloss on meaning” respect to judicial precedents because of judges normative role in developing legal doctrine. However, as cited at § 3.3 n.54, as a practical matter, under the instrumentalist “Grand Style” of judicial decisionmaking “precedent is carefully regarded, but if it does not make sense it is ordinarily re-explored.”120 This willingness to “re-explore” precedent based on whether the judge concludes the precedent “makes sense” has meant that in practice instrumentalist judges tend to be the least faithful to following existing precedents, as discussed at §§ 4.3.1-4.3.2. Specific examples in the context of constitutional adjudication of this instrumentalist predeliction for not following precedents are discussed at § 7.3.2 nn.128-33.

§ 6.3.3 Treatment of Social Practice

As positivists who believe that all law emanates from the sovereign will, formalist and Holmesian jurists have been reluctant ever to permit use of mere social practice as evidence to determine the meaning of constitutional provisions. Thus, Justices Scalia and White, and Chief Justice Rehnquist, were among the four Justices in Stanford v. Kentucky121 who concluded that establishing traditions under the 14th Amendment substantive due process analysis depended upon whether that tradition


120 Karl Llewellyn, On the Current Recapture of the Grand Tradition, in Jurisprudence: Realism in Theory and Practice 215, 217 (1962). This passage is cited in full at § 3.3 n.54.

was established from consideration of legislative enactments and their application, and not from other indicia, such as public opinion polls, the views of interest groups, and the positions adopted by various professional associations. Similarly, in *Atkins v. Virginia*, 122 a case striking down the death penalty for mentally retarded criminals, Chief Justice Rehnquist, joined by Justices Scalia and Thomas, noted in dissent, “[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.” Resort to non-juridical events, like social practice, should never be considered.

Despite this view, there is an argument, discussed at §§ 10.2.1.3 & 10.2.2.1, that a true Holmesian would reject the view in *Stanford v. Kentucky* that evidence of social practice should be limited to "laws and the application of laws" for purposes of determining our societal traditions. This approach would follow Justice Holmes' view in *Lochner v. New York* that our tradition derives from both "our people and our laws," 123 though not foreign laws. Nevertheless, perhaps because of the Holmesian posture of deference to government, as represented in constitutional adjudication by the views of Professor Thayer and others, noted at § 6.2.2.2 nn.53-54, some Holmesian jurists have adopted the *Stanford* limitation of looking only to legislative and executive practice to determine traditions.

Natural law and instrumentalist jurists, as followers of a normative approach to law, are more willing to consider normative considerations from whatever source, including social practice, particularly in the United States, but also the world community generally. The classic example regarding practice in the United States, as noted at § 6.3.1 n.107, involved James Madison, who while President in 1815-16 relied on the social practice of “indications, in different modes, of a concurrence of the general will of the nation” to support the constitutionality of Congress creating a national bank. With regard to social practice in the world community generally, this can be justified for instrumentalist judges as part of prudential consideration of sound social policy, as discussed at § 11.2.2.1. For natural law judges, this can be justified to the extent the provision being interpreted is viewed as incorporating a natural law principle of universal applicability, whose contours can better be understood by considering social practice from around the world, as discussed at § 12.2.2.1.

For example, in *Atkins v. Virginia*, 124 discussed at § 23.2.1.4, a 6-3 Court majority, composed of natural law and instrumentalist Justices, discussed social practice, both in the United States and in the world generally, in addition to legislative and executive practice, raising concerns about the constitutionality of the death penalty for mentally retarded criminals. The Court noted, “Although

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123  198 U.S. 45, 75-76 (1905) (Holmes, J., dissenting).
these factors are by no means dispositive, their consistency with the legislative evidence lends further support to our conclusion that there is a consensus among those who have addressed the issue.” In a speech following criticism, and calls for impeachment, of Court members for reliance on international opinion in Atkins and other cases, Justice Stevens commented that there is a vast difference between considering the thoughtful views of other scholars and judges in foreign countries, as well as in America, and treating international opinion as controlling the interpretation of the Constitution. He said, “We should not be impeached for the former, and we are not guilty of the later.”

From an instrumentalist or natural law perspective, these views are correct.

It should be noted that Justice Kennedy joined this majority opinion in Atkins, despite his having joined with Justices Scalia and White, and Chief Justice Rehnquist, in Stanford v. Kentucky. As discussed at § 12.4.1, Justice Kennedy has an occasional inclination for the formalist style of interpretation. In Atkins, however, he returned to the traditional natural law interpretive methodology. As discussed at § 27.3.4.2, in his majority opinion in Lawrence v. Texas, which ruled unconstitutional state laws banning sodomy, Justice Kennedy also 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.”

§ 6.3.4 General Observations on Static versus Living Constitutions

As Justice Scalia noted, discussed at § 6.2.1.1 n.23, “[T]he Great Divide with regard to constitutional interpretation is not that between Framers’ intent and objective meaning, but rather between original meaning (whether derived from Framers’ intent or not) and current meaning.” This is the issue whether the Constitution should have a static, fixed meaning or should its meaning evolve over time. As indicated in the materials at §§ 6.3.1-6.3.3, only formalist judges adhere to a strict static meaning approach. To various extents, the Holmesian, natural law, and instrumentalist decisionmaking styles are willing to embrace some aspects of subsequent considerations, particularly legislative, executive, and social practice and judicial precedents, to provide some “gloss” on meaning to the Constitution.

In this regard, it may be useful to underscore the difference between Justice Scalia’s formalist model of interpretation and the natural law model of James Madison, which was shared by Madison’s co-authors of the The Federalist Papers, Alexander Hamilton and John Jay, who was the first Chief Justice of the United States Supreme Court, as well as by Chief Justice John Marshall, Justice Story, and other influential participants and judges of the framing and ratifying generation. As discussed at § 7.1, the major figure of the founding era to adopt a formalist-sounding, static model of constitutional interpretation was Thomas Jefferson. Thus, to extent that certain contemporary groups, like The Federalist Society, tend to support a formalist model of constitutional interpretation, an approach shared by Justices Scalia and Thomas, it would be more historically accurate if the

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125 Justice Stevens Speaks Out on Attacks, National Law Journal 6 (June 6, 2005).

visage they placed on their promotional materials was that of Thomas Jefferson, not James Madison. Although Madison shared Jefferson’s views on the substance of constitutional doctrine regarding basic federalism issues, as discussed at §§ 18.1.1, 18.1.2 & 18.2.1.1, James Madison, like most framers and ratifiers, did not adopt a formalist style of interpretation, as noted throughout Chapter 12 on the natural law style of interpretation. In contrast to formalism, the natural law style of interpretation embraces an evolutionary theory of constitutional interpretation, as discussed generally at §§ 4.1 nn.8-12, 6.3.1-6.3.3 & 12.2.2, and specifically at § 12.3.3 nn.115-28. In addition, as discussed at § 8.4.1, a true “jurisprudence of original intent,” in former Attorney General Edwin Meese’s famous phrase, would support Madison’s natural law style of interpretation – not Jefferson’s quasi-formalism, nor Holmes’ deference-to-government theory of interpretation, nor Earl Warren’s instrumentalism.

§ 6.4 Prudential Considerations
§ 6.4.1 Possible Instrumentalist Use of Non-Interpretive Prudential Considerations

As noted at § 5.4.1, one major issue regarding prudential considerations is the extent to which judges should use non-interpretive prudential consideration of the judges’ own views in their decisions. Formalist and Holmesian judges, having a positivist understanding of law that all law emanates from the sovereign will, and not even in part from the judge’s will, naturally strongly reject the use of non-interpretive prudential considerations. As a theoretical matter, mainstream instrumentalist judges also reject such use, purporting to rely only on background social policies embedded in the law to resolve leeways in the law, not the judge’s own views. For example, at her confirmation hearing, Justice Ginsburg stated, “My approach [towards judging] is rooted in the place of the judiciary . . . in our democratic society. The Constitution’s preamble speaks first of ‘we the people’ and then of their elected representatives. The judiciary is third in line. . . . [O]ne of the most sacred duties of a judge is not to read her convictions into the Constitution.” As noted at § 3.3 nn.57-58, only a “radical” instrumentalist judge may be willing to embrace in theory non-interpretive prudential considerations.

In practice, however, the line between the judge’s own views and contemporary social views embedded in the law may be difficult to determine, as was explained by Justice Cardozo at § 3.3 nn.60-61. Particularly during the instrumentalist era of the Supreme Court, 1954-86, certain decisions were challenged as being best explained by reference to such non-interpretive prudential considerations. For example, in 1978 Professor John Hart Ely remarked, "The Court's current constitutional jurisprudence . . . involves the Court in the merits of the policy or ethical judgment sought to be overturned." This criticism has continued past the end of the instrumentalist era. For

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example, in 1997 Justice Scalia remarked, “Worse still, however, it is known and understood that if that logic [of existing precedents] fails to produce what in the view of the current Supreme Court is the desirable result for the case at hand, then, like good common-law judges, the Court will distinguish its precedents, or narrow them, or if all else fails overrule them, in order that the Constitution might mean what it ought to mean. Should there be . . . a constitutional right to die? If so, there is. Should there be a constitutional right to reclaim a biological child put out for adoption by the other parent? Again, if so, there is. If it is good, it is so.”

§ 6.4.2 Possible Natural Law Use of Non-Interpretive Prudential Considerations

Regarding the natural law approach, the matter is similarly complex. Two basic approaches could be taken. One view is to embrace non-interpretive consideration of principles of justice. Under this approach, whether or not the framers and ratifiers of the Constitution intended each clause to embody natural law principles, judges should take that view today. Thus, judges should always read the Constitution's words against the backdrop of natural law theory. This would require judges to pay great respect to the ordinary meaning and purpose of the words used in the Constitution, but would always permit judges to resort to natural law philosophy in the final instance "so as to check meaning and purpose by an all-things-considered value judgment that acts as a safety-valve against wildly absurd or unjust results." In its most extreme form, as noted at § 12.2.2.3 nn.72-73, such an approach to judicial decisionmaking would place judges in the role of Platonic Guardians, deciding constitutional cases in order to promote the judge's natural law vision of the "just state."

A second approach, more consistent with the “social contract” natural law approach to judicial decisionmaking dominant during the framing and ratifying of our Constitution, noted at § 3.4 nn.84-87, holds that judges should resort to natural law principles in interpreting the Constitution only to the extent that particular clauses of the Constitution were drafted with natural law principles in mind, discussed at § 12.2.2.3 nn.74-75, 80, or to the extent a case can be made that the framers and ratifiers themselves intended judges to resort to natural law principles outside the written text of the Constitution to supplement it, discussed at § 12.2.2.3 nn.76-79. However, under either version of this “social contract” approach, where clear constitutional provisions do not reflect a sound natural law position, as in the case of slavery under the United States Constitution before the 13th Amendment, judges should follow the clear meaning of the Constitution until the natural law position is properly added to the document.

Virtually all Supreme Court Justices in our constitutional history have rejected the “radical instrumentalist” or "Platonic Guardian" model of judicial decisionmaking. The natural law decisionmaking tradition of our society follows the Marshall Court's approach to the issue of slavery: if the Constitution has clearly adopted an unsound position from the perspective of natural


law, it is up to legislative action, constitutional amendment, or, in Locke’s phrase discussed at § 12.2.2.3 n.80, the people's reserved right of revolution, to correct the problem.

In addition to being inconsistent with the framers and ratifiers' approach to judicial decisionmaking, an additional weakness of the "Platonic Guardian" method is that there is no assurance that Supreme Court Justices personally will hold natural law principles that are in fact sound from the perspective of reason. For example, Chief Justice Taney's opinion in Dred Scott v. Sandford, discussed at § 25.1 nn.9-16, permitted slave owners to continue to have enforceable rights to their slaves even if they brought their slaves into "free" states. This holding went beyond the compromise on slavery struck in the Constitution, and was an attempt to impose on free states a natural law vision contrary to the abolitionist's anti-slavery natural law views. Justice Taney's vision sprang from economic natural law arguments concerning property rights and the slave as property (and in no sense a citizen), a position not part of the original constitutional compromise, nor supported by reason, which would oppose slavery by granting to each person equal concern and respect, as discussed at §§ 16.1 & 16.2.1. However, as a matter of custom and tradition, Justice Taney's views were held by numerous individuals, particularly in the South, before the Civil War, as noted at § 25.1 nn.3-6.

Of course, under the traditional natural law model of judicial decisionmaking, if some governmental action is unconstitutional judges have a duty to so hold, even if other branches may object. For example, in Worcester v. State of Georgia, the Supreme Court held that Georgia's anti-Cherokee laws were unconstitutional because the Indian tribes are a "distinct [sovereign] community . . . in which the laws of Georgia can have no force." This decision was made over the expressed objection of President Andrew Jackson, who "apocryphally" is reported to have said, "John Marshall made his decision; now let him enforce it." Of course, under the traditional natural law model of judicial decisionmaking, if some governmental action is unconstitutional judges have a duty to so hold, even if other branches may object. For example, in Worcester v. State of Georgia, the Supreme Court held that Georgia's anti-Cherokee laws were unconstitutional because the Indian tribes are a "distinct [sovereign] community . . . in which the laws of Georgia can have no force." This decision was made over the expressed objection of President Andrew Jackson, who "apocryphally" is reported to have said, "John Marshall made his decision; now let him enforce it."

It has been noted that Worcester did not prevent United States regulation of the Native Americans in Georgia, and shortly after Worcester, President Jackson embarked on a policy that "forced most Cherokees to march on the 'Trail of Tears' to forced relocation in Oklahoma." The Worcester case is a good reminder of the limits of judicial power to influence events in the absence of a willing Congress, President, and/or the people to go along. As Alexander Hamilton noted in The Federalist Papers No. 78, the federal judiciary lacks ultimate "influence over either the sword or the purse," and thus "may truly be said to have neither FORCE nor WILL but merely judgment; and must ultimately depend upon the aid of the executive even for the efficacy of its judgments."

Because they were immersed in the Anglo-American system of judicial decisionmaking, the framers and ratifiers' views concerning text, context, history, practice, and precedent were grounded in the grand traditions of the Anglo-American common law system. As noted, this approach rejects non-interpretive review. However, this approach does favor such principles as reasoned elaboration of

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133 60 U.S. (19 How.) 393 (1857).
135 See Brest, Levinson, Balkin & Amar, supra note 107, at 121.
136 Id.
the law, fidelity to precedent, deciding cases on narrower grounds where possible, and deciding most
cases only after full briefing and argument.137

The principle of "reasoned elaboration" also includes clearly defined tests that work in practice;
coherence and consistency in legal categories; and avoidance of functional balancing tests that are
situation-specific and not easily reconcilable with other aspects of legal doctrine, unless
contemporaneous sources and subsequent events mandate use of such tests. All of these
considerations are consistent with the prudential consideration of a proposed decision’s
consequences in light of text, context, history, practice, and precedent, and thus represent an
interpretive approach toward prudential considerations.138

§ 6.4.3 General Use of Interpretive Prudential Considerations

The remaining issues concerning prudential considerations involve the weight to be given to the
remaining three kinds of prudential arguments: (1) the contemporaneous sources of constitutional
text, purpose, context, and history; (2) the subsequent event sources of practice and precedent; and
(3) the mainstream normative concern with whether the decision would advance a particular
background principle of justice or social policy that the judge believes is embedded in the law. As
a matter of theory, each of the four decisionmaking styles should use these prudential considerations
consistent with their general approach to judicial decisionmaking.

For example, the formalist style, with its static model of constitutional interpretation, should resort
only to category (1)’s contemporaneous sources of prudential argumentation. The Holmesian style,
with its “deference-to-government” model of a living Constitution, should be willing to add category
(2)’s subsequent events of legislative and executive practice. The natural law style should be willing
to add category (3)’s prudential consideration of background principles of justice. The
instrumentalist style should be willing also to consider category (3)’s prudential consideration of
social policy. Reflecting a positivist theory of judicial decisionmaking, formalist and Holmesian
judges reject category (3)’s resort to background principles or policies embedded in the law, as noted
at § 2.3.2, and reflected in Table 3.4.

Specific examples of each of these uses of prudential considerations in the context of constitutional
adjudication is discussed when addressing each of the judicial decisionmaking styles at §§ 9.2.2.3,
10.2.2.3, 11.2.2.3 & 12.2.2.3. As the discussion there will indicate, in practice each of the
decisionmaking styles has remained substantially faithful to their theoretic approach, although

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137 See generally Harry W. Jones, Our Uncommon Common Law, 42 Tenn. L. Rev. 443, 450-
(Souter, J., concurring in part and concurring in the judgment) (discussing deciding cases on
narrower grounds, the importance of full briefing and argument, and reasoned and consistent
elaboration of the law).

138 For one attempt describing "how the various types of argument are combined or weighed
against each other" based on "the normatively best understanding that is reasonably consistent with
what actually happens in . . . constitutional interpretation," see Fallon, supra note 21, at 1243-68.
occasionally there has been some slippage, like a formalist judge occasionally giving at least some minimal consideration to prudential consideration of category (2)’s subsequent events. This is similar to formalist use of legislative or executive practice. For example, despite theoretic objection under a static Constitution to ever using subsequent events as a source of interpretation, Justice Scalia will consider a specific tradition of legislative enactments since 1868 to influence the meaning of liberty under the Due Process Clause of the 14th Amendment, as discussed at § 9.2.2.1.

§ 6.4.4 Concluding Observations

Fuller description of the precise choices made by formalist, Holmesian, natural law, and instrumentalist jurists regarding use of text, context, history, practice, precedent, and prudential considerations in the context of constitutional adjudication is reserved for Chapters 9-12. Detailed Tables reflecting the choices made by each of these four decisionmaking styles appear at Tables 9.3, 10.3, 11.3 & 12.3. However, the materials presented in Chapters 1-6 do permit some initial conclusions to be drawn. These conclusions are summarized below in Table 6.4.1 & 6.4.2.

As noted in Table 6.4.1, in theory the formalist style of interpretation uses only contemporaneous sources of meaning because of its belief in a static model of constitutional interpretation. 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, mechanically derived answers as specific interpretive tasks. As discussed at § 7.1, specific interpretive tasks – like those involving the plain meaning of text; verbal maxims; specific historical evidence, particularly involving specific historical intent; 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, particularly as reflected in general historical intent; reasoned elaboration of the law; or prudential consideration of background principles or policies embedded in the law – involve greater use of the inferential logic of inductive reasoning. As noted at § 4.1, the formalist style of interpretation is the style most comfortable with deductive modes of reasoning. For this reason, the formalist style is the most comfortable with placing greater reliance on specific interpretive tasks, such as only considering “general” arguments of purpose if the provision’s “specific” literal meaning is ambiguous or absurd, as noted at § 6.2.1.2.

With regard to subsequent considerations, while in theory formalists will not rely on such sources, based on their static constitution model, in practice most formalists will give some weight to specific legislative or executive practice, as noted at § 6.4.3, as well as some precedential weight to the core holdings of cases which are “settled law” or on which there has been “substantial reliance,” as noted at § 6.3.2. Most formalists will give no weight, however, to such general interpretive tasks as reasoned elaboration of the law, as noted at § 6.3.2; resort to general social practice, as noted at § 6.3.3; or background principles or policies embedded in the law, as noted at § 6.4.3.

Holmesian jurists, with their functional focus on a doctrine’s purposes, are more willing to embrace the general kinds of contemporaneous source reasoning, like arguments of purpose, than are formalist jurists, as noted at § 6.2.1.2. Given their deference-to-government posture, discussed at §§ 3.2 & 6.2.2.2, Holmesian jurists are the most willing to give great weight to arguments of legislative or executive practice. Because of their functional attitude, they are also more willing than
formalists to consider prudential arguments of text, context, history, practice, and precedent, as well as slightly more willing to follow the core holdings of precedents based upon “substantial reliance,” as noted at § 6.3.4. As positivists, however, Holmesian jurists share with formalists a rejection of judicial reasoned elaboration of the law, as noted at § 6.3.2; and a rejection of judicial resort to background principles of justice or social policies to resolve leeways in the law, as noted at § 6.4.3.

The main differences between natural law and instrumentalist jurists are the natural law great respect for precedent and reasoned elaboration of law, not shared by instrumentalists, as discussed at §§ 4.3.2 & 12.2.2.2; the instrumentalist great focus on prudential considerations, which reflects a concern with achieving justice given the “situation-sense” of each case, as discussed at § 3.3; 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, as discussed at § 3.4.

As indicated in Table 6.4.1, the Holmesian, natural law, and instrumentalist styles of interpretation all give “great weight” to contemporaneous sources of meaning, with one exception. As noted at § 6.2.1.2 n.25, Justice Holmes wrote, "[T]he general purpose is a more important aid to the meaning than any rule which grammar or formal logic may lay down." Based upon this statement, the functional Holmesian and instrumentalist judges tend to give greater weight to arguments of purpose than literal text, as discussed in greater depth at §§ 10.2.1.1 & 11.2.1.1. Predominantly, however, the differences among Holmesian, natural law, and instrumentalist interpretation styles lie in the weight given to subsequent considerations. As to these considerations, Holmesian judges give greatest weight to arguments of practice; natural law judges give greatest weight to arguments of precedent; and instrumentalist judges give greatest weight to prudential considerations. The approaches give “lesser weight” to the other subsequent considerations which are not their predominant focus, sometimes giving only minimal “some weight” to sources about which they are most skeptical, or “no weight” to sources whose use they reject. For example, all Holmesian judges reject use of background principles or policies embedded in the law, as discussed at § 6.4.3.

Table 6.4.2 summarizes the different predispositions of conservative versus liberal judges. As discussed at § 6.2.2.3, on issues of federalism, conservative judges tend to prefer states’ rights, while liberal judges tend to favor exercises of federal power. As discussed at § 6.2.2.4, 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, for both individuals and businesses, while liberal judges tend to focus on the protection of non-economic, civil/political rights, as discussed at § 21.2.1.2. As noted at § 4.4.2, and discussed at §§ 9.3.3, 10.3.3, 11.3.3 & 12.3.3, each style of decisionmaking has conservative and liberal variations. However, as discussed at § 11.3.3 nn.61-62, 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.
Table 6.4.1
Sources of Constitutional Meaning and Styles of Interpretation

<table>
<thead>
<tr>
<th>Interpretation Style</th>
<th>Main Focus of Interpretation Style</th>
<th>More Specific Interpretive Tasks</th>
<th>General Kinds of Reasoning</th>
</tr>
</thead>
<tbody>
<tr>
<td>Formalism</td>
<td>Contemporaneous Sources</td>
<td>Text: Literal or Plain Meaning of Text</td>
<td>Purpose or Spirit of Text</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Context: Verbal Maxims</td>
<td>Policy Maxims</td>
</tr>
<tr>
<td></td>
<td></td>
<td>History: Specific Historical Evidence</td>
<td>General Historical Evidence</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Specific Historical Intent</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>General Historical Intent</td>
</tr>
<tr>
<td></td>
<td>Subsequent Considerations</td>
<td>Practice: Legislative or Executive Practice</td>
<td>Social Practice</td>
</tr>
<tr>
<td>Holmesian</td>
<td></td>
<td>Precedent: Core Holdings of Precedent</td>
<td>Reasoned Elaboration of Law</td>
</tr>
<tr>
<td>Natural Law</td>
<td></td>
<td>Prudential: Consequences Evaluated in Light of Text, Context/Structure, And Purpose/History</td>
<td>Consequences Evaluated in Light of Practice and Precedent; Background Principles of Justice and/or Social Policy Embedded in the Law; or Not So Embedded</td>
</tr>
<tr>
<td>Instrumentalism</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Formalism: For contemporaneous sources, great weight given to specific interpretive tasks and lesser weight given to general kinds of reasoning. For subsequent considerations, no weight given in theory, but some weight given in practice to specific interpretive tasks, while no weight given even in practice to general kinds of reasoning.

Holmesian: Great weight to all contemporaneous sources, except literal or plain meaning of text, which is given lesser weight, based upon Holmes’ functional observation, noted at § 6.2.1.2, that “general purpose is a more important aid to the meaning than any rule which grammar or formal logic may lay down.” For subsequent considerations, great weight to legislative or executive practice; lesser weight to the other specific interpretive tasks; perhaps some weight to social practice, following Justice Holmes, or no weight to social practice, following Chief Justice Rehnquist and Justice White, as discussed at § 6.3.3; no weight in theory or practice to the other general kinds of reasoning.

Natural Law: Great weight to all contemporaneous sources. For subsequent considerations, great weight to core holdings of precedent and reasoned elaboration of the law; lesser weight to the other specific interpretive tasks and social practice and background principles of justice embedded in the law; no weight in theory or practice to social policies embedded in the law or principles of justice or social policies not so embedded, unless a more radical, Platonic Guardian kind of natural law judge, as discussed at § 6.4.2.

Instrumentalism: Great weight to all contemporaneous sources, except literal or plain meaning of text, which is given lesser weight, based upon the functional observation, noted at § 6.2.1.2, that “general purpose is a more important aid to the meaning than any rule which grammar or formal logic may lay down.” For subsequent considerations, great weight to prudential considerations of text, context, history, practice and precedent, and principles of justice or social policies embedded in the law; lesser weight to legislative or executive practice and social practice; some weight to core holdings of precedent and reasoned elaboration of the law; no weight in theory or practice to principles of justice or social policies not so embedded, unless a more radical kind of instrumentalist judge, as discussed at § 6.4.1.

Table 6.4.2
Conservative versus Liberal Predispositions

<table>
<thead>
<tr>
<th>Styles of Decisionmaking</th>
<th>Political</th>
<th>Federalism</th>
<th>Separation of Powers</th>
<th>Individual Rights</th>
</tr>
</thead>
<tbody>
<tr>
<td>Formalism (static constitution)</td>
<td>Conservative</td>
<td>States’ Rights</td>
<td>Executive Branch</td>
<td>Economic Rights</td>
</tr>
<tr>
<td>Holmesian (deference to government)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Natural Law (reasoned elaboration)</td>
<td></td>
<td>Federal Power</td>
<td>Legislative Branch</td>
<td>Civil/Political Rights</td>
</tr>
<tr>
<td>Instrumentalism (aid unempowered)</td>
<td>Liberal</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
CHAPTER 7: EFFICIENT CAUSES OF CONSTITUTIONAL INTERPRETATION

As noted at § 1.2.1, in Aristotle’s example of a silver bowl, the efficient cause of the silver bowl is the “hammering of the silversmith” to make the material cause, silver, into the shape of a bowl. Likewise, this Chapter deals with the efficient causes of the form of constitutional decisionmaking. This involves the techniques used by judges in dealing with the materials of text, context, history, practice, precedent, and prudential considerations in order to “hammer out” decisions on constitutional law. Discussed with specific reference to constitutional law, these techniques are the approach to judicial reasoning as predominantly deductive or inductive, discussed at § 7.1; the adoption of legal doctrine as categorical rules or balancing tests, as elements to meet or factors to weigh, as rules or standards, and as questions of law versus questions of fact, discussed at § 7.2; the treatment of precedent in a narrow or broad fashion or as having a gloss on meaning or not, discussed at § 7.3; and aspects of the judicial process, including the nomination and confirmation process for Supreme Court Justices; the process by which cases get decided, including the rules regarding Supreme Court adoption of cases through grants of petitions for certiorari, mechanism of Supreme Court consideration of cases in judicial conference, the process of selecting a Justice to write the Court’s opinion, and the possible writing of concurring and dissenting opinions; and rules of judicial recusal, discussed at § 7.4.

§ 7.1 Deductive versus Inductive Reasoning

As noted at § 4.1 nn.1-6, judicial reasoning in common-law, statutory interpretation, or constitutional law cases can adopt either a deductive or an inductive mode of reasoning. Regarding constitutional adjudication, judicial reasoning tends to be more deductive in areas where the constitutional provision is phrased in relatively detailed, specific terms, and thus where adjudication is more like statutory interpretation. In contrast, for constitutional provisions phrased more generally, like the First Amendment’s provision that “Congress shall make no law . . . abridging the freedom of speech” or the 14th Amendment’s provision that “no State shall . . . deny to any person equal protection of the laws,” judicial elaboration has tended to be more inductive in form.

As noted at § 6.2.1.1 nn.13-18, the “Enlightenment rationalist” mode of interpretation follows a more deductive mode of analysis. This “Enlightenment rationalist” approach provided the intellectual basis for the French Revolution and the adoption of the Napoleonic Code, the first great code of the modern era in civil-law countries. The premise of this approach was that the people make the law, place it in codes, and then the judges by deductive logic merely follow the law that the people have laid down. This approach underlays not only the French Revolution, but also the analytic positivism of Jeremy Bentham and John Austin in the late 18th century and early 19th century England. Although this formalist, deductive model of interpretation predominated on the courts in America in the context of the conservative ideology of the formalist era of 1873-1937, as discussed at §§ 13.1 & 14.2.2, the fact that the same approach toward judicial decisionmaking was adopted by the reformists of the French Revolution and by Bentham in England underscores that the approach can also be consistent with progressive ideology. This approach can be particularly attractive to progressives where judges are perceived as adjuncts to a conservative executive branch, as in 18th-century France and England, rather than an independent third branch of government.
From the perspective of constitutional interpretation, the most salient feature of this “deductive” methodology is the more willing embrace of the “specific interpretive tasks” listed in Table 6.4.1, rather than resort to “general interpretive reasoning.” Specific interpretive tasks, like those involving the plain meaning of text, verbal maxims, specific historical intent, legislative or executive practice, or the core holdings of precedent, are more amenable to being applied through deductive logic. In contrast, more general interpretive tasks, like those involving determining purposes behind text, resort to background structural arguments, use of concepts which emerge from general historical intent, determination of social practice from various sources, general reasoned elaboration of the law, or prudential consideration of background principles or policies embedded in the law, involve greater use of the inferential logic of inductive reasoning.

For instance, the examples of “mainstream normative” prudential considerations in cases like Planned Parenthood v. Casey, Plyler v. Doe, BMW v. Gore, and Griswold v. Connecticut, discussed at § 5.4.2 nn.117-29, all involved various amounts of inductive reasoning that was used to determine the content of the background moral principles involved in the case. Cases focused more on literal text and specific historical evidence, such as the focus on the literal text of the Bicameralism and Presentment Clauses used in INS v. Chadha, discussed at § 6.3.1 n.113, involved more elements of deductive reasoning. As noted at § 4.1 n.13, the formalist style of interpretation is the style most comfortable with deductive modes of reasoning. The formalist style of interpretation is thus the most comfortable with placing greater reliance on specific interpretive tasks, as noted in Table 6.4.

Of the framing and ratifying generation, the most prominent individual to have adopted a theory of constitutional interpretation similar to a formalist, deductive model of interpretation was Thomas Jefferson. As noted by Professor David Mayer, in The Constitutional Thought of Thomas Jefferson, Jefferson adopted this approach, as did Bentham in England, in order to limit the discretion of judges, whom Jefferson viewed with suspicion. He was concerned that judges, particularly those “weaned on the ‘honeyed Mansfieldism’ of Blackstone,” would use any broader style of reasoning to frustrate the legitimate will of the people.1 For example, as noted at § 3.4 n.91, the natural law style of interpretation embraces the “Rule of Heydon’s Case” regarding equitable interpretation of a statute in light of its “mischief to be remedied.” Blackstone and Mansfield warmly embraced this style of interpretation.2 In contrast, reflecting a more formalist style of interpretation, Jefferson wrote, “Relieve the judges from the rigour of text law, and permit them, with pretorian discretion, to wander into it’s [sic] equity, and the whole legal system becomes uncertain.”3 A few other

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3 Id. at 1010, quoting a letter from Thomas Jefferson. In a diary from his days at Harvard Law School in 1842, later President Rutherford B. Hayes reported on Jefferson’s view of Chief Justice Marshall’s use of “equity” and other non-formalist natural law reasoning, “Thomas Jefferson said: ‘When conversing with Marshall, I never admit anything. So sure as you admit any position to be good, no matter how remote from the conclusion he seeks to establish, you are gone. So great is his sophistry, you must never given him an affirmative answer, or you will be forced to grant his conclusion. Why, if he were to ask me whether it were daylight or not, I’d reply, “Sir, I don’t know,
Jeffersonians of the same era shared in Jefferson’s theories of interpretation.4

A classic debate during the first two years of our Nation’s founding occurred over whether the Constitution, as a whole, and specifically its provisions dealing with the commerce and spending powers, should be dealt with in a deductive or inductive fashion. Specifically, this debate involved the constitutionality of Congress creating a national bank. Jefferson’s views to President Washington in 1791 on this issue are instructive of Jefferson’s approach to constitutional interpretation. Professor David Mayer noted that in deciding that Congress did not have such a power Jefferson focused on:

the words of Article I, the enumerations of congressional power, construed (as Jefferson would later put it) “according to the plain and ordinary meaning of its language, to the common intendment of the time and those who framed it.” “The incorporation of a bank, and other powers assumed by this bill, have not . . . been delegated to the U.S. by the Constitution,” Jefferson concluded, arguing that they were neither “among the powers specifically enumerated” nor “within either of the general phrases” of Article I [§ 8].5

Regarding the “specifically enumerated” powers, Jefferson noted that the bill to create the national bank laid no taxes, borrowed no money, and regulated no commerce. Regarding the commerce clause, Jefferson adopted a literal definition of commerce. Professor Mayer noted:

The creation of a bank, [Jefferson] maintained, was exactly like the creation of a bushel of wheat or the mining of precious metals; and the creation of a subject of commerce was not the same as the regulation of commerce. “To erect a thing which may be bought and sold, is not to prescribe regulations for buying and selling.”6

Jefferson also gave a literal interpretation to the two “general phrases” of Article I, § 8, the “general welfare” clause and the “necessary and proper” clause. He combined this literal interpretation with contextual arguments of related provisions. The “general welfare” clause provides: “The Congress shall have the Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.” Jefferson read this phrase as a single power to “collect Taxes, Duties, Imposts, and Excises,” that power granted “in order” to pay the “Debts, and provide for the common Defence and general Welfare of the United States,” subject to the requirement of uniformity. Interpreting the “general welfare” clause as a separate grant of power beyond a power to tax, which would permit Congress “a distinct and independent power to do any


4 See, e.g., James B. Staab, The Tenth Amendment and Justice Scalia’s “Split Personality,” 16 J.L. & Pol. 231, 244-51 (2000) (citing Virginia Supreme Court Chief Justice Spencer Roane, and House members and Senators John Taylor and John Randolph, all Jefferson allies)

5 Mayer, supra note 1, at 190-91.

6 Id. at 191.
act they please, which might be for the good of the Union,” Jefferson noted, would “render all the preceding and subsequent enumerations of power completely useless” and would run against the “established rule of construction” dealing with related provisions that a phrase should be given a meaning that “will allow some meaning to the other parts of the instrument, and not that which would render all the others useless.”7

The same argument can be made about the language “provide for the common Defence.” If that provision were viewed as a separate grant of power, rather than merely one purpose for which taxes may be raised, it would render superfluous the other provisions in Article I, § 8, cls. 11-16 regarding Congress having the power to declare war, raise and support armies and navies, and provide for organizing, arming, and disciplining of Militias. In addition, under the “last antecedent” maxim of construction, discussed at § 5.2.2.1.A n.37, if the “pay the Debts” and “provide for the general Welfare” clauses were intended to be independent powers, then the modifier regarding “uniform” “Duties, Imposts and Excises” should have been placed just after the listing of the power to “lay and collect Taxes” which it modifies. Inclusion of that language at the end of the passage suggests that there is just one power of collecting taxes, which the final clause of the passage modifies.

Jefferson’s argument regarding the Necessary and Proper Clause of Art. I, § 8, cl. 18 similarly followed a literal interpretation combined with arguments of context. As Professor Mayer noted:

[all of the remaining powers in Article I, § 8] can all be carried into execution without a bank, Jefferson argued; “a bank is not necessary, and consequently not authorised by this phrase.” The argument, of course, turns on the meaning of the adjective necessary, which Jefferson contrasted with convenient. . . . “[I]f such a latitude of construction be allowed to this phrase as to give any non-enumerated power, it will go to every one, for there is no one which ingenuity may not torture into a convenience . . .” [and thus] the necessary and proper clause “would swallow up all the delegated powers, and reduce the whole to one phrase as before observed” in Jefferson’s discussion of the general welfare clause.8

Following a subjective mode of interpretation, Jefferson also relied on evidence of the subjective intent of the drafters of the Constitution. Professor Mayer stated, “Jefferson further argued, relying on a piece of historical information undoubtedly furnished to him by Madison: the power of Congress to incorporate a bank – ‘the very power now proposed as a means’ – was considered and ‘rejected as an end’ by the Constitutional Convention.”9

In contrast to this approach, Alexander Hamilton’s advice to President Washington on why the bank bill was constitutional approached the issue from the perspective of the traditional common-law style of interpretation. This approach emphasized more than did Jefferson “general kinds of reasoning” rather than Jefferson’s focus on “specific interpretive tasks.” Hamilton argued that there are three kinds of governmental powers: “express powers,” “implied powers” and “resulting powers.”

7  Id. at 191-92.

8  Id. at 192-93.

9  Id. at 192.
“Resulting powers” are based upon background principles of government embedded in the law from “the whole mass of the powers of the government, and from the nature of political society.” The policy maxim that governmental powers “ought to be construed liberally, in advancement of the public good” was used to rebut Jefferson’s argument about a restrictive meaning to be given to the Necessary and Proper Clause. Hamilton also indicated that determining express, implied, or resulting powers can be based by induction from “fair reasoning & construction . . . – taking as guides the general principles & general ends of the government.” In addition, Hamilton noted that Jefferson’s interpretation of the Necessary and Proper Clause was “to give it the same force as if the word absolutely or indispensibly had been prefixed to it.” Not only was such a reading inconsistent with the specific interpretive task of resorting to related provisions, since, as noted at § 5.2.2.1.C n.46, the phrase “absolutely necessary” was used in Article I, § 10, but only the phrase “necessary and proper” was used in Article I, § 8, but also such a construction “would beget endless uncertainty & embarrassments” since “few measures of any government would stand so severe a test.”

It was Hamilton’s approach, combined with 20 years of legislative and executive practice and judicial precedents supporting the bank’s constitutionality, that Chief Justice Marshall relied upon in the Court’s decision in 1819 to uphold the power of Congress to incorporate a bank in McCulloch v. Maryland, discussed at § 18.1.2. Following the prevailing mode of interpretation at the time, which prevented resort to legislative or constitutional history, discussed at § 6.2.3.1 n.64, Marshall made no reference in his opinion to the internal deliberations of the Constitutional Convention.

To state that Jefferson relied more on “specific interpretive tasks” than did Hamilton is not to state that Jefferson ignored “general kinds of reasoning.” Like most formalists, he just gave them lesser weight than arguments of literal meaning, verbal maxims, related provisions, or specific historical intent. Of course, regarding arguments of purpose and structural arguments of federalism, Jefferson and Hamilton had very different views. Reflecting a states’ rights view, discussed at § 5.2.2.2.B, Jefferson believed that “the capital and leading object [of the Constitution] was to leave with the States all authorities which respected their own citizens only, and to transfer to the United States those which respected citizens of foreign or other States; to make us several as to ourselves, but one as to all others.” For Hamilton, and Chief Justice Marshall in McCulloch v. Maryland, greater domestic power was reposed in the federal government under the dual theory of sovereignty. McCulloch v. Maryland is discussed further at § 18.1.2.

The “deduction versus induction” issue was important regarding the issue of Congress’ power to incorporate a national bank because a decision on that matter influenced how to view the entire scope of federal power, as discussed at § 18.1.2 text following n.43. In addition, Jefferson’s
approach must be considered against a backdrop of Jefferson’s view that since “the earth belongs in usufruct to the living,” each new generation has the right to make for itself a new Constitution.\textsuperscript{15} Under such a view, the Constitution would not be intended to endure for ages, but only until the next Constitution was adopted. A static, deductive model of interpretation makes better sense in such circumstances, for needed flexibility can come from newly-adopted constitutional language. Jefferson supported such a static model. As Jefferson phrased the point, “on every question of construction, [we] carry ourselves back to the time when the Constitution was adopted, recollect the spirit manifested in the debates, and instead of trying what meaning may be squeezed out of the text, or invented against it, conform to the probable one in which it was passed.”\textsuperscript{16} Thus, for initiatives that Jefferson supported, but which were of questionable constitutionality under his model of interpretation, like use of federal monies for internal improvements, Jefferson “felt that amendment of the Constitution” was the proper means of action, rather than creative judicial interpretation.\textsuperscript{17} Even concerning the Louisiana Purchase, which was a very popular action, Jefferson preferred a constitutional amendment to ratify the purchase. As stated by Professor Mayer, “Although he eventually acquiesced in the Louisiana Purchase without the constitutional amendment that he believed was necessary to sanction it, what is noteworthy is the degree to which he agonized over what may be fairly regarded as a technical question. Indeed, he was willing to jeopardize the acquisition of Louisiana, despite its immense strategic importance, in order to save the principle of strict [textual] construction.”\textsuperscript{18}

As noted at § 4.1 nn.11-12, despite Jefferson’s support, the view of constantly newly-adopted Constitutions was rejected by the framing and ratifying generation, including James Madison. For Madison, “too frequent appeals to the people to ‘new-model’ government would ‘in great measure deprive the government of that veneration, which time bestows on every thing, and without which perhaps the wisest and freest governments would not possess the requisite stability.’”\textsuperscript{19} Chief Justice Marshall remarked in \textit{McCulloch},\textsuperscript{20} “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.” Unlike the detailed Constitutional Codes that emerged during the 19\textsuperscript{th} and 20\textsuperscript{th} centuries in civil-law systems, the United States Constitution was not intended to be such a document. Imposing a style of interpretation on it that fits better with documents drafted as a code, like formalism’s focus on literal text, discussed at § 9.2.1.1, would be inconsistent with how the Constitution was drafted. Similarly, requiring formal constitutional amendment for every evolutionary change in

\textsuperscript{15} Id. at 302-08.

\textsuperscript{16} Id. at 285 (quoting Jefferson).

\textsuperscript{17} Id. at 218-19.

\textsuperscript{18} Id. at 215.

\textsuperscript{19} Id. at 300-01 (quoting Madison).

\textsuperscript{20} 17 U.S. (4 Wheat.) 316, 415 (1819).
understanding of a natural law concept placed into the Constitution would be inconsistent with how
the framers and ratifiers would have expected the constitutional amendment process to have to work
given a natural law style of interpretation, and thus inconsistent with the degree of difficulty that the
framers chose for the amendment process, as discussed at § 20.1.1.3 nn.20-21.

§ 7.2 The Form or Shape of Constitutional Law Doctrine

The form or shape of constitutional doctrine is dependent on whether the doctrine is phrased as a
categorical rule or a balancing test; as elements to meet or factors to weigh; as a rule or standard;
and as a question of law, a question of fact, or a mixed question of law and fact. As noted at § 4.2.2,
both balancing tests and categorical rules can adopt the structure of elements to meet or factors to
weigh. In the following material, examples of each of these forms or shapes of constitutional
document are presented. Discussion of balancing tests that adopt the structure of elements to meet
or factors to weigh appears at § 7.2.1. Discussion of categorical rules that adopt elements to meet
or factors to weigh appears at § 7.2.2. Discussion of constitutional doctrines phrased as rules versus
standards appears at § 7.2.3. Discussion of issues arising from doctrine being phrased as questions
of law, questions of fact, or mixed question of law and fact, and the related issue of whether the
document adopts a subjective or objective approach to factual or legal issues, appears at § 7.2.4.

§ 7.2.1 Balancing Tests in Constitutional Doctrine: The “Base Plus Six” Model of
Review

As discussed at § 4.2.1 nn.23-24, a balancing test is a test that involves a cost-benefit analysis of
means and ends – in Professor Aleinikoff’s terms “a head-to-head comparison with competing
interests.”21 The logic of this cost-benefit analysis results in every balancing test including three
basic components. First, there is question of what principles or policies are involved, that is, what
are the ends to be achieved by the doctrine. Against the backdrop of these ends, the means of the
action under review are examined both for the benefits achieved by the means (the benefit) and the
burdens imposed by the means (the cost) as part of the cost-benefit analysis. Thus, balancing tests
inevitably involve a three-part consideration of ends, benefits, and burdens.

As discussed at § 4.2.2, two kinds of balancing tests are possible. One kind of balancing test
structures the three considerations of ends, benefits, and burdens as factors to weigh. This is the
classic kind of balancing test, where consideration of ends, benefits, and burdens are thrown together
and weighed one against the other. As noted at § 4.2.2 nn.28-30, the procedural due process cases
based upon Mathews v. Eldridge and the dormant commerce clause cases involving Pike v. Bruce
Church’s “clearly excessive burden” analysis are classic examples of factor balancing tests.

In applying this kind of balancing test, there is an issue of whether the challenger has the burden of
establishing that the governmental action is unconstitutional, or whether the government has the
burden of establishing that the action is constitutional. Sometimes, as in each of the two cases cited
above, the burden is on the challenger to establish the unconstitutionality of the governmental action.

21 T. Alexander Aleinikoff, Constitutional Law in the Age of Balancing, 96 Yale L.J. 943, 945
Cases under the Contracts Clause that involve the government substantially impairing the contract obligations of their own contracts have a similar structure. For example, in \textit{United States Trust Co. v. New Jersey},\textsuperscript{22} discussed at § 22.1.4 nn.29-30, the challenger has the burden of showing – given the three-part factor balancing of the state’s “legitimate” interest; the statute’s means, including whether the benefits of the statute could be served “equally well” by an “evident and more moderate course”; and the “burden” on individual contract rights – that the burden was not “reasonable and necessary” given the statute’s benefits.

However, sometimes the burden shifts to the government. For example, in dormant commerce clause cases where the state regulation facially discriminates against interstate commerce, such as \textit{Maine v. Taylor},\textsuperscript{23} discussed at § 20.3.2.1.D n.194, the Court balances (1) the state’s legitimate interest in the regulation; (2) whether the benefits could be achieved as well by available non-discriminatory alternatives; and (3) the burden on interstate commerce, but the burden shifts to the government to establish the constitutionality of its regulation. In the First Amendment area, when considering the right of government workers to speak on matters of public concern, the government has the burden to establish in cases like \textit{Pickering v. Board of Education of Will County, Illinois},\textsuperscript{24} discussed at § 30.2.2.1 nn.17-2, that (1) the government’s “legitimate” ends; (2) given the means by which the governmental action achieved these benefits, including whether the ends “could be promoted through less drastic action”; (3) “outweigh” the “burden” on the individual’s First Amendment rights. The Fifth Amendment Takings Clause balancing test in \textit{Dolan v. City of Tigard},\textsuperscript{25} discussed at § 22.2.5.1 nn.9-13, requires the government to establish a “rough proportionality” between the government’s burden on the individual and the individual’s burden on society. This test was explicitly related in \textit{Dolan} to search and seizure doctrine,\textsuperscript{26} which places the burden on the government to establish under the Fourth Amendment balancing test that any search and seizure is “reasonable,” discussed at § 23.2.1.1 n.59.

A second kind of balancing test structures the balancing in terms of elements to meet. For example, as noted at §§ 26.1.1.1 n.12 & 26.1.1.2 nn.52-53, under the Equal Protection Clause the Court has organized the three inquiries into ends, benefits, and burdens as separate elements to meet. Thus, under minimum rational review, the legislation has to (1) advance legitimate government ends, (2) be rationally related to advancing these ends, and (3) not impose irrational burdens on individuals. 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. Under strict scrutiny, the statute must (1) advance compelling governmental ends, (2) be substantially and directly related to advancing these

\begin{thebibliography}{9}
\bibitem{22} 431 U.S. 1, 22, 31 (1977).
\bibitem{23} 477 U.S. 131, 138 (1986).
\bibitem{24} 391 U.S. 563 (1968).
\bibitem{25} 512 U.S. 374, 388-91 (1994).
\bibitem{26} See id. at 391. \textit{See generally} Aleinikoff, supra note 21, at 965 (describing the range of cases in modern doctrine that use balancing under Fourth Amendment search and seizure doctrine).
\end{thebibliography}
ends, and (3) be the least restrictive effective means to advance these interests.

In its phrasing of intermediate review, the Court has 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. Unfortunately, sometimes the Supreme Court has used the phrase “narrowly drawn” under strict scrutiny. To reflect the rigor of strict scrutiny analysis, and to separate this approach from the more flexible “substantially” narrowly drawn analysis used at intermediate review, the terms “precisely tailored” or “necessary” are better terms to use than “narrowly tailored” for the strict scrutiny “least restrictive alternative” test. The term “necessary” is used in the rest of this book when discussing the strict scrutiny test.

As discussed at §§ 26.1.1.1 n.13-21 & 26.1.1.2 nn.44-51, the first inquiry under each of these three balancing tests is what governmental ends support the statute’s constitutionality. Depending on the standard of review, the governmental interests must be legitimate or permissible; important, substantial, or significant; or compelling or overriding. To reflect the most common terminology used by the Court, the terms legitimate governmental interests, important or substantial governmental interests, and compelling governmental interests are used in the remainder of this book. Of course, the governmental interest to support a statute may be illegitimate, and thus not support the statute under any standard of review. For example, in a sequence of cases, the Court has stated that prejudice against interracial marriage, prejudice against the mentally impaired, and animus against politically unpopular groups, such as hippies in communes, or homosexuals, are illegitimate governmental interests.

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27  See, e.g., Board of Trustees of the State Univ. of New York v. Fox, 492 U.S. 469, 480 (1989) (“narrowly drawn” phrased used).


The second inquiry under each of these three balancing tests concerns the relationship between the statute’s means and how it advances those governmental ends. Depending on the standard of review, the statute must have a rational relationship to its ends, a substantial relationship, or a substantial and direct relationship. 32 This relationship inquiry has two parts: (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 for those whom the statute does regulate (the service inquiry). 33 As discussed at § 27.1.2.1 nn.43-45, though under a pristine analysis the Court probably should consider only the underinclusiveness inquiry under Equal Protection Clause analysis, and reserve the service inquiry for Due Process Clause analysis, the Court has not typically disciplined its analysis in this way.

The third inquiry focuses on the burdens imposed by the statute’s means. Depending on the standard of review, the statute’s burden must be not irrational, not substantially more burdensome than necessary, or the least restrictive burden that would be effective in advancing the governmental interests. 34 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). 35 Again, though under a pristine analysis the Court probably should consider only the overinclusiveness inquiry under Equal Protection Clause analysis, and reserve the restrictiveness inquiry for Due Process Clause analysis, the Court has not disciplined its analysis in this way either. As discussed at § 27.1.2.1 nn.43-45, 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.

While these three standards of review are clearly identified in modern Supreme Court doctrine, two other standards of review have been used in modern doctrine. These standards reflect variations on the three inquiries of governmental interests, relationship to benefits, and burdens. As noted, under intermediate review, the legislation must: (1) advance important or substantial government interests, (2) be substantially related to advancing those interests; and (3) not be substantially more burdensome than necessary to advance these interests. Strict scrutiny requires an increased level of scrutiny for each of these three questions. Under strict scrutiny, the statute must: (1) advance compelling governmental interests; (2) be directly related, as well as substantially related, to advancing those interests; and (3) be the least restrictive effective means of doing so.

32 See Kelso, supra note 30, at 1288-97.
33 Id. at 1281.
34 Id. at 1298-1305.
35 Id. at 1281.
The first additional level of review continues the intermediate level of scrutiny for elements one and three of the balancing test, but increases the level of scrutiny under the second prong from the intermediate level of substantial relationship to the strict scrutiny level of direct relationship. This is the test used to determine the constitutionality of commercial speech regulations. As the Court stated in Central Hudson Gas & Electric Corp. v. Public Service Commission,36 discussed at § 30.3.2.1 nn.228-30, “[W]e ask whether the asserted governmental interest is substantial. [Next] we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than necessary to serve that interest.” 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. Use of the terminology “with bite” to reflect a heightened version of a level of review is common in modern constitutional terminology.37

A second additional level of review adopts the strict scrutiny requirement for both elements one and two, but continues the intermediate level of scrutiny for element three. Because this level adopts two of the three levels of strict scrutiny, but waters down element three to an intermediate level of inquiry, this additional level can be called "loose" strict scrutiny. The most recent use of this standard of review occurred in the equal protection case of Bush v. Vera,38 discussed at § 26.2.1.5 nn.278-81. In that case, although generally applying a strict scrutiny compelling governmental interest analysis to a case of race discrimination, the majority, per 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.’” Instead, the Court adopted the intermediate prong three requirement that the racial redistricting only not be “substantially more [burdensome] than is ‘reasonably necessary.’”

Two earlier Supreme Court cases implicitly adopted such a loose strict scrutiny option in the context of race-based affirmative action in the employment context. In Paradise v. United States,39 discussed at § 26.2.1.4.C nn.229-32, a four-Justice plurality stated that despite a strict scrutiny approach the affirmative action remedial plan was not required to satisfy the least restrictive alternative test. In Fullilove v. Klutznick,40 discussed at § 26.2.1.4.B nn.220-23, three Justices did not apply a least restrictive alternative analysis in a case they said was consistent with a strict scrutiny approach. However, in an opinion authored by Justice O’Connor, the Court clearly adopted traditional rigorous strict scrutiny for race-based affirmative action in the context of employment of construction workers in Adarand Constructors, Inc. v. Pena,41 discussed at § 26.2.1.4.C nn.242-

45, following Justice O’Connor’s dissent in Paradise, discussed at § 26.2.1.4.C nn.233, where she criticized the Paradise plurality for not adopting traditional rigorous strict scrutiny in a race-based affirmative action case. Despite this criticism of loose strict scrutiny in Paradise and Adarand, the adoption by Justice O’Connor of loose strict scrutiny in her majority opinion in Bush v. Vera suggests that this standard of review has become part of modern Supreme Court doctrine, at least for racial redistricting cases.

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.

Each of these levels of scrutiny is also clearly defined in terms of doctrinal inquiries that have been discussed in prior cases. These levels thus provide predictability, along with flexibility, which are useful goals in developing an approach toward standards of review. Furthermore, because each level is composed of elements which are used in many cases, there are plenty of precedents available on how to apply the standard, even if few cases have used that precise standard. For example, although few cases have applied loose strict scrutiny, there are plenty of strict scrutiny cases on “compelling” governmental interests and “directly related” advancement of benefits, and plenty of intermediate review cases on what the “not substantially more burdensome than necessary” test requires.

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 review balancing test. Under this test, the governmental action is constitutional unless the challenger can establish that the action is not supported by any legitimate governmental end, or is not rationally related to advancing a legitimate governmental end, or imposes an irrational burden on individuals. As discussed at §§ 26.1.1.1 nn.22-24 & 26.4.1 n.439, in applying this test, the Court gives “substantial deference” to the government’s judgment concerning the legitimacy of the ends and the rationality of the means. As discussed at § 26.1.3 nn.83-91, the Court permits “any conceivable legitimate end” to be used to make the action constitutional.

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Slightly more rigorous than this test are the two factor 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, discussed at § 20.3.2.1.D nn.196-208; or not “reasonable and necessary,” as under Contracts Clause review, discussed at § 22.1.4 nn.29-33; or not “roughly proportionate,” as under Takings Clause review, discussed at § 22.2.5.1 nn.97-103; or some other phrasing of not being “reasonable,” as under Fourth Amendment search and seizure doctrine, discussed at § 23.2.1.1 nn.58-59.

As discussed in Part IV, when considering each of these doctrines in greater depth, the Court does not give the same kind of “substantial deference” to the government’s judgment regarding either the ends advanced or the means employed when applying these factor balancing tests. Nevertheless, some “deference” to the government is still given, discussed at § 21.2.4.3 nn.110-12. However, these tests are less burdensome on the government than intermediate review or strict scrutiny, since both of the factor balancing tests permit the governmental action to be justified using legitimate government interests, rather than the important or substantial governmental interests of intermediate review, or the compelling governmental interests of strict scrutiny.

Because the two factor balancing tests permit resort to legitimate governmental interests, they are best understood as versions of rational review. To give these tests names which reflect that aspect of their approach, the first factor balancing test, where the burden is still on the challenger to prove the unconstitutionality of the governmental action, similar to the burden under minimum rational review, can be called “basic rational review” or “second-order” rational review. It is “basic” because each of the various factor balancing tests adopt some linguistic version of the requirement that the governmental action be basically “reasonable” or not “excessive,” given a balancing of means and ends. It is “second-order” because it is the least rigorous of the balancing tests that are more rigorous than minimum rational review. The second factor balancing test, where the burden shifts to the government to justify the constitutionality of its action, can be called “rational review with bite” or “third-order” rational review, since all the linguistic variations of this balancing test place the burden on the government, and thus are more rigorous than basic rational 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, basic rational review, and rational review with bite. In sum, there are thus seven different balancing tests that the Court applies in various cases.

These seven balancing tests – the “base” of minimum rational review, “plus six” other standards of heightened review – are summarized in Table 7.2:
Table 7.2
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 or Interest to be Advanced</th>
<th>Statutory Means to Ends Relationship To Benefits</th>
<th>Relationship to Burdens</th>
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<tr>
<td>&quot;Base&quot; Minimum Rational Review (Three Requirements are Separate Elements to Meet)</td>
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<tr>
<td>Minimum Rational</td>
<td>Legitimate</td>
<td>Rational</td>
<td>Rational</td>
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<td>The &quot;Plus Six&quot; Standards of Increased Scrutiny</td>
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<tr>
<td>Heightened Rational Review (Factor Weighing of Means and Ends, Not Separate Elements)</td>
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<tr>
<td>Basic Rational</td>
<td>Means Are “Reasonable/Not Excessive” Given Legitimate Ends</td>
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<td>or Second-Order</td>
<td>(no substantial deference)</td>
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<td>(no substantial deference)</td>
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<td>Review: Burden on</td>
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<td>challenger to prove unconstitutionality</td>
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<td>Rational Review</td>
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<td>with Bite or Third-Order Review</td>
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<td>Intermediate Review Standards (Three Requirements are Separate Elements to Meet)</td>
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<td>Substantially Related</td>
<td>Not Substantially More Burdensome Than Necessary</td>
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<td>Directly Related</td>
<td>Not Substantially More Burdensome Than Necessary</td>
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<td>Strict Scrutiny Standards (Three Requirements are Separate Elements to Meet)</td>
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<td>Loose</td>
<td>Compelling</td>
<td>Directly Related</td>
<td>Not Substantially More Burdensome Than Necessary</td>
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<td>Least Restrictive Effective Alternative</td>
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</table>
In deciding which of these seven balancing tests to apply, the Court considers a range of at least nine factors that suggest either that the base level of minimum rational review should be applied, or one of the six more rigorous standards of review should be used. These nine factors are discussed at § 26.1.2.1 nn.57-67. In addition to this analysis, sometimes the Court will use an elements to meet approach to determine if any balancing test needs to be triggered. For example, as discussed at § 22.1.4 nn.27-28, not every burden on contract rights today triggers application of the Contracts Clause balancing test. Only “substantial impairments” of contract rights trigger a Contracts Clause analysis. Once this element of “substantial impairment” is met, the question then becomes under the nine-factor analysis whether considerations like deficiencies in the political process suggest that a second-order rational review balancing test should be used, as for government infringement of its own bond obligations, or whether only a minimum rational review test should be employed, as is standard today under the Contracts Clause for routine government regulation. As discussed at §§ 22.1.1-22.1.5, during the traditional natural law and formalist eras, the Court applied a categorical Contract Clause doctrine. Only the modern Contracts Clause doctrine reflects this balancing approach. As noted at § 4.2.1 nn.33-35, traditional natural law judges and formalist judges had a greater predisposition for categorical tests rather than balancing approaches, while modern natural law judges and instrumentalist judges have a greater predisposition for balancing tests.

Given this understanding of the Court’s current practice regarding these seven balancing tests of the constitutionality of governmental action, a danger of increased confusion and unpredictability exists if proliferation of levels continues. This could happen if:

1. The Court adopts additional kinds of inquiries different than the three basic inquiries used under minimum rational review, intermediate scrutiny, and strict scrutiny (e.g., language relating to an “exceedingly persuasive justification” in United States v. Virginia, rather than requiring either legitimate, important, or compelling governmental interests, discussed at § 21.2.4.1);
2. Additional mixings and matchings occur for different kinds of scrutiny for the governmental interests, relationship to benefits, and burden inquiries (e.g., use of a rational relationship to an important governmental interest test, as phrased in Timmons v. Twin Cities Area New Party, discussed at § 21.2.4.2); or
3. The "base plus six" standards are not clearly acknowledged (discussed at § 21.2.4.3).

Unfortunately, each of these concerns are real, given some language in current Supreme Court cases. These concerns are addressed in depth at §§ 21.2.4.1-21.2.4.3, as part of the discussion there of the general structure of individual rights doctrine in constitutional law. For purposes of the discussion here, it is useful to note that it would be best for the Court to stick with seven levels of review and not engage in any unnecessary and confusing additional proliferation. Given the three basic inquiries of governmental ends, relationship to benefits, and burdens, and three levels of scrutiny for each inquiry (i.e., legitimate, important, or compelling governmental ends; rational, substantial, or direct relationship to benefits; and not irrationally burdensome, not substantially more burdensome than necessary, or least restrictive alternative), mathematically there are 27 possible permutations of levels of review. With the addition at rational review of the factor balancing tests of second-order and third-order rational review, their various linguistic variations, and the possibility of placing the burden of proof on the challenger or the government in any of these levels of scrutiny, the number of possible permutations rises to more than 64. Practical reasonableness, however, a
hallmark of the common law,\textsuperscript{43} suggests that the Court should resist such a proliferation in possible
tests where there is no demonstrated need for such additional levels. Of course, this does not mean
that the Court should not adopt a variation within a level of review if institutional needs so counsel.
For example, in \textit{Fiallo v. Bell},\textsuperscript{44} the Court noted the extra level of deference, more than the usual
“substantial deference” of minimum rational review, given to congressional regulations of
immigration and naturalization, where “Congress regularly makes rules that would be unacceptable
if applied to citizens.”

If seven levels of review are going to be used, the seven levels most in current use provide the
soundest foundation on which to base doctrine. Of course, the Court could choose to scrap the levels
of review, and adopt either a “sliding scale” approach or some new theory entirely separate from the
current doctrinal approach.\textsuperscript{45} Practical considerations and historical experience suggest such a move
would be neither a good idea nor likely to be adopted by a majority of the Court.

As typically defined, a sliding scale approach “considers such 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.”\textsuperscript{46}
Such a sliding scale approach would not be a good idea because it provides too little guidance for
lower courts faced with resolving constitutional disputes and thus provides 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 Court to
engage in meaningful ‘error correction.’”\textsuperscript{47}

Recent proposals to adopt a new theory of constitutional review are most often made by progressive
constitutional theorists disappointed at the conservative result of some current doctrinal outcome.
With regard to such proposals for the Court to abandon current precedents and strike out on its own,

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\textsuperscript{43} See, e.g., Daniel A. Farber, \textit{The Inevitability of Practical Reason: Statutes, Formalism, and
the Rule of Law}, 45 Vand. L. Rev. 533 (1992); Charles Fried, \textit{The Artificial Reason of the Law or:

\textsuperscript{44} 430 U.S. 787, 792 (1977).

\textsuperscript{45} See, e.g., Leslie Goldstein, \textit{Between the Tiers: The New(est) Equal Protection and Bush v.
by Justice Marshall in \textit{San Antonio v. Rodriguez}, discussed at § 26.5.4.n.546, and Justice Stevens
in \textit{Craig v. Boren}, discussed at § 26.3.1.2 n.363); Stephen M. Griffin, \textit{Judicial Review in a
individual rights, “asking what a democracy of rights really involves as a system of institutions and
then situating judicial review in that system.”).

\textsuperscript{46} Chemerinsky, \textit{supra} note 37, at 647.

\textsuperscript{47} Ashutosh Bhagwat, \textit{Separate But Equal?: The Supreme Court, the Lower Federal Courts,
\end{flushright}
Professor John Hart Ely’s caution of two decades ago is still relevant: “[T]here is absolutely no assurance that the Supreme Court’s life-tenured members will be persons who share your values.”48

In any event, the fact that versions of the standards of review appear in so many doctrines suggests strong institutional support at the Supreme Court for doctrine to be developed in that way. Further, unlike the experience in France during the French Revolution, where much old doctrine was thrown out in favor of new doctrine developed by non-judicial actors and imposed through the Napoleonic Code, there are few examples in our common-law system of judges rejecting doctrines so well-developed and entrenched as the standards of review. Perhaps the only similar example would be the Supreme Court’s rejection in 1937 of the formalist-era Court’s substantive due process approach in *Lochner v. New York* and commerce clause approach in cases like *Hammer v. Dagenhart*. As discussed at § 14.2.3 nn.59-63, that rejection was a product of the well-known constitutional conflict between President Roosevelt and the Court, including President Roosevelt’s proposal of the so-called “The Court Packing Plan of 1937.” No conflict of that magnitude is on the horizon today.

§ 7.2.2  **Categorical Tests in Constitutional Doctrine**

As noted at § 4.2.1, doctrines phrased as categorical tests, like doctrines phrased as balancing tests, can adopt an approach of either elements to meet or factors to weigh. When a doctrine is phrased as a set of elements, this means that for the doctrine to apply the court must conclude that each element of that doctrine is met independently of the other elements. In the simplest case, these elements arise from the plain language of the Constitution or the ordinary dictionary definition of words used in the Constitution.

For example, as noted at § 6.3.1 n.113, and discussed in greater depth at § 19.4.2.1, the Court held in *INS v. Chadha*49 that a one-house veto by Congress of an INS determination regarding deporting an individual from the United States was unconstitutional. The Court reached this conclusion by adopting a categorical rule that all legislative action must comply with the Bicameralism and Presentment requirements in Article I of the Constitution. The Court adopted this test primarily because the plain language of the Constitution states that all legislation must result from a step-by-step deliberative process of both houses passing the same bill (bicameralism) and then sending that bill to the President for signature or veto (presentment). A one-house, or even a two-house, congressional veto of executive branch action does not literally comply with that process.

A doctrine where the ordinary dictionary definition of words used in the Constitution determines the elements to meet is the categorical rule against Bills of Attainder. As discussed at § 23.2.2.1, the text of the Constitution merely states a ban on legislative “Bills of Attainder.” The plain language

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in the Constitution does not define that term any further. However, based upon the ordinary
dictionary definition, a Bill of Attainder is a “legislative punishment of an identifiable individual.”
Thus, in cases like *Nixon v. Administrator of General Services*, the Court has phrased the Bill of
Attainder doctrine as requiring that 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.

Where the Constitution’s text is not so specific or susceptible to easy dictionary definition, the Court
is faced with the choice of whether to phrase the categorical test in terms of elements to meet or a
set of factors to weigh. Because the text of the Constitution is not so specific in these kind of cases,
the general judicial predispositions of the Justices become more critical. As discussed at § 4.2.2,
the formalist, traditional natural law, and Holmesian styles of interpretation have a greater
predisposition for doctrine phrased as elements to meet than the modern natural law and
instrumentalist styles of interpretation, which are more willing to embrace doctrine phrased as
factors to weigh.

One example of this difference is the political questions doctrine. As discussed at §§ 17.3.4.1-
17.3.4.3, during the traditional natural law, formalist, and Holmesian eras of American law, 1789-
1954, the categorical ban on the Court deciding political questions was phrased in terms of whether
certain elements were met. In the words in 1803 of *Marbury v. Madison*, the test was whether
there exists “a constitutional or legal discretion” so that “nothing can be more perfectly clear than
that their acts are only politically examinable.” In political question cases like *Luther v. Borden* in
1849, or *Coleman v. Miller* in 1939, the Court refused to adopt a factor weighing approach. Since
1954, the political questions doctrine has been phrased as a weighing of factors, as discussed at §
17.3.4.4. Thus, in 1962 in *Baker v. Carr*, the Court stated that the factors to weigh under the
political questions doctrine concern whether: (1) there is a textually demonstrable constitutional
commitment to a coordinate branch of government; (2) there is a lack of judicially manageable
standards; (3) the issue calls for resolution of a non-judicial policy decision; (4) the decision would
represent a lack of respect for other branches of government; (5) there is need for finality; and (6)
there is a potentiality of embarrassment from multifarious pronouncements on the particular issue.

A second example of a categorical approach to doctrine that uses factor analysis today is the state
action doctrine. The Court has stated as a categorical matter that to bring a case under most
individual rights provisions in the Constitution state action is needed. As discussed at § 21.1.2.5
nn.38-40, in *Edmonson v. Leesville Concrete Co., Inc.*, the Court summarized modern state action
doctrine as involving a consideration of three factors to determine if state action exists: (1) “the

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51 5 U.S. (1 Cranch) 137, 166 (1803).
52 *Coleman*, 307 U.S. 433, 454 (1939); *Luther*, 48 U.S. (7 How.) 1, 42 (1849).
extent to which the actor relies on governmental assistance and benefits”; (2) “whether the actor is performing a traditional governmental function”; and (3) “whether the injury caused is aggravated in a unique way by the incidents of governmental authority.” Discussed at § 21.1.2.5 n.42, the Court similarly adopted a factor weighing approach in Brentwood Academy v. Tennessee Secondary School Athletic Association, focusing on the “entwinement” of the private and governmental actors. “Entwinement” is best understood as an aspect of factor (1) of the Edmonson opinion. This factor approach was criticized in Brentwood by formalist Justices Thomas and Scalia, Holmesian Chief Justice Rehnquist, and occasionally formalist-leaning natural law Justice Kennedy. In dissent, they adopted a phrasing of state action doctrine more in terms of elements, stating, “[W]e have found a private organization’s acts to constitute state action only when the organization performed a public function; was created, coerced, or encouraged by the government; or acted in a symbiotic relationship with the government. Justice Kennedy’s formalist leanings are discussed at § 12.4.1.

Sometimes, in deciding what kind of categorical test to adopt, the Court has explicitly considered a number of factors that led to that particular conclusion. As noted at § 4.2.1 n.31, some commentators have called this “definitional” balancing, exemplified by the holding in New York v. Ferber that a balancing of interests suggests that the distribution of child pornography is not protected by the First Amendment. To the extent that Ferber adopted a categorical view that child pornography is not protected by the First Amendment, Ferber is best conceived as adopting a categorical approach to doctrine based upon a weighing of factors that led to that decision. Professor Tribe has used the term “categorical definitions” to describe this kind of case.

In addition to Ferber, another good example of this kind of case involves the conclusion in Nixon v. Fitzgerald that the President should have absolute immunity from civil damage action lawsuits for official actions taken while President. As discussed at § 20.1.4.2.A nn.66-68, the Court in Fitzgerald balanced a number of factors to conclude that a categorical absolute immunity should apply in these kind of cases. However, as discussed at § 20.1.4.2.A nn.60-61, 69-74, these same factors suggested to the Court that only a factor balancing qualified immunity approach was appropriate for Presidential immunity when raised in the context of a criminal trial, as in United States v. Nixon, or for unofficial actions, including unofficial actions taken by the President before the President took office, as in Clinton v. Jones.

56 Id. at 305 (Thomas, J., joined by Rehnquist, C.J., and Scalia & Kennedy, JJ., dissenting).
§ 7.2.3  Rules versus Standards in Constitutional Doctrine

As noted at § 4.2.3, a third issue that courts must confront when faced with the task of defining doctrine is whether to phrase some part of the doctrine as a rule or a standard. As typically defined, doctrines are phrased as rules when the elements or factors embody specific definitions capable of relatively mechanical application. Doctrines phrased as standards embody more general definitions, such as that behavior must be reasonable. Thus, in the classic torts example, Holmes’ view that automobile drivers should “stop, look, and listen” at railroad crossings was an example of a rule; Cardozo’s view that the negligence of automobile drivers at railroad crossings should be based upon whether they acted “reasonably under the circumstances” was an example of a standard.60

Not surprisingly, given their focus on reducing judicial discretion through analytic, logic treatment of settled positive law, formalists have the greatest predisposition to frame doctrine as rules. As Professor Sullivan noted in her classic article, The Justices of Rules and Standards, “Justice Scalia, more than any current Justice, favors operative rules and condemns operative standards.”61 As Justice Scalia stated in an article entitled The Rule of Law as a Law of Rules, “[B]y making the mode of analysis relatively principled or relatively fact-specific, the courts can either establish general rules or leave ample discretion for the future.”62 In her article, Professor Sullivan discussed a number of examples where Justice Scalia has preferred doctrine to be phrased as rules, including cases involving the dormant commerce clause, separation of powers, the Free Exercise Clause, and Takings Clause doctrine.63 Professor Sullivan concluded:

These . . . examples taken together suggest that Justice Scalia’s model for judicial rulemaking in constitutional law is that not of the common law, but of the civil code. Here is the codifier at work: first, state the general rule; second, rationalize the existing messy pattern of cases by grandfathering in a few exceptions and doing the best you can to cabin their reach; and third, anticipate future cases in which the rule might be thought problematic and dispose of them in advance by writing sub-paragraphs and sub-sub-paragraphs qualifying the rule with clauses beginning with “unless” and “except.”64


63  Sullivan, supra note 61, at 83-89.

64  Id. at 87.
Professor Sullivan noted in her 1992 article, “If Justice Scalia leads the charge for rules on the current Court, Justice Stevens is his most consistent, standard-bearing antagonist.” With respect to each example cited by Professor Sullivan where Justice Scalia favored a rule-based approach, Justice Stevens was on the opposite side, endorsing a standard-based approach. In a number of these cases, Justice Stevens also supported a factor balancing approach, as is the case under the dormant commerce clause *Pike v. Bruce Church* test, which Justice Scalia rejects, as discussed at § 20.3.2.3 nn.237-38. As indicated in Table 4.1, instrumentalist judges have a predisposition for balancing tests, factor analysis, and standards. Professor Sullivan noted Justice Stevens’ “commitment to multi-factored contextual analysis and his opposition to rule-based or categorical decisionmaking.”

Of course, doctrine phrased as standards of “reasonableness” creates concerns similar to those discussed at § 3.3 nn.59-62 regarding the difficulty of determining Cardozo’s “objective social values” to guide instrumentalist decisionmaking. For instrumentalists, that difficulty would not be viewed as a major problem, because the judge can resort to “objective social values” to determine the “reasonableness” of behavior. For the other decisionmaking styles, that difficulty raises a more serious question whether the judge has too much discretion in judicial decisionmaking.

As discussed at § 3.4 nn.81-84, 93-106, the natural law approach handles this problem by limiting judicial discretion through great respect to precedent; use of background moral principles only embedded in the law, not background social policies; and by resort to custom. Regarding what defense the “standard-favorers” might offer against the criticism that use of standards gives judges too much discretion, Professor Sullivan noted:

> The answer that the defenders of common-law reasoning gave was something like “custom,” or widely shared social practices. The usual criticism of such notions is that in a deeply heterogenous society we have no single culture and so reliance on “custom” is no constraint at all. Nonetheless, Justices O’Connor, Kennedy, and Souter seem to believe that, however heterogeneous our culture, some concepts are so entrenched, so basic, like bedrock, that they furnish points of reference from which those who apply standards can proceed. When judges rely on such bedrock concepts, they need not worry that they are making it all up out of whole cloth. Consider, for example, coercion . . . .

A collection of a number of these “bedrock” moral principles – such as “no person should be permitted to profit from his own wrong”; “promises should be kept”; and “arbitrary coercion is wrong” – is presented at § 12.2.2.3 text following n.81. The relationship between social custom and reason under a natural law approach is discussed at § 15.4.1 nn.50-56.

As noted at § 4.2.3 n.60, because of their desire for certainty in the law, Holmesian judges have a predisposition for doctrine to be phrased more in terms of rules, rather than standards. Holmes’ preference for the “stop, look, and listen” rule is just one of a number of examples of Holmes’

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65 *Id.* at 88.

66 *Id.*

67 *Id.* at 93.
preference for rules over standards. On the other hand, the functional aspect of the Holmesian approach means that a Holmesian judge may be slightly more willing to embrace a standard-like approach if that would better do justice to the functional purposes behind the law. Thus, among the four areas cited by Professor Sullivan at § 7.2.3 n.63, Holmesian Justices like Chief Justice Rehnquist and Justice White have been willing to embrace the modern dormant commerce clause doctrine, discussed at § 20.3.2.2, or modern separation of powers doctrine, discussed at § 19.1, which reject Justice Scalia’s formalist, rule-based approach to these doctrines. On the other hand, these Holmesian Justices have been willing to embrace Justice Scalia’s rule-based approach in the context of cases involving the Free Exercise Clause, discussed at § 32.2.2.5 nn.253-56, or Justice Scalia’s rule-based approach to the Takings Clause in *Lucas v. South Carolina Coastal Council*, discussed at § 22.2.5.1 nn.95-96.

## § 7.2.4 Law versus Fact in Constitutional Doctrine

As discussed at § 4.2.4, a fourth issue that courts must confront when faced with the task of defining the content of any legal doctrine is whether the relevant rule or standard, embedded in some element to meet or factor to weigh, which is part of a categorical test or a balancing approach, is phrased as an issue of fact or an issue of law. If the doctrine is phrased as an issue of fact, resolution of that doctrine will be initially for the trier of fact. Under usual rules of civil procedure, that finding will be entitled to deference on appeal and the appellate court will apply some variation of a “clearly erroneous” standard, which requires finding that the trier of fact “abused its discretion” in some manner. In contrast, if the doctrine is phrased as an issue of law, it will be decided by the trial court judge, and will not be entitled to deference on appeal. Instead, the appellate court will decide “de novo” if the trial court’s determination on the issue of law was “erroneous” or not.

The Ninth Circuit Court of Appeals *en banc* decision in *Southwest Voter Registration Education Project v. Shelley*, which overturned the panel decision to stop the California recall election of Governor Gray Davis, is a good example of this aspect of constitutional doctrine at work. The *en banc* opinion noted that a trial court’s decision to grant or deny a preliminary injunction is a question of fact reviewed under the “abuse of discretion” standard, while the district court’s interpretation of legal principles is a question of law for “de novo” review. Since the issue before the court was whether or not the district court’s decision denying a preliminary injunction was correct, the “abuse of discretion” standard was appropriate to apply, and the *en banc* opinion concluded that “the district court did not abuse its discretion in concluding that plaintiffs will suffer no hardship that outweighs the stake of the State of California and its citizens in having this election go forward as planned.”

This issue of whether the relevant aspects of any particular doctrine are questions of law or fact will be discussed for each doctrine in Part IV, Chapters 17-32. As will be seen, certain doctrines are phrased as “mixed questions of law and fact.” With respect to these doctrines, the relevant question is what level of deference is given on appeal, that is, whether or not the district court’s determination of this mixed question of law and fact is given deference on appeal. For example, as discussed at § 20.3.2.1.D nn.204-08, a district court’s factual decisions on how strong a state interest is for purposes of applying the *Pike v. Bruce Church* factor balancing test under dormant commerce clause

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68 344 F.3d 914, 917-20 (9th Cir. 2003).
review is a question of fact entitled to deference on appeal. However, the question whether that state regulation constitutes a “clearly excessive” burden on interstate commerce is viewed as a “mixed question of law and fact” given no deference on appeal and examined under a “de novo” standard.

For some doctrines, whether the issue is one of law or fact may be a matter on which the Court has not given clear guidance. For example, under the rational review, intermediate review, and strict scrutiny element balancing tests, the issue of whether some governmental interest is illegitimate, legitimate, important, or compelling is not clearly stated to be a question of law or fact. Similarly, the issues of whether the statutory means are rationally, substantially, or directly related to the ends, or whether the burden is irrational, substantially more burdensome than necessary, or the least restrictive alternative, are not clearly questions of law or fact.

As discussed at § 26.1.4 nn.100-02, the better view is that the extent of the government’s benefit, and conclusions about how much the government’s actions advance governmental ends or burden individuals in their operation, are fact questions subject to the “clearly erroneous” standard of deference on appeal. The ultimate conclusions about whether some governmental end is illegitimate, legitimate, important, or compelling, or whether the means are rationally related, substantially related, or directly related to the ends, or whether some burden is irrational, substantially more burdensome than necessary, or the least restrictive alternative, are best conceived as mixed questions of law and fact for “de novo” review by courts on appeal.

An additional issue regarding law and facts is whether the doctrine should adopt either a subjective or an objective approach toward the determination of some fact. Related to the issue of whether a court should adopt a subjective or an objective approach toward interpretation of documents, discussed at §§ 5.2.1 & 6.2.1.1, the issue here is whether any particular doctrine should require subjective “actual” knowledge or an objective “reason to know.”

For example, in determining when executive officials should be immune from damage lawsuits if their behavior violated someone’s constitutional or statutory rights, a court has six different options from which to choose: (1) absolute immunity from being questioned; (2) must show lack of both subjective and objective knowledge that the behavior was unlawful to be liable; (3) must show only a lack of subjective good faith to be liable (a pretext inquiry); (4) must show only a lack of objective good faith to be liable (a reasonably prudent person would have known the behavior was unlawful); (5) must show either a lack of subjective or objective good faith to be liable; or (6) without regard to what subjectively the person knew, or objectively what the individual should have known, liability can be based on what the actual facts are, as determined in court. As discussed at § 20.1.4.2.B nn. 84-87, in Harlow v. Fitzgerald, the Court adopted option (4) above, focusing on whether the executive official violated “clearly established statutory or constitutional rights of which a reasonable person would have known.” This case overruled that aspect of Butz v. Economou which had suggested, as in option (5), that subjective knowledge could also trigger a finding of liability.69

This issue of subjective or objective knowledge arises in other areas of the law. For example, in defamation law, under *New York Times Co. v. Sullivan*, a finding of “actual malice” requires that the individual had a subjective mental state of reckless disregard for the truth, option (3) above, as discussed at § 30.2.1.1 nn.149-52. As discussed at § 30.2.2.1 n.191, the issue of what kind of objective versus subjective standard to adopt was the focus of *Waters v. Churchill*, concerning the rights of government workers to speak on matters of public concern.

In *Waters*, a four-Justice plurality adopted a combined subjective-objective approach, option (5) above, which allowed governmental action based upon an objectively reasonable investigation into what the employee had said, provided that the employer also actually subjectively believed the results of the investigation. A concurring opinion adopted option (3) above, requiring only that the employer subjectively believed in a valid reason for acting after an investigation, and thus the action against the employee was not a pretext for illegitimate motives. A dissenting opinion adopted option (6) above, requiring the court to determine for itself what was said, not what the employer either subjectively or objectively believed after their investigation.

§ 7.3 Dealing with Precedents

As noted at § 5.3.2, judicial precedents are one of the sources used in constitutional interpretation. While the Constitution does not directly address what weight should be given to precedent, arguments of context, history, practice, precedent, and prudential considerations all suggest that some traditional common-law theory of precedent was intended to form part of the “judicial power” referred to in Article III of the Constitution. As Hamilton observed in *The Federalist Papers* No. 78, “To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents.” Thus, as a constitutional norm, Congress could not command the Court to adopt a particular theory of precedent. However, as noted at § 9.2.2.2 n.55, some formalists, based on a lack of specific text in the Constitution regarding use of precedent, have argued for such a congressional power under the Necessary and Proper Clause.

As noted at § 6.3.2, where precedents are viewed as having a gloss on meaning, the precedent will be given great weight in later cases. Even when a precedent is not treated as having a gloss on meaning, the precedent still has some weight, particularly if it represents settled law or is a precedent upon which individuals have substantially relied. In addition, as noted at § 4.3.4, judges sometimes adopt a narrow, or strict, use of precedent, particularly when trying to distinguish a prior case from

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71 *Id.* at 689-92 (Scalia, J., joined by Kennedy & Thomas, JJ., concurring).

72 *Id.* at 694-99 (Stevens, J., joined by Blackmun, J., concurring).

the present case. Under this use of precedent, courts limit the preceding case to its “core holding.” In contrast, when language in the prior case is welcomed by the present court, the court may refer not only to the core holding of the preceding case, but also to its “general reasoning.” The court may use that reasoning to help justify the result in the present case, a broad, or loose, use of precedent.

The following material will provide greater content to these observations by using examples from contemporary constitutional adjudication. The first set of examples, at § 7.3.1, deal with the issue of a narrow, or strict, use of precedent versus a broad, or loose, use of precedent. The second set of examples, at § 7.3.2, deal with the issue of following or overruling precedents, assuming the precedent does not have a gloss on meaning. The third set of examples, at § 7.3.3, deal with reasons to follow or overrule a precedent, assuming that the precedent does have a gloss on meaning. The fourth set of examples, at § 7.3.4, deal with the procedural issues regarding the “rule of law” and how they impact whether to follow or overrule a precedent.

§ 7.3.1 Strict versus Loose Use of Precedent

§ 7.3.1.1 Cases Focusing on the Core Holding of Precedent, Not its General Reasoning

As noted at § 4.3.4, independent of the decision whether to follow or overrule a precedent, a court must first decide what the precedent means. In their treatment of precedent, 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.” On the other hand, when language in the prior case is welcomed by the present court, the court may refer not only to the core holding of the preceding case, but also to its “general reasoning.”

A good example of the difference between considering the core holding of a precedent versus its general reasoning occurred in United States v. Morrison,74 discussed at § 18.2.5 nn.116-18. In Morrison, Justice Souter, joined by Justices Stevens, Ginsburg, and Breyer, followed the general reasoning of the instrumentalist-era precedents, which permitted Congress to regulate any activity under the Commerce Clause with an affect on interstate commerce. Based upon congressional findings regarding the economic impact of violence against women, Justice Souter’s opinion supported congressional power to pass the Violence Against Women Act of 1994. Justices Stevens, Ginsburg and Breyer, as discussed at § 11.3.2, and Justice Souter, as discussed at § 12.4.3, have tended to be the Justices on the modern Court most sympathetic to the results in instrumentalist-era decisions. In contrast, Chief Justice Rehnquist, along with Justices O’Connor, Scalia, Kennedy, and Thomas, are not as enamored with instrumentalist-era precedents. Thus, they tend to follow only the core holdings of these cases. In Morrison, this meant upholding Congress’ power over economic criminal activity, as in Perez v. United States, which involved extortionate credit transactions, but concluding that regulation of noneconomic, criminal conduct, an issue not directly before the Court in the instrumentalist-era cases, could not be justified under Congress’ Commerce Clause power.

A similar split has appeared in cases involving the criminal justice system. For example, in *Pennsylvania Board of Probation v. Scott*, the Supreme Court was faced with the question whether to apply the exclusionary rule to bar the introduction at parole revocation hearings of evidence seized in violation of the parolees’ Fourth Amendment rights. As discussed at § 23.2.1.1 nn.95-98, dissenting with Justices Ginsburg and Breyer, Justice Souter argued that the deterrent function of the exclusionary rule is implicated just as much in a parole revocation proceeding as in a criminal trial. Thus, the general reasoning of the trial cases should apply equally to the revocation proceeding. In contrast, Justice Thomas’ majority opinion, joined by Chief Justice Rehnquist and Justices O’Connor, Scalia, and Kennedy, noted that no prior precedent had explicitly addressed the applicability of the exclusionary rule to parole revocation hearings. Thus, no prior core holding governed the case.

A similar split occurred in *Ramdass v. Angelone*. At issue in *Ramdass* was whether to extend Justice Blackmun’s opinion in *Simmons v. South Carolina*, which had held that where the state puts the defendant’s future dangerousness in issue in a death penalty case, due process requires the jury to be informed if a life sentence would be without the possibility of parole. As discussed at § 23.2.1.2 nn.149-54, the defendant had not yet become parole ineligible because a separate court had not yet entered judgment on a jury’s verdict that would make the defendant parole ineligible. Justice Stevens’ dissent, joined by Justices Souter, Ginsburg and Breyer, argued the “acute unfairness in permitting the State to rely upon a recent conviction to establish a defendant’s future dangerousness while simultaneously permitting the State to deny that there was such a conviction when the defendant attempts to argue that he is parole ineligible” and that “[e]ven the most miserly reading of the opinions in *Simmons*” supports the defendant’s argument in this case. In contrast, the majority noted that technically the defendant was not parole ineligible at the time the jury instruction was given, and thus the core holding of *Simmons* did not directly govern resolution of the case.

§ 7.3.1.2 Cases Building on Welcome Precedents

If the facts of a current case are perceived to be only somewhat similar to those of a precedent, instead of being closely analogous, then "following" the precedent may really be "extending" it past its “core holding.” This way of treating a precedent involves building on a precedent with which the judge agrees, often by resort to the “general reasoning” in the prior opinion.

A representative example of the Supreme Court building on a welcome precedent occurred in 1995. In 1969, the Court had held in *Powell v. McCormack* that Congress has no power to exclude by simple majority vote any person, duly elected by constituents, who had the three qualifications for

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75 524 U.S. 357, 369 (1998); id. at 370-72 (Souter, J., joined by Ginsburg & Breyer, JJ., dissenting).

76 530 U.S. 156, 169, 175-78 (2000) (plurality opinion of Kennedy, J., joined by Rehnquist, C.J., and Scalia & Thomas, JJ.); citing Simmons v. South Carolina, 512 U.S. 154, 156 (1994); id. at 179-81 (O’Connor, J., concurring in the judgment); id. at 182 (Stevens, J., joined by Souter, Ginsburg & Breyer, JJ., dissenting).

membership specified in the text of the Constitution, although based upon literal text Congress may expel a member from Congress by a 2/3 vote. In 1995, the Court extended Powell to the states by holding in U.S. Term Limits, Inc. v. Thornton, that states, like Congress, lack the power to add to the qualifications of age, citizenship, and residency that are prescribed for members of Congress by the Constitution. Justice Stevens’ majority opinion, joined by Justices Kennedy, Souter, Ginsburg, and Breyer, found in actions taken during the Convention and in the post-Convention ratification debates, an intent that the qualifications in the Constitution be fixed and exclusive. Justice Stevens cited Justice Story, who said in his treatise on the Constitution that "the states can exercise no powers whatsoever, which exclusively spring out of the existence of the national government, which the constitution does not delegate to them. . . . No state can say, that it has reserved, what it never possessed." Justice Stevens also noted that congressional and state practice since the Constitution was ratified also supported this view. Justice Stevens added that recognizing a power in the states to add qualifications would violate a fundamental principle of representative democracy that the people should choose whom they please to govern them. In support, he cited McCulloch v. Maryland, wherein Justice Marshall said that the government of the Union is a government that emanates from the people. Justice Kennedy, concurring, elaborated on this theme. He stated that there “can be no doubt, if we are to respect the republican origins of the Nation and preserve its federal character, that there exists a federal right of citizenship, a relationship between the people of the Nation and their National Government, with which the States may not interfere.”

In contrast, Justice Thomas dissented, joined by Chief Justice Rehnquist and Justices O'Connor and Scalia. Justice Thomas argued that where the Constitution is silent about the exercise of a particular power, the Federal Government lacks that power and the states enjoy it. According to Justice Thomas, Powell was not relevant, as its core holding dealt only with the power of Congress to impose additional qualifications on House members, not the power of the states. He said the ultimate source of constitutional authority is the consent of the people of each individual state, not the consent of the undifferentiated people of the Nation as a whole. With respect to reserved state powers, Justice Thomas noted that the core holding of McCulloch v. Maryland did not indicate that the question depended on whether the states had enjoyed the power before the framing.

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79 Id. at 787-815.
80 Id. at 802, citing Joseph Story, Commentaries on the Constitution of the United States § 627 (1833).
81 Id. at 816-19, 823-26.
82 Id. at 821, citing McCulloch, 17 U.S. (4 Wheat) 316, 430-36 (1819).
83 Id. at 845 (Kennedy, J., concurring).
84 Id. at 845-55 (Thomas, J., joined by Rehnquist, C.J., and O’Connor & Scalia, JJ., dissenting).
A second example of building on welcome precedents comes from abstention doctrine. In 1971, the Court held in *Younger v. Harris*\(^{85}\) that because of respect for "Our Federalism," the federal courts, as a matter of comity, should not enjoin, unless in exceptional circumstances, a state criminal action if prosecution was begun before proceedings on the merits had occurred in the federal action. *Younger* was extended in later cases, including *Juidice v. Vail*\(^{86}\) in 1977, where the Court required abstention from adjudicating a challenge to a state's contempt process, in an on-going state action, because the state's interest in maintaining its judicial system was a sufficiently great interest.

In 1987, the Court extended *Younger* again to civil actions in *Pennzoil Co. v. Texaco, Inc.*\(^{87}\). This extension was slightly more problematic, because although The Anti-Injunction Act bars federal courts from enjoining proceedings in state courts, it contains several exceptions, including express authorization by Congress.\(^{88}\) In 1972, the Court had held in *Mitchum v. Foster* that suits under 42 U.S.C. § 1983, the primary vehicle to enjoin enforcement of unconstitutional state actions, were an exception expressly authorized by Congress. Nevertheless, the Court held in *Pennzoil* that a federal court in a § 1983 action may not enjoin a plaintiff who has prevailed in a state trial court from executing the judgment in plaintiff's favor pending an appeal to a state appellate court. Justice Powell, with Justices Rehnquist, White, Scalia, and O'Connor, said that a state has an important interest here, as it had an important interest in *Younger* and *Juidice*, in the enforcement of its orders and judgments in its courts.\(^{89}\)

Justices Brennan and Marshall disagreed with this conclusion, and argued that *Younger* should be limited to its core holding involving criminal or quasi-criminal proceedings, and not apply to civil proceedings, especially when plaintiff brings a § 1983 action. Their opinion, laying the groundwork for a later narrow interpretation of *Pennzoil*, interpreted the majority opinion as based on the unique factual circumstances of the case, including the "open courts" provision of the Texas Constitution.\(^{90}\)

§ 7.3.1.3 Cases Emphasizing An Aspect of a Precedent With Which the Judge Agrees

Another way to "follow or extend" a precedent involves targeting an aspect of the prior precedent with which the judge agrees, and then emphasizing that part of the precedent. This can occur when the later court focuses on some aspect of the general reasoning in the prior opinion, and then resolves the case according to that aspect without considering other things the prior court said in its opinion.

\(^{85}\) 401 U.S. 37 (1971).


\(^{87}\) 481 U.S. 1 (1987).

\(^{88}\) 28 U.S.C. § 2283.


\(^{90}\) Id. at 19, 21 n.* (Brennan, J., joined by Marshall, J., dissenting).
An example of the technique of emphasizing part of a prior precedent with which the judge agrees occurred in *Nixon v. United States*.\(^91\) In *Nixon*, the Court held that a nonjusticiable political question was presented by a challenge to the Senate's vote in the trial of an impeachment case where the Senate had acted on the basis of a report from a special Senate Committee, together with a transcript of its proceedings. The proceedings were challenged as violating the Impeachment Trial Clause, Art. I, § 3, cl. 6. It provides that the "Senate shall have the sole power to try all Impeachments."

For the Court, Chief Justice Rehnquist cited language from *Baker v. Carr* indicating that six factors tend to be relevant in political questions cases. These six factors are: whether there is a textually demonstrable constitutional commitment of the issue to a coordinate political department; a lack of judicially discoverable and manageable standards for resolving it; an initial policy decision of a non-judicial kind is required to resolve it; a need to respect a decision already made; a need for finality; or avoidance of embarrassment.\(^92\) In *Nixon*, Justice Rehnquist focused on the first two of these factors, the ones linked most closely with text and the traditional judicial role, rather than the other factors which involve more prudential considerations. Justice Rehnquist noted that use of the word "sole" suggested that the Senate alone was intended to determine whether an individual should be acquitted or convicted, and that the word "try" lacks sufficient precision to afford any judicially manageable standard.\(^93\) He also noted that historical sources supported this conclusion.\(^94\) Although mentioning all six factors, the opinion did not embrace fully the broad six-factor balancing approach of Justice Brennan's *Baker v. Carr* opinion, giving only cursory treatment to the other factors.\(^95\)

In contrast, Justice White, joined by Justice Blackmun, concluded that an argument based upon text and a lack of judicial manageable standards alone was unpersuasive. Instead, engaging in a broader inquiry into prudential considerations required by the six-factor approach in *Baker v. Carr*, Justice White concluded that the historical evidence suggests a deep concern of the Framers with a basic system of checks and balances underlying the separation of powers. A balance is achieved by having the Senate control by its impeachment power the otherwise largely unaccountable judiciary, with judicial review ensuring that the Senate adheres to a minimal set of procedural standards in conducting impeachment trials.\(^96\) Justice Souter also traced the political questions doctrine back to broader consideration of the six factors listed in *Baker v. Carr*. He concluded that unusual circumstances, such as a coin-toss by the Senate, might make judicial interference appropriate even though prudential considerations would ordinarily counsel silence.\(^97\)

\(^93\) *Nixon*, 506 U.S. at 228-33.
\(^94\) *Id.* at 233-35.
\(^95\) *Id.* at 235-36.
\(^96\) *Id.* at 240-50 (White, J., joined by Blackmun, J., concurring).
\(^97\) *Id.* at 251-53 (Souter, J., concurring).
§ 7.3.1.4  

Cases Manipulating a Precedent to Claim it is Merely Being Followed

A final way to "follow or extend" a precedent is to elevate some general statement that may have been dictum into the status of a holding, or find implicit in the precedent a principle broader than anything stated in the case, and use it as a premise in the case at hand. When a court does this, the court is really manipulating the prior precedent to claim that today's court is merely following or extending prior law.

Instrumentalist Justices have been particularly creative in interpreting and grouping precedents in order to show that they support, or at least are not inconsistent with, a result believed just in the particular case or for society generally. A well-known example is Justice Brennan's opinion in *Frontiero v. Richardson*, which said that the Court, when engaging in equal protection review, could find "implicit support" for applying strict scrutiny to gender classifications in *Reed v. Reed*, even though Chief Justice Burger's opinion in that case explicitly stated that the test in a gender discrimination case was whether the different treatment based upon gender bears a rational relationship to a legitimate state objective.

This tactic, however, is not reserved exclusively for instrumentalist Justices. For example, Holmesian Justice Rehnquist creatively interpreted prior precedents in *Paul v. Davis* to hold that there is no reputational interest under the liberty component of 14th Amendment procedural due process analysis. Chief Justice Rehnquist also engaged in a creative interpretation of commercial speech precedents in *Posadas De Puerto Rico Associates v. Tourism Company of Puerto Rico*, although that creative interpretation was overruled ten years later in *44 Liquormart, Inc. v. Rhode Island*. Formalist Justice Scalia applied the skill in *Employment Division v. Smith*, by reinterpreting prior Free Exercise Clause cases to require the combination of a free exercise claim with another fundamental right in order to trigger strict scrutiny.

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98  411 U.S. 677, 682 (1973), discussed § 26.3.1.2 n.362.

99  404 U.S. 71, 75-76 (1971), discussed § 26.3.1.2 n.361.


102  517 U.S. 484 (1996), discussed § 30.3.2.1 nn.246-48.

103  494 U.S. 872, 881-82 (1990), discussed § 32.2.2.5 nn.253-56.
In general, as discussed at § 4.3.4, the judicial decisionmaking styles differ in their general predispositions regarding narrow/strict versus broad/loose use of precedents: instrumentalist judges tend more toward narrow use of precedent, followed by formalist judges and Holmesian judges. Natural law judges are the most willing to extend precedents in light of a general principle found therein, a broad or loose use of precedents. As these examples make clear, however, in any individual case, judges from any of the four styles of interpretation may resort to a narrow or broad use of precedent depending upon whether or not they favor the substantive result of the precedent.

§ 7.3.2 Following or Overruling Precedent Without Regard to Whether There is a Gloss on Meaning: The Considerations of Settled Law and Substantial Reliance

To the extent that precedents are viewed as having no gloss on meaning, whether a prior precedent is rightly or wrongly decided carries great weight. Yet even when precedents are so viewed as having no gloss on meaning, they still have some weight in future decisionmaking, particularly if they represent settled law or there has been substantial reliance by individuals.

As discussed at § 4.3.2 nn.79-80, 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).”

Justice O’Connor has stated that precedents represent “settled law” when they have become “integrated into the fabric of the law.”

In deciding whether a precedent represents or has produced settled law, many factors may be relevant. As discussed at § 4.3.2 nn.81-83, the age of the precedent is certainly one factor, but it is not the sole determining factor. Judges may also ask whether the precedent case was itself a departure from prior precedents and gave little weight to established traditions. A third factor is whether or not the precedent is susceptible of principled application.

As noted at § 4.3.2 nn.84-87, formalist judges in particular give special weight to this consideration in their treatment of precedent. Thus, four examples are presented here from opinions by formalist Justices Scalia and Thomas with respect to voting not to overrule a case because it represents settled law. First, as noted at § 4.3.2 n.84, although Justices Scalia and Thomas do not themselves believe that the framers and ratifiers of the 14th Amendment intended the Due Process Clause to incorporate selectively the Bill of Rights, they have indicated a willingness not to challenge the instrumental-era cases which incorporated almost all of the Bill of Rights into the 14th Amendment, because it is a matter of settled law. As Justice Scalia, joined by Justice Thomas, noted in *TXO Production Corp. v. Alliance Resources Corp.*, "I am willing to accept the proposition that the Due Process Clause of the [14th] Amendment, despite its textual limitation to procedure, incorporates certain substantive guarantees specified in the Bill of Rights; but I do not accept the proposition that it is the secret repository of all sorts of other, unenumerated, substantive rights."

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A second example comes from Employment Division v. Smith.\textsuperscript{107} In that case, the Court, per Justice Scalia, held that strict scrutiny should not be applied when a neutral, generally applicable law is challenged by a free exercise claim unconnected with some other constitutional protection, such as freedom of speech or the press.\textsuperscript{108} Nonetheless, the Court indicated in Smith a willingness to continue using strict scrutiny in the context of unemployment compensation cases, based on the 1963 instrumentalist-era precedent of Sherbert v. Verner and its progeny.\textsuperscript{109}

A third example appears in Justice Thomas' concurrence in United States v. Lopez.\textsuperscript{110} Focusing on the literal meaning of commerce and on the specific intent of the framers and ratifiers of the Constitution, Justice Thomas concluded that the Court's recent Commerce Clause jurisprudence and the "substantial affects" test were wrong because the Court had drifted too far from the original understanding of the Commerce Clause. However, Justice Thomas noted that it may be too late to undertake a fundamental reexamination of precedents written in the last 60 years. He said, "Consideration of stare decisis and reliance interests may convince us that we cannot wipe the slate clean."\textsuperscript{111} It may nonetheless be possible, Justice Thomas noted, for the Court to at least "temper" its Commerce Clause jurisprudence. Justice Thomas said that if Congress could regulate all matters that substantially affect interstate commerce, there would have been no need for many of the specific grants of power in Art. I, § 8.\textsuperscript{112} This aspect of the Lopez case is discussed at § 18.2.5 nn.103-09.

A fourth example comes from Justice Scalia's opinions in dormant commerce clause cases. Justice Scalia has indicated he would abandon traditional court scrutiny of state regulations under the dormant commerce clause unless the state statute involves "rank discrimination against citizens."\textsuperscript{113} Even so, he and Justice Thomas have stated that they will follow the result of traditional dormant commerce clause analysis for current cases involving state laws "indistinguishable from a type of law previously held unconstitutional by the Court [based] on stare decisis grounds."\textsuperscript{114}

Despite this willingness to follow "settled law," most formalists will not go beyond the core holdings of these precedents to adopt the general reasoning of these precedents. Unlike the natural

\textsuperscript{107} 494 U.S. 872 (1990).

\textsuperscript{108} Id. at 881.

\textsuperscript{109} Id. at 883-85, citing Sherbert v. Verner, 374 U.S. 398 (1963), and its progeny.


\textsuperscript{111} Id. at 601 n.8.

\textsuperscript{112} Id. at 588-89, 601-02.

\textsuperscript{113} Tyler Pipe Indus., Inc. v. Washington State Dep't of Rev., 483 U.S. 232, 265 (1987) (Scalia, J., concurring in part and dissenting in part).

law approach, discussed at § 12.2.2.2, formalists are not willing to follow a “reasoned elaboration” of the general reasoning in prior precedents if the formalist concludes that the precedents’ general reasoning is flawed. As Justice Scalia phrased the point in his dissent in Planned Parenthood v. Casey,115 “Roe was plainly wrong – even on the Court’s methodology of ‘reasoned judgment,’ and even more so (of course) if the proper criteria of text and tradition [tradition encompassing history and legislative and executive practice, as discussed at § 9.2.2.1 nn.40-47] are applied.”

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 in many branches of the law 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.116 This can also be true of precedents. As Justice Brandeis observed in Burnet v. Coronado Oil & Gas Co.,117 “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 the kind of substantial reliance that is important from the perspective of stare decisis. More broadly, the principle of not overruling cases that give rise to substantial reliance is likely to have the most force where overruling would upset settled expectations upon which people have justifiably relied by making serious financial, business, employment, or other similar 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.118 Justice Rehnquist noted in Payne,119 “Applying these general principles, the Court has during the past 20 Terms overruled in whole or in part 33 of its previous constitutional decisions.” Reflecting a connection between settled law and substantial reliance kinds of considerations, Justice O’Connor noted in Adarand Constructors, Inc. v. Pena,120 “[A] long-established precedent that has become integrated into the fabric of the law . . . is likely to have engendered substantial reliance.”

The extent to which a person's substantial reliance on prior cases is reversible or not is an important, although often unstated, aspect of this analysis. In the classic case of substantial reliance, an individual has made a financial or employment decision based on the current state of the law. If the


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


119 Id. at 828 & n.1.

law changes, there is no practical way to return the person fully to the status quo. Time has passed, and other financial or employment opportunities have gone by the board. In a practical sense, reliance is irreversible. Yet there are other cases where, if the law changes, persons can modify their behavior with respect to the new law, and their prior reliance is reversible. Such cases do not present the same kind of compelling circumstances for application of *stare decisis* based upon reliance concerns.

In general, because Holmesian judges are more attuned to this functional inquiry into whether individuals have actually irreversibly relied than are judges from a more analytic tradition, such as formalist or natural law judges, Holmesian judges can be predicted to be more sensitive to the existence of actual irreversible reliance before applying this restraint to overruling precedent. For example, the joint opinion of Justices O’Connor, Kennedy, and Souter in *Planned Parenthood v. Casey* noted that one reason not to overrule *Roe* was substantial reliance on *Roe*. The joint opinion noted that for two decades people have organized intimate relationships assuming abortion would be an option if contraception should fail. However, while reliance did exist during the 20 years between *Roe* and *Casey*, 1973-92, that kind of reliance is not irreversible. If *Roe* were overruled, nothing would bar people in the future from organizing their intimate relationships knowing that abortion might not be legally available in certain states should contraception fail. The joint opinion noted, “[The] hypothesis [is] that reproductive planning could take virtually immediate account of any sudden restoration of state authority to ban abortion.” Accepting this hypothesis as true, Chief Justice Rehnquist noted in dissent, “[A]ny traditional notion of reliance is not applicable here.”

In response, it could be argued, as did the joint opinion in *Casey*, that women have made many irreversible decisions regarding education, jobs, and social companions during the 20 years between *Roe* and *Casey*, based on an assumption that they would have the reproductive freedom granted by *Roe*. The joint opinion stated, "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. . . . 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." These arguments were critiqued in Chief Justice Rehnquist's dissent. Justice Rehnquist observed:

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*

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122 *Id.* at 856.

123 *Id.* at 856.

124 *Id.* at 956 (Rehnquist, C.J., joined by White, Scalia & Thomas, JJ., dissenting).

125 *Id.* at 856.
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.126

Despite this Holmesian willingness to follow “settled law” or precedents upon which individuals have “substantially relied,” most Holmesian jurists will not go beyond the core holdings of these precedents to adopt the general reasoning of the precedents. As a positivist approach to law, Holmesians share with formalists a reluctance to follow a judicial “reasoned elaboration” of the reasoning in precedents if the Holmesian concludes that the precedents’ general reasoning is flawed, based upon the Holmesian analysis of text, context, history, practice, and prudential considerations.

Judicial embrace of such “reasoned elaboration of law” is adopted more by judges following a normative perspective on the judicial task, as is true for natural law judges, as discussed at § 12.2.2.2. Holmesian jurists thus differ from the natural law approach to “reasoned elaboration of law.” For this reason, it is not surprising that Holmesian Chief Justice Rehnquist and Justice White, and formalist Justice Thomas, all joined formalist Justice Scalia’s dissent in Planned Parenthood v. Casey, where he stated, “Roe was plainly wrong – even on the Court’s methodology of ‘reasoned judgment,’ and even more so (of course) if the proper criteria of text and tradition are applied.”127

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-jacketed 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, if they think that the old doctrine was wrongly decided, or is wrong for society today. As noted at § 4.3.2 text following n.78, this consideration – and this consideration alone – of whether the prior precedent is rightly or wrongly decided carries greatest weight with instrumentalist judges. This is true even if the prior precedent appears to represent settled law, there has been substantial reliance on the precedent, or no additional reason is present that calls for the precedent to be overruled. Thus, as noted in Table 4.3, instrumentalist judges tend to be the judges least likely to follow precedent, and thus most willing to overrule precedent.

Such overrulings occurred frequently between 1963 and 1969, when the instrumentalist-era Warren Court consisted of a majority of 5 Justices willing to recognize new rights by providing additional constitutional protections against governmental action in numerous areas of the law.128 In 1963, the five Justices were Chief Justice Warren, along with fellow liberal instrumentalists Justices Douglas,

126  Id. at 956-57 (Rehnquist, C.J., joined by White, Scalia & Thomas, JJ., dissenting).

127  Id. at 983 (Scalia, J., joined by Rehnquist, C.J., and White & Thomas, JJ., dissenting).

Brennan, and Goldberg, joined in many cases by Justice Black, who as a liberal formalist shared the liberal outlook of the liberal instrumentalists on the Court, particularly with respect to his view that all of the Bill of Rights are fundamental and should be incorporated into the Due Process Clause, as noted at §§ 9.4 nn.91-92 & 27.2.3 nn.117-19. Justice Fortas, another liberal instrumentalist, replaced Justice Goldberg in 1965. In 1967, with the confirmation of Justice Thurgood Marshall, who replaced Holmesian Justice Tom Clark, 5 liberal instrumentalists became seated on the Court, in addition to the liberal formalist Justice Black. As Justice Brennan noted, “As late as 1961, I could stand before a distinguished assemblage of the bar at New York University’s James Madison Lecture and list the following as guarantees that had not been thought to be sufficiently fundamental to the protection of human dignity so as to be enforced against the states: the prohibition against cruel and unusual punishments, the right against self-incrimination, the right to assistance of counsel in a criminal trial, the right to confront witnesses, the right to compulsory process, the right not to be placed in jeopardy of life or limb more than once upon accusation of a crime, the right not to have illegally obtained evidence introduced at a criminal trial, and the right to a jury of one’s peers. The history of the quarter-century following that Madison Lecture need not be told in great detail. Suffice it to say that each of the guarantees listed above has been recognized as a fundamental aspect of ordered liberty.”129 This perspective continued to have considerable influence during the years of the Burger Court, 1969-86, although it was tempered because only four instrumentalists remained on the bench: Justices Brennan, Marshall, Blackmun, and Douglas or, after 1975, Justice Stevens.130

Of course, where the proper social policies would be advanced by maintaining an adherence to instrumentalist-era precedents, an instrumentalist judge may be as willing as any other judge to emphasize the importance of precedents, as revealed by Justice Thurgood 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.”131 However, given the willingness of instrumentalist judges to embrace the overruling 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, or perhaps presume that Marshall was merely "tweaking the nose" of the formalist, Holmesian, and natural law judges in Payne, all of whom refused to follow precedent in the case. If so, that plan certainly worked. 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.”132 Naturally, the true test of how strongly a judge adheres to precedent is not how much a judge counsels following a precedent with which the judge agrees, but whether the judge


132 Id. at 833-34 (Scalia, J., joined by O’Connor, J., & Kennedy, J., concurring).
is willing to follow a precedent with which the judge disagrees. Even in Payne itself, the instrumentalist judges did not make a fetish over the need to follow precedent based on reliance.\textsuperscript{133}

Judges following different interpretation styles may disagree about whether some precedents are rightly or wrongly decided. Divergent views on the correctness of Roe v. Wade present an obvious example.\textsuperscript{134} Disagreements on the constitutionality of school prayer in Lee v. Weisman provide another example.\textsuperscript{135} Sometimes the formalist approach may be alone in dissent, as in the independent prosecutor case, Morrison v. Olson.\textsuperscript{136} Other times, the instrumentalist approach may be alone in dissent, as in the state action case, Hudgens v. NLRB.\textsuperscript{137} And even when judges agree about the result in a case, different interpretation styles can lead them to disagree about the rule laid down to justify the result, as in the substantive due process case of Michael H. v. Gerald D.\textsuperscript{138} For instrumentalist jurists, it is these considerations, rather than faithfulness to precedent, that drive most decisions.

\textbf{§ 7.3.3 Following or Overruling Precedent Assuming the Precedent Has Created a Gloss on Meaning}

As noted at § 6.3.2 nn.116-19, for some 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 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 reasons are needed before the court should depart from a prior judicial opinion. The judges who most often have this extra commitment to precedent are judges in the natural law tradition, as discussed at § 12.2.2.2.

As noted at § 4.3.2 n.87, based upon recent cases, including the joint opinion of Justices O’Connor, Kennedy, and Souter in Planned Parenthood v. Casey, the additional reasons which suggest that a precedent should be overruled can be grouped under five headings: (1) the precedent is unworkable

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\textsuperscript{133} Id. at 850-53 (Marshall, J., joined by Blackmun, J., dissenting) (criticizing the Payne reliance formulation).

\textsuperscript{134} 410 U.S. 113 (1973), discussed § 27.3.3.3 nn.215-26.

\textsuperscript{135} 505 U.S. 577 (1992), discussed § 32.1.3.1.B.2 nn.152-56.

\textsuperscript{136} 487 U.S. 654 (1988), discussed § 19.4.3.1 nn.99-104.

\textsuperscript{137} 424 U.S. 507 (1976), discussed § 11.3.2 nn.41-42.

\textsuperscript{138} 491 U.S. 110 (1989), discussed § 27.3.3.1.C nn.201-04.
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 (5) the precedent raises concerns about a commitment to the "rule of law." The Supreme Court has also discussed these factors in the context of statutory interpretation, as discussed at § 4.3.2 nn.88-89. The first four of these reasons are discussed at §§ 7.3.3.1-7.3.3.4. Because it involves a number of related doctrines, the final reason focusing on the “rule of law” is considered at § 7.3.4.

§ 7.3.3.1 The Precedent is Unworkable in Practice

If a doctrine is considered unworkable in practice, a court may well overrule it. One ground for concluding a doctrine unworkable is that it has the practical result of immersing the courts in a resource-squandering activity. An example involving this kind of unworkability occurred in the 1995 case, Sandin v. Conner.\(^\text{139}\) As discussed at § 27.4.2.3 nn.319-24, in determining whether prison regulations created a protected liberty interest, the Court had held in 1983 in Hewitt v. Helms\(^\text{140}\) that courts should ask whether the state had issued merely procedural guidelines, which would not create a liberty interest, or had used language of mandatory character, which would create a liberty interest. Hewitt had built upon Wolff v. McDonnell,\(^\text{141}\) decided in 1974, where a prisoner had been given a protected liberty interest by a state statute that bestowed a mandatory sentence reduction for good behavior, subject to change for serious misconduct. The Court had said that the interest conferred was one of "real substance." In Sandin, the Court abandoned Hewitt, noting that it had produced two undesirable effects. First, it had led to the involvement of federal courts in resource-squandering day-to-day management of prisons. Second, it had created disincentives for states to codify prison management procedures. The methodology adopted in Sandin was to ask whether the prison regulation represents a dramatic departure from the basic conditions of the sentence.\(^\text{142}\) Applying this more workable test, the Court held that disciplining a prisoner by 30 days of segregated confinement, which did not inevitably affect the duration of the sentence, and which was under conditions mirroring those imposed by administrative and protective custody, did not present the significant deprivation in which a state might conceivably have created a liberty interest.\(^\text{143}\)

Another example of resource-squandering activity occurred in First Amendment obscenity doctrine. As discussed at § 30.1.3 nn.83-87, during the 1960s appellate courts had to determine for themselves whether various books or movies were obscene.\(^\text{144}\) That approach was overruled in 1973 in Miller


\(^\text{142}\) 515 U.S. at 482-84.

\(^\text{143}\) Id. at 484-87.

v. California, discussed § 30.1.3 nn.88-91, which placed the primary burden of those findings on district court juries.

A second kind of unworkable situation occurs where the test articulated by the Supreme Court is difficult to apply and leads to the specter of continuing splits in lower court decisions. In 1976, in a 5-4 opinion, the Court held in National League of Cities v. Usery that the 10th Amendment prevents Congress from applying its Commerce Clause power in a manner that directly displaces the freedom of states to "structure integral operations in areas of traditional government functions" unless, as stated in Justice Blackmun's concurrence, which was the critical fifth vote for the majority’s result, the federal interest is very strong and state compliance would be essential. As a result, Congress could not apply to state employees the Fair Labor Standards Act’s maximum hour and minimum wage provisions.

In 1985, in Garcia v. San Antonio Metropolitan Transit Authority, the Court overruled National League of Cities. Justice Blackmun's principal justification for changing his mind and voting to overrule a case in which he had concurred nine years earlier was that National League had proved unworkable in practice. In particular, Justice Blackmun explained that National League required courts to determine what are "traditional governmental functions," as opposed to "non-traditional governmental functions" or "non-governmental functions." Nine years of experience with National League had shown the difficulty of drawing this distinction. Justice Blackmun stated in Garcia:

Just how troublesome the task has been is revealed by the results reached in other federal cases. Thus, courts have held that regulating ambulance services, licensing automobile drivers, operating a municipal airport, performing solid waste disposal, and operating a highway authority are functions protected under National League of Cities. At the same time, courts have held that issuance of industrial development bonds, regulation of intrastate natural gas sales, regulation of traffic on public roads, regulation of air transportation, operation of a telephone system, leasing and sale of natural gas, operation of a mental health facility, and provision of in-house domestic services for the aged and handicapped, are not entitled to immunity. We find it difficult, if not impossible, to identify an organizing principle [in these decisions]. The constitutional distinction between licensing drivers and regulating traffic, for example, or between operating a highway authority and operating a mental health facility, is elusive at best.

Furthermore, Justice Blackmun did not see any way in Garcia that the Court could ever develop a principled approach to this issue. He rejected the possibility of developing workable guidelines based upon distinctions between governmental and proprietary activities, or a pure historical approach to traditional governmental functions, or determination of what is "uniquely" a

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146 426 U.S. 833, 852 (1976); id. at 856 (Blackmun, J., concurring).
148 Id. at 538-39 (citations omitted).
governmental function, or an "essential" governmental function.\textsuperscript{149}

Justice Blackmun also noted that in any event it was "unsound in principle" for the Court to try to determine what are "essential" governmental functions because that improperly, but "inevitably invites an unelected federal judiciary to make decisions about which state policies it favors and which ones is dislikes."\textsuperscript{150} This more pure instrumentalist reason for overruling \textit{National League of Cities} – that it should be overruled just because its doctrine is wrong – had earlier appeared in Justice Stevens' concurrence in \textit{EEOC v. Wyoming}.\textsuperscript{151} There is, of course, a real debate on the Court over whether the general principle announced in \textit{National League} is rightly or wrongly decided. That issue is discussed when considering issues of federalism and the 10\textsuperscript{th} Amendment at \textsection 18.4.4.

Another example of a doctrine being limited in practice because of its apparent doctrinal unworkability is \textit{Lemon v. Kurtzman}.\textsuperscript{152} Under \textit{Lemon}, when a law is challenged under the Establishment Clause, the government must establish that: (1) the law has a secular governmental purpose; (2) the law does not have a principal or primary effect to advance religion, although it may incidentally advance religion; and (3) the law does not further excessive governmental entanglement with religion. Between 1971 and 1992, the "\textit{Lemon test}" was applied in a large number of cases dealing with the meaning of the Establishment Clause. As discussed at \textsection 32.1.2.4 nn.57-75, court decisions drawing the distinctions called for by the \textit{Lemon} test have proven difficult to explain on any principled basis. This is true not only for the second prong of \textit{Lemon} concerning what is the difference between a "principal or primary" advancement of religion versus merely "incidentally" advancing religion, but also for trying to determine whether "excessive entanglement" exists and whether the government has a “secular” purpose or only a “religious” purpose.

Thus, since 1992, the Court has been increasingly ignoring \textit{Lemon} when rendering its decisions. For example, in \textit{Board of Education of Kiryas Joel Village School District v. Grumet},\textsuperscript{153} Justice O'Connor explicitly phrased the unworkability aspect of \textit{Lemon} in terms of \textit{Lemon}'s unsuccessful attempt to create a unitary analysis of Establishment Clause doctrine, an attempt that had clearly proven unworkable in the context of free speech doctrine. In \textit{Lamb's Chapel v. Center Moriches Union Free School District},\textsuperscript{154} Justice Kennedy, concurring, stated that citation to \textit{Lemon} was unsettling and unnecessary, and Justices Scalia and Thomas, concurring, noted, "Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being

\textsuperscript{149} Id. at 540-47.
\textsuperscript{150} Id. at 546.
\textsuperscript{151} 460 U.S. 244, 248-50 (1983) (Stevens, J., concurring).
\textsuperscript{152} 403 U.S. 602, 612-13 (1971).
\textsuperscript{154} 508 U.S. 384, 396 (1993) (Kennedy, J., concurring in part & concurring in the judgment); \textit{id} at 398 (Scalia, J., joined by Thomas, J., concurring in the judgment).
repeatedly killed and buried, \textit{Lemon} stalks our Establishment Clause jurisprudence once again." While \textit{Lemon} might eventually be overruled, as indicated at § 32.1.4, between 1993-2006 it was not formally overruled as there was not yet a clear five-person majority on the Court for a separate test.

\textbf{§ 7.3.3.2 The Precedent Creates Inconsistency or Incoherence in the Law}

If a prior case is perceived to be "out-of-sync" with related law, judges are more likely to call for its overruling. This is particularly true for formalist or natural law judges, whose analytic perspective on the nature of law, as discussed at §§ 2.2 & 2.4, make them more sensitive to logical anomalies in legal doctrine. For formalist judges, this consideration will be one of the factors used to determine whether a precedent represents settled law. As noted at § 4.3.2 n.82, a case is less likely to be viewed as settled if the precedent case was itself a departure from prior precedents and gave little weight to established traditions. For natural law judges, even if for other reasons the precedent case does not represent settled law, the precedent should still be followed unless this reason of inconsistency, or one of the other additional reasons, exist that call for the precedent to be overruled.

A series of cases where inconsistency with related law was involved concerns race-based affirmative action, discussed generally at § 26.2.1.4. In the fountainhead case, \textit{Regents of the University of California v. Bakke},\textsuperscript{155} decided in 1978, five Justices struggled to determine what level of review should apply to governmental affirmative action programs based upon race. Justice Powell, whose vote was decisive, concluded that strict scrutiny should be applied to affirmative action, just as strict scrutiny is applied to laws which discriminate against minority groups. Justice Brennan, on behalf of four Justices, wrote that only intermediate scrutiny should be applied to race-based affirmative action, although strict scrutiny is applied to discrimination against racial minorities.

With regard to state affirmative action programs, the dispute between Justices Brennan and Powell was resolved in 1989 in \textit{Richmond v. J.A. Croson Co.}\textsuperscript{156} In \textit{Croson}, the Court majority applied strict scrutiny to a state affirmative action program, basing its conclusion in part on the logical consistency of applying the same standard of review to discrimination against individuals, no matter what their race. In dissent, Justice Marshall, joined by Justices Brennan and Blackmun, would have applied intermediate scrutiny, based on the "benign" purpose to remedy prior discrimination.\textsuperscript{157}

Regarding federal affirmative action programs, however, Justice Brennan assembled a five-Justice majority for application of the intermediate standard of review in \textit{Metro Broadcasting, Inc., v. FCC},\textsuperscript{158} a case involving a congressional program that gave racial preferences for new broadcast

\textsuperscript{155} 438 U.S. 265, 291 (1978) (Powell, J., announcing the judgment of the Court); \textit{id.} at 356-59 (Brennan, J., joined by White, Marshall & Blackmun, JJ., concurring in the judgment in part & dissenting in part).

\textsuperscript{156} 488 U.S. 469, 494 (1989) (O’Connor, J., opinion for the Court).

\textsuperscript{157} \textit{id.} at 528 (Marshall, J., joined by Brennan & Blackmun, JJ., dissenting).

licenses and in certain proceedings for the sale of existing radio and television stations. The majority in Metro Broadcasting was made up of four liberal instrumentalist judges, who typically argued for intermediate scrutiny, and Justice White, whose Holmesian deference, particularly to the federal government, apparently led him to distinguish between the state affirmative action program in Croson and federal affirmative action programs. The majority noted in Metro Broadcasting,159 "It is of overriding significance in these cases that the FCC's minority ownership programs have been specifically approved – even mandated – by Congress." Justice Brennan also based his reasoning in part on Fullilove v. Klutznick,160 a 1980 case of federal affirmative action where the Court did not clearly choose between applying intermediate or strict scrutiny. It must be noted also that Justice White joined Justice Brennan's opinion in Bakke, which applied intermediate scrutiny to a state affirmative action program. This suggests support by Justice White for intermediate scrutiny, although Justice White also joined Justice Powell's opinion in Bakke which applied strict scrutiny.161

In part, Justice Brennan’s reasoning was also based on the fact that our nation has experienced and continues to experience various forms of racism. As stated by Justice Marshall, dissenting in Richmond v. J.A. Croson Co.,162 "My view has long been that race-conscious classifications designed to further remedial goals 'must serve important governmental objectives and must be substantially related to achievement of those objectives' in order to withstand constitutional scrutiny." This requirement of a substantial government interest is readily met by an intent to remedy the effects of past discrimination, or to create diversity where that can produce significant benefits. Applying intermediate review, instrumentalist Justices Brennan, Marshall, and Blackmun did not find that any affirmative action program reviewed by the Court during their service on the bench failed substantially to relate to the achievement of goals that were important.

Five years after the Metro Broadcasting decision, four of the five Justices in the majority had retired from the Court (Justices Brennan, Marshall, Blackmun, and White). In Adarand Constructors, Inc. v. Pena,163 the Court overruled Metro Broadcasting, and held that to the extent, if any, that Fullilove held federal racial classifications subject to less than strict scrutiny, it was no longer controlling.

159 Id. at 563.
160 448 U.S. 448, 491-92 (1980) (Burger, C.J., joined by White & Powell, JJ., announcing the judgment of the Court) (same result under either strict scrutiny or intermediate scrutiny); id. at 495-96 (Powell, J., concurring) (strict scrutiny should be applied); id. at 517-23 (Brennan, J., joined by Marshall & Blackmun, JJ., concurring in the judgment) (intermediate scrutiny should be applied).
161 Bakke, 438 U.S. at 356-59 (Brennan, J., joined by White, Marshall & Blackmun, JJ., concurring in the judgment in part & dissenting in part); id. at 387 n.7 (White, J., opinion, joining in part Justice Powell’s opinion, Part III-A, adopting a strict scrutiny approach).
Justice O'Connor's majority opinion noted that the justification for strict scrutiny was initially explained by Justice Powell in *Bakke*. She said the principle of strict scrutiny was not abandoned in *Fullilove*, was put in place by *Croson*, erroneously abandoned in *Metro Broadcasting*, and now in *Adarand* was being restored. Focusing on *Metro Broadcasting* as a precedent, Justice O'Connor first noted that because the Equal Protection Clause protects individuals of all races equally, *Metro Broadcasting* had wrongly applied a different level of scrutiny to race-based discrimination against any individual, whether white, African-American, Asian-American, Hispanic, or other ethnic background. Second, she noted that *Metro Broadcasting* had not become part of the fabric of the law and, because it was such a recent decision, it had not given rise to substantial reliance. Thus, it was ripe for overruling. Turning to consideration of an additional reason, which is usually necessary for natural law jurists to overrule precedent, Justice O'Connor noted that *Metro Broadcasting* was inconsistent with the rest of Equal Protection Clause and Due Process Clause doctrine. That doctrine treats individuals as individuals and applies the same level of review to discrimination for or against a respective group, as in the case of gender-based discrimination, where discrimination for or against women or men, based upon gender, triggers the same intermediate level of review. The Court also cited in *Adarand* a number of other cases, in areas as diverse as the law relating to double jeopardy, to whether members of the military may be tried in court-martial proceedings for non-service related crimes, and to antitrust law, where the Supreme Court had overruled prior precedents based on "inconsistency" with "accepted and established doctrine."

Four Justices dissented in *Adarand*. Justice Souter, who had joined with Justices O'Connor and Kennedy in *Casey*, dissented in *Adarand*, and was joined in dissent by Justices Ginsburg and Breyer. Justice Souter noted that since the challengers in this case had not identified any factual premises on which *Fullilove* rested as having disappeared since the case was decided, *stare decisis* compelled its application, and that gave *Metro* an adequate foundation. However, despite the fact that no factual circumstances had changed between *Fullilove* and *Adarand*, that is just one of the possible additional reasons that can be used to justify overruling a precedent, as discussed at § 7.3.3.3. The reason cited by Justice O'Connor, inconsistency with related law, is an independent reason that can justify a precedent being overruled. Justice Stevens, also dissenting, with Justice Ginsburg, reiterated the instrumentalist position that a number of reasons support using a standard of review that gives some deference to congressional efforts to create affirmative action programs. Governing impartially, he said, does not require that courts ignore the moral and constitutional difference between a policy designed to perpetuate a caste system and one that seeks to eradicate racial subordination.

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164 *Id.* at 226-27.

165 *Id.* at 233-34.

166 *Id.* at 224, 227-28.

167 *Id.* at 232-33.

168 *Id.* at 265-66 (Souter, J., joined by Ginsburg & Breyer, JJ., dissenting).

169 *Id.* at 242-49 (Stevens, J., joined by Ginsburg, J., dissenting).
An additional example of the Court overruling a prior case thought to be inconsistent with developed doctrine can be found in 44 Liquormart, Inc. v. Rhode Island,170 discussed at § 30.3.2.1 nn.246-48. The question in Liquormart was whether to follow what had become the standard application of the Central Hudson test for commercial speech, which requires an intermediate review analysis into whether the regulation at issue was sufficiently narrowly tailored to achieve substantial governmental ends, or whether to follow an earlier case, Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico,171 where the Court, in an opinion by Justice Rehnquist, gave greater deference to the governmental choice of activity. A majority of the Court said in Liquormart that Posadas was wrongly decided in terms of the level of protection given under standard commercial speech doctrine. Justice Stevens’ plurality opinion stated, "The Posadas majority's conclusion . . . cannot be reconciled with the unbroken line of prior cases . . . . Because the decision in Posadas marked such a sharp break from our prior precedent, . . . we decline to give force to its highly deferential approach." Chief Justice Rehnquist, author of the Posadas opinion, joined in a concurring opinion that agreed that Posadas should be overruled, although Justice Rehnquist did not join in Justice Stevens' plurality opinion which explained in full the reasons for its overruling.

The Court’s opinion in Lawrence v. Texas,172 discussed at § 27.3.4.2 nn.259-64, represents another such example. The majority opinion in Lawrence overruled Bowers v. Hardwick because Bowers was not settled law, in part because it had suffered “serious erosion from our recent decisions in Casey and Romer”; there had been no substantial reliance on Bowers; and Bowers was inconsistent with related law because “precedents before and after its issuance contradict its central holding.”

§ 7.3.3.3 A Changed Understanding of Facts Undermines the Precedent

A third reason for overruling or limiting a precedent is that new information casts doubt on its factual assumptions. This doubt may arise from new discoveries concerning legislative or constitutional history, or new discoveries concerning the perceived consequences of a proposed interpretation or application. In one of the most famous examples of this principle at work, the Court in Brown v. Board of Education173 perceived that although public education was scant when the Civil War Amendments were drafted and ratified, public education by 1954 had come to be the most important function of state governments and a vital opportunity if persons were to be readied for participation in society. Further, by 1954 the Court had developed the conviction that legally enforced segregation had deleterious effects on minority students. As a result, a unanimous Court held that anything to the contrary in Plessy v. Ferguson174 was overruled. The joint opinion referred

170 517 U.S.484, 509-14 (1996) (plurality opinion of Stevens, J., joined by Kennedy, Souter & Ginsburg, JJ.); id. at 528-32 (O’Connor, J., joined by Rehnquist, C.J., and Souter & Breyer, JJ., concurring in the judgment).


174 163 U.S. 537 (1896).
to this fact in *Casey*, stating, "While we think *Plessy* was wrong the day it was decided, see *Plessy*, [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."175

A second famous example of a critical change in factual perception can be seen in the overruling of *Lochner v. New York* by *West Coast Hotel v. Parrish*.176 As the joint opinion stated in *Planned Parenthood v. Casey*,177 “[T]he lesson seemed unmistakable to most people by 1937, that the interpretation of contractual freedom protected [by *Lochner*] rested on fundamentally false factual assumptions about the capacity of a relatively unregulated market to satisfy minimal levels of human welfare. . . . 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." In contrast to this view, Chief Justice Rehnquist said in his dissent in *Casey* that the joint opinion's approval of the overruling of *Plessy* and *Lochner* on grounds that the Nation and the Court had learned new lessons in the interim, was "at best a feebly supported, post hoc rationalization for those decisions." The opinions in those cases, said Rehnquist, both rested simply on a judgment that the Court had been mistaken – not whether the public had changed its beliefs. Thus, without regard to any additional reason, Chief Justice Rehnquist, a Holmesian judge, joined by the other Holmesian and formalist Justices on the Court, supported the overruling of *Plessy* and *Lochner*.178 This willingness to support overruling of a precedent without the presence of an additional reason to overrule is consistent with the premise of this section that the additional reason justification for overruling precedent is the special province of natural law judges, like Justices O’Connor, Kennedy, and Souter in the joint opinion in *Casey*.

§ 7.3.3.4  The Precedent is Substantially Wrong or Represents a Substantial Injustice

A fourth reason that may justify to a natural law judge an overruling of wrongly-decided precedent is when the prior opinion is "inconsistent with [a] sense of justice"179 or is "so clearly [an] error that its enforcement [is] for that very reason doomed."180 The post-instrumentalist Supreme Court has applied this doctrine most forcefully in cases raising structural issues of constitutional law. As

175  *Casey*, 505 U.S. at 863 (joint opinion of O’Connor, Kennedy & Souter, JJ.).


177  *Casey*, 505 U.S. at 861-62 (joint opinion of O’Connor, Kennedy & Souter, JJ.).

178  *Id.* at 960-63 (Rehnquist, C.J., joined by White, Scalia & Thomas, J.J., dissenting). For discussion whether *Plessy* and *Lochner* were “wrong the day they were decided” or wrong based on a changed understanding of facts, see Jack M. Balkin, “Wrong the Day it Was Decided”: *Lochner* and Constitutional Historicism, 85 Boston U.L. Rev. 677 (2005).


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Justice Kennedy has noted, structural issues are those involving "separation of powers, checks and balances, judicial review, and federalism."¹⁸¹ Thus, instrumentalist-era precedents that reflect a different vision of separation of powers, checks and balances, judicial review, or federalism than held by post-instrumentalist Justices, are among the cases ripe for narrowing or overruling because they appear to many non-instrumentalist Justices to be substantially wrong.

One example of this process at work involves the narrowing of federal governmental power under the Commerce Clause that occurred in United States v. Lopez.¹⁸² In Lopez, for the 5-4 majority, Chief Justice Rehnquist held it beyond Congress' Commerce Clause power to bar the possession of a gun around a school because that kind of event, not being an economic activity, had nothing to do with commerce and did not substantially affect interstate commerce. Prior to Lopez, there had been an unbroken line of unsuccessful challenges to exercises of congressional Commerce Clause power, extending all the way back to 1937.¹⁸³ Chief Justice Rehnquist distinguished these cases from Lopez on the ground that they had sustained regulations of activities that arose out of or were connected with commercial transactions which, viewed in the aggregate, substantially affected interstate commerce. Here, in contrast, the criminal statute by its terms had nothing to do with "commerce" or any sort of economic enterprise.¹⁸⁴

Justice Kennedy, concurring with Justice O'Connor, brought federalism concerns clearly to the surface in his opinion. Justice Kennedy noted that he saw the case in terms of broad principles reflecting the role of the Court and the significance of federalism in the whole structure of the Constitution. Justice Kennedy reflected that of the various structural elements in the Constitution, the Framers had made a unique contribution to political science and political theory by their insight that freedom was enhanced by the creation of two governments, rather than one. However, if the federal government could take over the regulation of entire areas of traditional state concern, such as education, that are beyond the realm of commerce, in the ordinary and usual sense of that term, the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory. Also, local programs for the prohibition of guns would be in danger of displacement by federal authority. These structural concerns supported departing from the line of precedents since 1937 supporting congressional power under the Commerce Clause.¹⁸⁵


¹⁸⁴ 514 U.S. at 555-65.

¹⁸⁵ Id. at 573-82 (Kennedy, J., joined by O'Connor, J., concurring).
Justice Souter's dissent in *Lopez* picked up on faithfulness to another aspect of structural concerns: the role of the court in a case involving minimum rational review. Under standard minimum rational review, the Court defers to legislative judgments about whether a rational connection exists between means and ends, in this case whether there is rational connection between gun-related school violence and interstate commerce, unless the congressional judgment is wholly irrational, which Justice Souter said was not true in this case.\(^{186}\) Justice Breyer in his dissent also noted that it was rational for Congress to think that such a connection exists.\(^{187}\) Justice Souter, agreeing, said in his dissent that he was thus not convinced that following the 60 years of precedent supporting exercises of federal authority would represent a substantial error in this case.\(^{188}\) The various arguments for and against the majority opinion in *Lopez* are discussed at § 18.2.5 nn.100-15.

Another example of a post-instrumentalist majority on the Court overruling a “federalism” precedent felt to be substantially wrong is *Seminole Tribe of Florida v. Florida*, which overruled *Pennsylvania v. Union Gas Co.* In *Seminole Tribe*, both the majority and dissenting opinions said that cases that present a substantially wrong understanding of the 11th Amendment should be overruled, or limited. A 5-4 Court had held in *Union Gas*\(^{189}\) that Congress, when exercising its Commerce Clause power, could authorize lawsuits in federal court against States on federal question grounds, even though the 11th Amendment limitation on federal court jurisdiction was ratified after the Commerce Clause. 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. This result was supported by the fifth vote of Justice White, who wrote a concurring opinion that said he disagreed with much of Brennan's reasoning. Thus, while this 1989 case was not within the usual time frame for an instrumentalist decision, the holding and the reasoning of Justice Brennan’s plurality opinion were instrumentalist in tone.

In *Seminole Tribe*,\(^{190}\) Chief Justice Rehnquist adopted the reasoning of the *Union Gas* dissent to claim that this understanding of the 11th Amendment was clearly wrong. As Justice Rehnquist noted in his 5-4 majority opinion, the result and rationale in *Union Gas* 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 Fourteenth Amendment.

Justice Souter, dissenting, with Justices Ginsburg and Breyer, took issue with Justice Rehnquist's conclusion that the Court's decision in *Union Gas* was substantially wrong. Instead, Justice Souter concluded that, based upon constitutional text and history, the famous old 11th Amendment case of

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\(^{186}\) *Id.* at 603-07 (Souter, J., dissenting).

\(^{187}\) *Id.* at 615-18 (Breyer, J., joined by Stevens, Souter & Ginsburg, JJ., dissenting).

\(^{188}\) *Id.* at 608 (Souter, J., dissenting).

\(^{189}\) 491 U.S. 1, 16-23 (1989) (plurality opinion of Brennan, J., joined by Marshall, Blackmun & Stevens, JJ.); *id.* at 57 (White, J., concurring in the judgment & dissenting in part).

Hans v. Louisiana was substantially wrong in holding that because a state could plead sovereign immunity against a noncitizen or alien suing the state, for that reason a state must enjoy the same protection in a suit by one of its own citizens.\textsuperscript{191} Beyond that, Justice Souter contended that the Court in Hans had misread statements in The Federalist and that Hans wrongly did not even consider whether Congress could abrogate the state's sovereign immunity by statute. Justice Souter explored historical materials to show that even those framers who expected common-law immunity to survive ratification were talking about diversity jurisdiction, a position supported by the discussion at \S 17.2.4.2 nn.223-24, and that American political thought at the time of framing had so revolutionized the concept of sovereignty that it would have been illogical to call for the immunity of a state against the jurisdiction of the national courts.\textsuperscript{192}

Regarding their approach to precedent, although Justice Souter disagreed with Chief Justice Rehnquist and the majority opinion over which prior 11\textsuperscript{th} Amendment case was wrongly decided, they both agreed that a wrong precedent regarding an 11\textsuperscript{th} Amendment federalism issue was sufficiently wrong that it should not be followed. Justice Souter did not call for Hans to be explicitly overruled, however, because Hans had not proven unworkable, did not conflict with later doctrine, and facts had not changed to undermine its premises. Rather, he stated that because Hans was wrongly decided, the Court should permit Congress "to abrogate" the Hans principle if Congress so wished.\textsuperscript{193} Justice Stevens also dissented in Seminole Tribe.\textsuperscript{194} The various arguments for and against the majority opinion in Seminole Tribe are discussed at \S 17.2.4.2 nn.217-24.

A third example where a majority of the current Court concluded that federalism concerns required a change in doctrine occurred in the 10\textsuperscript{th} Amendment case of New York v. United States. Following Garcia's overruling of National League of Cities on grounds of unworkability, discussed at \S 7.3.3.1 nn.146-51, it was unclear what role remained for the 10\textsuperscript{th} Amendment as a matter of constitutional law. New York revived the 10\textsuperscript{th} Amendment, to a limited extent. From the perspective of following or overruling precedent, the most important fact in New York is that Justice O'Connor's opinion for the Court did not call for Garcia to be overruled, despite her having dissented in that case.\textsuperscript{195} Instead, Justice O'Connor seemed reconciled in New York to the expansion of federal power allowed by Garcia. As she stated in New York,\textsuperscript{196} "The Federal Government undertakes activities today that would have been unimaginable to the Framers in two senses: first, because the Framers would not have conceived that any government would conduct such activities; and, second, because the

\textsuperscript{191} Id. at 116-31 (Souter, J., joined by Ginsburg & Breyer, JJ., dissenting), citing Hans v. Louisiana, 134 U.S. 1 (1890).

\textsuperscript{192} Id. at 106-16.

\textsuperscript{193} Id. at 130.

\textsuperscript{194} Id. at 76-77 (Stevens, J., dissenting).

\textsuperscript{195} See Garcia, 469 U.S. at 557 (Powell, J., joined by Burger, C.J., and Rehnquist & O'Connor, JJ., dissenting).

\textsuperscript{196} 505 U.S. 144, 157 (1992) (O'Connor, J., for the Court).
Framers would not have believed that the Federal Government, rather than the States, would assume such responsibilities. Yet the powers conferred upon the Federal Government by the Constitution were phrased in language broad enough to allow for the expansion of the Federal Government's role." However, Justice O'Connor noted in New York that despite this expansion, any federal action that "commandeers" a state legislative process was too wrong to stand as a precedent.

The central question in New York was whether, consistent with the 10th Amendment, Congress could encourage states to deal with low-level radioactive waste by requiring them either to accept ownership of waste generated within their borders or to provide regulations according to instructions by Congress. Justice O'Connor distinguished Garcia by noting that Garcia involved the authority of Congress to subject state governments to generally applicable laws, that is, situations where Congress sought to subject states to the same legislation that applied to private parties. Here, Congress was seeking to use the states as implements of federal regulation, to direct or motivate them to regulate in a particular field or in a particular way. Justice O'Connor's opinion pointed to statements in several cases, actions in the Constitutional Convention, and statements in The Federalist Papers and the ratification campaign, all of which, in her judgment, showed an intent that Congress should have power to regulate, not commandeer.

Justice O'Connor also noted that in The Federalist Papers No. 27 Hamilton spoke about extending the authority of the federal government to citizens, "the only proper objects of government." The Convention had rejected the New Jersey plan for the reason, among others, that it might require the Federal Government to coerce the states into implementing legislation. These statements were accompanied by dicta from prior cases that had stated Congress may not simply "commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." To hold otherwise would not be merely wrong, but substantially wrong, and thus this aspect of the federal regulation involved in the case needed to be ruled unconstitutional. The Court extended New York in Printz v. United States, holding that the federal government also cannot commandeerv state executive or state administrative officials. The various arguments for and against the majority in New York and Printz are discussed at § 18.4.5 nn.236-48.

A fourth area of governmental structure where the post-instrumentalist Court has altered instrumentalist doctrine when it concluded such doctrine to be substantially in error involves the power of Congress to enforce the Civil War Amendments – the 13th, 14th, and 15th Amendments. The instrumentalist era saw substantial changes in the Court’s perception of Congress’ power to enforce the Civil War Amendments. These changes were based in part on the Court's perception that the prior cases were wrongly decided from the perspective of instrumentalist social policy. As discussed at § 28.2, the post-instrumentalist Court has not reversed or limited the line of 13th Amendment instrumentalist precedents, though neither has it used them to expand federal protections. The instrumentalist line of cases involving congressional power under the 14th and 15th

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197 Id. at 174-80.


Amendments have been more vigorously questioned, and in some cases overruled, as discussed at §§ 28.3-28.4.

A fifth area of structural concerns where the modern Court has been willing to cut back on instrumentalist-era precedents involves the law of taxpayer and citizen standing. Prior to the 1960s, it was established that the plaintiff had to suffer a distinct injury personal to him or her in order for the federal courts to have constitutional authority to hear the plaintiff's claim. During the instrumentalist era, however, the Court said that earlier cases contained overgeneralized language and that standing was merely a prudential matter. Justice Brennan stated in 1962 in Baker v. Carr, “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? That 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 said that “in terms of Article III limits 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.” Flast suggested a wide expansion in the concept of standing. 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.

However, since the demise of the Warren Court instrumentalist majority in 1969, that has not been the impact of Flast as a precedent. Instead, the desire by non-instrumentalist Justices to preserve the separation of powers by enforcing traditional limitations on standing has outweighed the instrumentalist policy of seeking to accomplish justice by keeping the judicial system open to any claimant who has a cause of action. In 1982, Justice Rehnquist wrote for the Court in Valley Forge College v. Americans United for the Separation of Church and State, Inc. that an irreducible minimum for Article III standing is that the plaintiff must show that “he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant . . . and that the injury 'fairly can be traced to the challenged action,' and ‘is likely to be redressed by a favorable decision.’” As discussed at § 17.3.1.3.D, while Congress has some role to play today in enlarging standing by creating new causes of action, this role is limited. However, as noted at § 17.3.1.4.B, the specific holding of Flast remains. As a matter of settled law, it is still true that standing exists for litigants relying, as taxpayers, on the Establishment Clause to curb federal spending programs.

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201 369 U.S. 186, 204 (1962).


204 See, e.g., Bowen v. Kendrick, 487 U.S. 589, 618 (1988) ("[W]e have consistently adhered to Flast and the narrow exception it created to the general rule against taxpayer standing.")
A sixth area where concerns about the correctness of prior precedent has led the Court to overrule a case deals with checks against official misconduct under the Due Process Clause, discussed at § 27.4.1. In 1981, the Court held in Parratt v. Taylor\textsuperscript{205} that a loss, negligently caused by a state official, could be an actionable deprivation within the meaning of the due process clause. Five years later, in 1986, at the beginning of the post-instrumentalist era, the Court held in Daniels v. Williams\textsuperscript{206} that the word "deprive" in the Due Process Clause connotes more than a negligent act. It proceeded to overrule Parratt to the extent it said that lack of due care by a state official may "deprive" an individual of life, liberty, or property under the Fourteenth Amendment.

Writing for the Court in Daniels, Chief Justice Rehnquist gave two main reasons for concluding that Parratt was substantially wrong. First, he said that historically the guarantee of due process was applied to deliberate decisions of government officials. No case before Parratt had held otherwise. He said this reflects the fact that the Due Process Clause, like the Magna Carta, was intended to secure individuals from the arbitrary power of government – from the use of power for oppression. In contrast, 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."\textsuperscript{207} Second, although the Constitution deals with large concerns of governors and governed, it does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that occur by living together in society, which includes lack of due care by prison officials. To support this conclusion, Justice Rehnquist cited in Daniels\textsuperscript{208} two cases as analogies, Estelle v. Gamble, where it was said that "medical malpractice does not become a constitutional violation merely because the victim is a prisoner," and Baker v. McCollan, saying the same about false imprisonment due to state action.

One practical consequence of this analysis in § 7.3.3 is that those who would advocate before the Court that an instrumentalist-era precedent should be overruled or limited should do more than contend that the precedent was wrongly decided, does not represent settled law, and there has been no substantial reliance on the precedent. Reference should also be made to one or more of the additional reasons that justify overruling precedents discussed in § 7.3.3. As a theoretical matter, the Supreme Court's reluctance to overrule precedents absent some additional reason beyond a perception that the case was wrongly decided is an appropriate stance for a modern natural law Court to take, given the natural law decisionmaking style's great respect for prior judicial work-product, commitment to reasoned elaboration of the law, and a view that calls for changes in the law to be largely the province of the legislative branch\textsuperscript{S}.


\textsuperscript{206} 474 U.S. 327, 330-31 (1986).

\textsuperscript{207} Id. at 331-32.

\textsuperscript{208} Id. at 332-33, citing Estelle, 429 U.S. 97, 106 (1976); Baker, 443 U.S. 137, 146 (1979).
§ 7.3.4    The Precedent Raises Concerns About the Rule of Law

Because they were immersed in the Anglo-American system of judicial decisionmaking, the framers and ratifiers’ views concerning text, context, history, practice, and precedent were grounded in the grand traditions of the Anglo-American common law system. This approach favors such principles such as reasoned elaboration of the law, deciding cases on narrower grounds where possible, and deciding most cases only after full briefing and argument.\(^\text{209}\) Additionally, there has been a concern that judicial decisionmaking reflect the “rule of law” rather than merely the “will” of decisionmakers. Some aspects of the “rule of law” are reflected in Lon Fuller’s “inner morality” of the law, discussed at § 2.3.1 n.29. Additionally, the rule of law is a way of saying that “rules and procedures of a legal system must meet – or at least strive to meet – tests or standards, which are drawn from fairness and justice. . . . Every official is accountable; every rule, every decision, must be justified by some grant of authority. . . . The result is a system in which official discretion – what officials can do using their own judgment – is restrained.”\(^\text{210}\) Four principles are presented here to give concrete expression to the constitutional implications arising from concern about the “rule of law.”

§ 7.3.4.1    The Retroactivity Concern

Today's post-instrumentalist Court has disagreed with the holdings of several instrumentalist precedents relating to whether newly announced rules of constitutional law should be applied to all pending cases or only prospectively, that is, only as to conduct in the future. Starting at the very beginning of the original natural law period, and carrying through the formalist and Holmesian eras, the theory of judicial review was, as stated in Marbury v. Madison, that it is the duty of the judicial department to "say what the law is."\(^\text{211}\) That principle had been taken to imply that any rule of law stated in a case, even a newly discovered rule, should be applied not only in the future but, also, to conduct and cases that preceded the decision – at least all cases not fully resolved. This rule was based on the belief "that the duty of the court was not to 'pronounce a new law, but to maintain and expound the old one.'"\(^\text{212}\) Before the instrumentalist era, the Court had recognized "a general rule of retrospective effect for the constitutional decisions . . . subject to [certain] limited exceptions."\(^\text{213}\)


\(^{211}\) 5 U.S. (1 Cranch) 137, 177 (1803).

\(^{212}\) Linkletter v. Walker, 381 U.S. 618, 622-23 (1965) (citing 1 W. Blackstone, Commentaries 69 (15th ed. 1809)).

Despite this long tradition, in 1965 an instrumentally oriented Supreme Court, treating the matter as one of policy, held in *Linkletter v. Walker*\(^{214}\) that the Constitution neither prohibits nor requires retrospective effect. Exercising its newly discovered freedom, the Court held that newly imposed constitutional rules of criminal procedure should be applied only prospectively when criminal proceedings were challenged in a collateral review. The Court elaborated upon *Linkletter* in 1967 in *Stovall v. Denno*\(^{215}\) to hold that the "criteria guiding resolution of the question implicate (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." This precedent was extended in 1969, when the Court held in *Desist v. United States*\(^{216}\) that it would not apply new constitutional criminal rules to events that preceded the decision, even in cases on direct appeal. Concurring in *Mackay v. United States*,\(^{217}\) Justice Harlan said, “[T]he Court's assertion of power to disregard current law in adjudicating cases before us that have not already run the full course of appellate review, is quite simply an assertion that our constitutional function is not one of adjudication but in effect of legislation.”

Despite Harlan's concerns, the *Desist* approach was extended to civil cases in 1971, when the Supreme Court decided *Chevron Oil v. Huson*.\(^{218}\) Under *Huson*, a new principle of law should be applied only prospectively depending on whether retrospective operation would further or retard the purpose of the rule, and whether retrospective application would produce substantially inequitable results.

The post-instrumentalist Court has reverberated to Justice Harlan's views. Reverting to traditional theory, the Court reversed *Desist* and *Huson* in *Griffith v. Kentucky*.\(^{219}\) Decided in 1987, *Griffith* held that all new rules for criminal prosecutions would be applied to all cases on direct review, with no exceptions. The Court said that the integrity of judicial review requires the Court, after declaring a new rule in adjudicating a case, "to apply that rule to all similar cases pending on direct review." This principle was extended in 1993 in *Harper v. Virginia Department of Taxation*.\(^{220}\) In *Harper*, the Court said, “Our approach to retroactivity heeds the admonition that ['t]he Court has no more constitutional authority in civil cases than in criminal cases to disregard current law or to treat similarly situated litigants differently.'" This extension of *Griffith* was locked into place in 1995

\(^{214}\) 381 U.S. 618, 629-40 (1965).

\(^{215}\) 388 U.S. 293, 297 (1967).

\(^{216}\) 394 U.S. 244, 246 (1969).


\(^{218}\) 404 U.S. 97, 105-09 (1971).


\(^{220}\) 509 U.S. 86, 97 (1993) (citation omitted).
when the Court stated in *Reynolds v. Casket Co. v. Hyde*, 221 “[W]hen (1) the Court decides a case and applies the (new) legal rule of that case to the parties before it, then (2) it and other courts must treat the same (new) legal rule as ‘retroactive,’ applying it, for example, to all pending cases, whether or not those cases involve predecision events.”

Despite this doctrine, for cases on collateral review, such as federal habeas corpus actions challenging the constitutionality of state criminal proceedings, the Court's does not apply new procedural rules retroactivity, under the doctrine of *Teague v. Lane*. 222 This doctrine acknowledges the state’s substantial reliance in following what were then constitutional practices. The Court still applies new substantive rules retroactivity, and will apply procedural rules retroactivity if they fall within one of *Teague's* two narrow exceptions: a new rule that places "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe," or if it involves "those procedures that . . . are 'implicit in the concept of ordered liberty.'" 223

§ 7.3.4.2 Response to Political Pressure Concern

Another affront to the rule of law would occur if the Court's decision in a case was based, or was perceived to have been based, not upon proper legal argumentation, but as a response to political pressure. This reason was explicitly used by the joint opinion in *Planned Parenthood v. Casey* as one reason for not overruling *Roe v. Wade*. The joint opinion stated in *Casey*, 223 "The Court must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in principle, not as compromises with social and political pressures having, as such, no bearing on the principled choices that the Court is obliged to make."

Taking a slightly different stance regarding this issue, but acknowledging how important it is that the Court not be perceived as giving in to political pressure, Chief Justice Rehnquist noted in *Casey* that the Court in *West Coast Hotel v. Parrish* and *Brown v. Board of Education* had acknowledged and corrected its previous errors in *Lochner* and *Plessy*, even though there was great pressure to overrule those cases. Further, public protests should not alter the normal application of *stare decisis*, "lest perfectly lawful protest activity be penalized by the Court itself." 224 Justice Rehnquist went on to say that the Court should never make its decisions with a view toward speculative public

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224 Id. at 960 (Rehnquist, C.J., joined by White, Scalia & Thomas, JJ., dissenting), citing *Parrish*, 300 U.S. 379 (1937); *Brown*, 347 U.S. 483 (1954).
perceptions. The Court's legitimacy is enhanced by faithful interpretation of the Constitution. Justice Scalia agreed with Rehnquist, but found the joint opinion even more unsatisfactory than did Justice Rehnquist. Justice Scalia said that he was "appalled" by the Court's suggestion that the decision whether to overrule an erroneous constitutional decision must be strongly influenced against overruling by the substantial and continuous public opposition it has generated.

§ 7.3.4.3 Decision Not Based Upon Full Briefing and Argumentation

A third concern about the rule of law is whether the original precedent was decided only after full briefing and argument on the issue, or without the benefit of briefing and argumentation. For example, in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, Justice Souter noted that Justice Scalia's reasoning in *Employment Division v. Smith*, which altered Free Exercise Clause doctrine, was not the product of full briefing and argument on the issue of changing standards in Free Exercise Clause cases. Thus, Justice Souter indicated in *Hialeah* less reluctance to overrule *Smith* since it did not have the imprimatur of consideration after full briefing and argument. As Justice Souter stated, "[A] constitutional principle announced *suo sponte* is entitled to less deference than one addressed on full briefing and argument."

§ 7.3.4.4 Plurality versus Majority Opinions

A fourth consideration regarding the rule of law is whether the reasoning in a precedent commanded the support of five or more members of the Supreme Court, or whether it was only a plurality opinion. Naturally, a plurality opinion is entitled to less weight than a majority opinion. For example, in *Seminole Tribe of Florida v. Florida*, discussed at § 17.2.4.2 nn.217-24, the Court noted that Justice Brennan's opinion in *Pennsylvania v. Union Gas Co.* was a 4-Justice plurality, and thus entitled to lesser precedential weight than if it had been a majority opinion. If the majority opinion is accompanied by one or more concurrences, that can also weaken the force of the precedent, particularly if the concurrences suggest different theories or approaches, and the votes of the concurring Justices are necessary to form the majority. For example, in *Youngstown Sheet & Tube Co. v. Sawyer*, discussed at § 19.3.1 nn.28-32, Justice Black's more formalist opinion for the Court on the extent of presidential power was undercut by the Holmesian functional understanding of presidential power adopted in the concurring opinions of Justices Frankfurter and Jackson.

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225 *Id.* at 959-60.

226 *Id.* at 998-1001 (Scalia, J., joined by Rehnquist, C.J., and White & Thomas, JJ., dissenting).


229 343 U.S. 579, 587-88 (1952); *id.* at 610-14 (Frankfurter, J., concurring); *id.* at 635-38 (Jackson, J., concurring).
Occasionally members of the Court have implied that a precedent involving a 5-4 vote, with the four in dissent vigorously contesting the majority opinion, may be entitled to less weight than a 6-3, 7-2, 8-1, or 9-0 case. For example, in *Payne v. Tennessee*, \(^{230}\) discussed at § 4.3.2 n.86, in overruling two key precedents, Chief Justice Rehnquist remarked, “*Booth* and *Gathers* were decided by the narrowest of margins, over spirited dissents challenging the basic underpinnings of those decisions.”

**§ 7.4  The Process of the Supreme Court Decisionmaking**

**§ 7.4.1  General Judicial Predispositions That May Affect Every Case**

One aspect of the reasoning process in deciding cases involves the general judicial predispositions that a judge may bring to the case. These were addressed with respect to judges generally at § 4.4. As noted there, given the judge's interpretive style, a judge is likely to view provisions of the Constitution though the interpretive style generally favored by the judge. Thus, formalist judges may tend to see the framers and ratifiers as formalists, Holmesian judges see them as Holmesian, and so forth. Furthermore, the political views that judges bring to the courts may also have some impact, and perhaps great impact, on how the Constitution is interpreted. In addition, some judges, because of past experiences or idiosyncratic preferences, may have a view about a particular doctrine which is inconsistent with the judge's general views. Further, in some cases a judge may prefer a particular party, or that party's lawyer, to the other party, or that party's lawyer, though rules regarding judicial recusal are meant to prevent such bias from affecting case resolution.

In addition to these considerations, the outcomes and opinions in cases are also influenced by the process by which individuals are appointed or elected to courts, the process by which cases get decided and written, and rules regarding judicial recusal. With particular reference to the Supreme Court, the process by which individuals are appointed or elected to courts is discussed at § 7.4.2; the process by which cases get decided and written is discussed at § 7.4.3; and rules regarding judicial recusal, as well as limitations on judicial speech, both during campaigns for judges who are elected to office, and limitations that apply to all judges while on the bench, are discussed at § 7.4.4.

**§ 7.4.2  The Process by Which Judges are Appointed or Elected to Courts**

Under the Appointments Clause of Article II, to become a Justice of the United States Supreme Court, an individual must be nominated by the President, and confirmed by a majority vote in the Senate. As discussed at § 19.4.3, for lower federal court judges, as for many officials in the executive branch, the Appointments Clause gives Congress the option of vesting the appointment “in the President alone, the Courts of Law, or in the Heads of Departments,” as long as such judges are viewed as “inferior officials.” Congress has consistently rejected this option for federal district court and court of appeals judges who have the same Article III protections as Supreme Court Justices of life-tenure “during good Behaviour” and salary which “shall not be diminished during their Continuance in Office.” Thus, these lower federal court judges are subject to the Presidential

nomination and Senate confirmation process. Details regarding life-tenure and salary protections are discussed at § 20.1.4.3 n.97.

In practice, Presidents often consult with Senators from a particular state, particularly if they are of the same political party, before making nominations to the lower federal courts in that state. As discussed at § 17.2.3.1 nn.159-62, some specialized federal judges, such as Patent Court judges, Court of Claims judges, or Tax Court judges, are not viewed as Article III judges and do not have the life-tenure and salary protections. Under existing congressional statutes, the Patent Court and Court of Claims judges must get Senate confirmation, while Tax Court judges are merely appointed by the “President alone.” Appointment of Administrative Law Judges who adjudicate claims within administrative agencies, such as social security disability claims or immigration and naturalization claims, typically occur by the “Heads of Departments” without Senate confirmation.

Each state has its own process for selecting judges for the state courts, including each state Supreme Court. This process varies widely from state to state. However, there are four main ways judges are selected: (1) election to office in a partisan election, that is, running as a member of a political party; (2) election to office in a non-partisan election, that is, running without being able to designate oneself as a member of a political party; (3) initial appointment by the Governor or state legislature to judicial office, but then running in a retention election some specific number of years later; or (4) a hybrid system, with different procedures (election versus appointment) depending on whether a Supreme Court or lower court position.

With respect to the Supreme Court, the number of Supreme Court Justices is determined by Congress. Initially, during the First Congress, 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 during the first half of the 19th century, Congress gradually increased this number in 1807 to 7; in 1837 to 9; and in 1863 to 10. Following President Lincoln’s assassination in 1865, the Republican-dominated Congress, wishing to deprive Lincoln’s Democratic Vice-President, Andrew Johnson, of the ability to nominate Supreme Court Justices, reduced the number of Justices in 1866 to 7. Once Johnson left office, Congress increased the number of Justices back to 9 in 1869, where it remains today, as provided in 28 U.S.C. § 1. As discussed at § 14.2.3 nn.59-63, in 1937 President Roosevelt proposed to Congress that it increase the size of the Court to 15, adding one new Justice for every Justice then over 70 years of age, ensuring Roosevelt could have “packed” the Court with Justices voting to uphold his New Deal legislative agenda. When the Court began to uphold New Deal legislation anyway, the need for the court-packing plan evaporated, and Congress rejected the plan.

As might be expected, when the President and a majority of the Senate are of the same political party, the nomination and confirmation process has been relatively smooth. For most of the period before the Civil War, there were Democratic Presidents and a Democratic-controlled Senate. For most of the period after the Civil War until the Great Depression, there were Republican Presidents

and a Republican-controlled Senate. However, as the experience with the Republican Congress and Democratic President Johnson suggests, when the Senate and the President are of different parties, the nomination and confirmation process may not be as smooth.

For example, before the Civil War, Presidents who were not Democrats, John Quincy Adams, John Tyler, and Millard Fillmore, had a total of 9 nominations to the Supreme Court not approved by the Senate, either because the nominations were withdrawn, postponed, not acted upon, or rejected by majority vote. Democratic Presidents during the same period only had 2 nominations ultimately not approved, one each by Polk and Buchanan. President Jackson’s original nominations of Roger Taney to be a Justice were rejected twice, based in part on Taney’s role as Acting Treasury Secretary in removing federal funds from the Second National Bank in 1833, an act consistent with Jackson’s veto of a bill to reauthorize the Bank. That veto provoked a censure vote of the President by the Senate in 1834, and a rejected of Taney’s confirmation to be Treasury Secretary, the first Cabinet appointment not approved by the Senate. After the November 1834 elections, the new Democrat-controlled Senate confirmed Taney to be Chief Justice in 1836, and the censure was expunged in 1837. Between the Civil War and the Great Depression, there were two Democratic Presidents, Grover Cleveland and Woodrow Wilson. Grover Cleveland’s nominations to the Court shared the pro-business perspective of the Republicans in the Senate, and thus were easily confirmed, as noted at § 14.2.2. Woodrow Wilson’s nominations of conservative jurists, like Justice McReynolds, similarly were easily confirmed. When President Wilson nominated a liberal jurist, Louis Brandeis, he was subjected to a 4-month delay before the Republican Senate finally confirmed him.

More recently, there have been a greater number of times where tension between a President of one party and a Senate with a different agenda have provoked confirmation battles. During the 1960s, Democratic President Johnson’s nomination of liberal, African-American activist Thurgood Marshall to the Court provoked a 3-month delay by conservative Republicans and conservative Democrats before he was confirmed. In 1968, President Johnson’s nomination of his close friend Associate Justice Abe Fortas to become Chief Justice was delayed until the Fortas nomination was withdrawn, with Justice Fortas also retiring from the Court. Two of Republican President Nixon’s nominations to the Court in 1970, Judges Clement Haynesworth (defeated 55-45) and Harold Carswell (defeated 51-45), were not approved, before the Democratic-controlled Senate finally confirmed Nixon’s third choice, Judge Harry Blackmun. Two of Republican President Reagan’s nominations to the Court in 1987, Judges Robert Bork (defeated 58-42) and Douglas Ginsburg (nomination withdrawn once marijuana use while a Harvard Law School student and professor became known), were not approved, before the Democratic-controlled Senate finally confirmed Reagan’s third choice, Judge Anthony Kennedy. Republican President George Bush’s nomination of Judge Clarence Thomas to the Court provoked a lively confirmation battle in 1991, before Judge Thomas was confirmed by the Democratic-controlled Senate on a narrow 52-48 vote.232

Regarding the general statistical profile of confirmed Justices, updated to account for the confirmations of Chief Justice Roberts in 2005 and Justice Alito in 2006, one author has noted:

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232 On Supreme Court nominations generally, see Henry J. Abraham, Justices, Presidents, and Senators: A History of the U.S. Supreme Court Appointments from Washington to Clinton (1999).
Since 1789, there have been [110] justices. There have been [17] chief justices; [98] associate justices; with five chiefs having first served as associates. On average, a new justice has joined the Court every 22 months, and the . . . drought of 11 years [between 1994 and 2005 was] the longest in over 180 years, since the administration of President James Monroe.

On average, each justice has served 15 years. The longest tenure of a justice has been 36 years (Justice William Douglas). Five others have served 34 years. The shortest service was just four months (Chief Justice John Rutledge's recess appointment). Age at the time of appointment has ranged from 32 to 69 years with a median age of 54. The oldest justice (Justice Oliver Wendell Holmes) retired at age 90.

Twenty-eight justices have been appointed from a lower federal court; 22 from a federal executive office; 22 from a state court; 18 from the private practice of law; eight from the U.S. Senate; four from the U.S. House; three from governorships; and three from law schools. Five justices previously served as Solicitor General.

Fifty-one justices have been Democrats (or their predecessor, Democrat-Republican) and 46 have been Republicans (or their predecessor, Federalist). Twelve of the [110] justices have been appointed from a political party different than that of their appointing presidents.

Justices have been appointed from 32 states, with the most coming from New York (15), Ohio (10), Massachusetts (9), Pennsylvania and Tennessee (6 each). Only two of the [110] justices have been women, and only two have been African-American. To the extent known, the justices have been predominantly Episcopalian (28), other Protestant (25) and Presbyterian (17). [ Eleven] have been Roman Catholic and seven have been Jewish. [On the Court as of 2006, five Justices are Roman Catholic (Chief Justice Roberts, and Justices Scalia, Kennedy, Thomas, and Alito); two are Jewish (Justices Ginsburg and Breyer); one is Episcopalian (Justice Souter), and one is other Protestant (Justice Stevens).]

Those who have served as chief justice have taken many different paths to the position. Most notably, only half of chief justices had prior judicial experience. Indeed, the chief justices have come to their position more by political experience than by technical legal experience. For example, two came from Secretary of the Treasury; two from Secretary of State; two from a governorship; two from U.S. Attorney General; and one each from a federal appeals court, the U.S. Senate, a state supreme court, private practice and the presidency. Three were elevated from positions as associate justice. [Two had served earlier as associate justices, but left the Court, and then returned later as Chief Justice: the recess appointment of Chief Justice Rutledge in 1795, and the appointment of Chief Justice Hughes in 1930. Hughes had been Governor of New York from 1907-10 and an associate justice from 1910-16. He left the Court in 1916 to run as the Republican nominee for President, but lost to Woodrow Wilson in that election. Chief Justice Rehnquist was confirmed directly from his associate justice position in 1986.]233

Nominations and confirmations of judges to the lower federal courts have typically not provoked the same kind of confirmation battles. Those judges must follow the precedents of the Supreme Court, and thus do not have the same kind of power to make law. However, given the growth in the dockets of the lower federal courts, and the Court only taking about 100 cases each year, it is “essentially impossible for the Court to engage in meaningful ‘error correction’ [today].” Thus, the judicial predispositions of individuals nominated for the lower federal courts, particularly courts of appeals rather than mere district courts, has taken on greater importance in the Senate confirmation process.

Historically, Presidents have tended to appoint judges to the lower federal courts that commanded sufficient mainstream support that they could be confirmed by filibuster-proof majorities in the Senate. Prior to 2000, there were no successful filibusters of judicial nominations to the lower federal courts. For example, during 1977-80 and 1993-94, when Democratic Presidents Carter and Clinton, respectively, were supported by a Democratic-controlled Senate, each of their nominations to the federal courts attracted more than 60 votes. Neither of these Presidents tried to “squeeze through” judicial appointments on a bare 50 plus one basis, even though their nominations could have moved easily through the Democratic-controlled Senate Judiciary Committee and brought to a Senate vote. Indeed, the Senate confirmed 99% of Clinton’s first-term judicial nominees without a roll-call vote.

Since 2000, President George W. Bush has tried to place individuals on the lower federal courts who could be approved on a 50 plus one basis, but who could not command a filibuster-proof 60 votes. While President Bush’s attempt is within the President’s power given the Appointments Clause, this attempt is inconsistent with the general practice of Presidents for 200 years in making lower federal court appointments. This attempt provoked the Democrats in the Senate to filibuster a number of these nominations on grounds that the individuals were not mainstream nominations, although the Democrats did not filibuster all such nominations. For example, during President Bush’s first term in office, the Senate confirmed 3 of President Bush’s judicial nominations by a bare majority of 50 plus one, but less than 60 votes: Dennis H. Shedd (4th Circuit; confirmed 55-44); Jeffrey Sutton (6th Circuit; confirmed 52-41); and Timothy M. Tymkovich (10th Circuit; confirmed 58-41). In one case during President Reagan’s term in office, a judge to a courts of appeals was approved in 1986 by a bare majority vote: Daniel Manion (7th Circuit; confirmed 48-46). His nomination could have been successfully filibustered by the Democratic minority, but was not. In one case during President’s Clinton term in office, a judge to a court of appeals was confirmed despite more than 40 votes in opposition: William A. Fletcher (9th Circuit; confirmed 57-41). Had all 41 of those individuals voted for a filibuster, that nomination could have been filibustered, but was not.

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As the start of President Bush’s second term in 2005, President Bush renominated 7 judges for court of appeals positions whom the Democrats had filibustered during his first term. In order to defeat the expected Democratic filibuster of these nominations, the Majority Leader of the Senate, Bill Frist, indicated a willingness to invoke what was called “the nuclear option” of changing the Senate rules to no longer require 60 votes to end a filibuster if the filibuster involved a judicial nomination, without the usual requirement of a two-thirds vote in the Senate to change Senate rules. When a Democratic Senator would complain about this violation of Senate procedure, Senator Frist indicated his intent to ask the Senate to disregard the complaint, which could be done by a majority vote of the Senate, and proceed to consider the judicial nomination anyway.

Since the two-thirds requirement for changing Senate Rules is nowhere stated in the Constitution, Senator Frist’s plan would not violate any clear text in the Constitution, although it would be inconsistent with legislative practice. As a matter of internal Senate procedure, however, any complaint by Democrats in the Senate would likely be viewed as a political question by the Court and not ruled upon, as are Senate procedures regarding impeachment proceedings, discussed at § 17.3.4.5 nn.571-73. With no prospect of judicial relief from Senator Frist’s plan, Democratic leaders in the Senate indicated that if Senator Frist invoked the “nuclear option” that they would retaliate by using other Senate rules to slow down or, in some cases, halt other Senate business.

Before the “nuclear option” was triggered, a group of 14 Senators, 7 Republicans and 7 Democrats, reached a compromise. This compromise was critical because those Senators held the controlling votes on whether to support continued Democratic filibusters on certain judges, or to support Senator Frist’s call for disregarding valid Senate rules by a majority Senate vote. That compromise called for each Senator to reject support for the “nuclear option,” but for 5 of the 7 nominations to proceed to a full vote in the Senate, and for later filibusters to be used only in “extreme circumstances.” Based on this compromise, as of June, 2005, all 5 of those nominations were approved, with three of the judges confirmed with more than 40 votes in opposition: Priscilla Owen (5th Circuit, confirmed 56-43); Janice Brown (D.C. Circuit, confirmed 56-43); William Pryor (11th Circuit, confirmed 53-45).

How this will affect the nature of judicial nominations in the future remains to be seen. Prior to 1980, there were no examples among the more than 3,000 appointments to the federal district courts or courts of appeals where the nominee received less than 60% support in the Senate. This ensured that the judges were perceived by a clear majority in the Senate as deserving confirmation, and meant that most federal judges were conservative, centrist, or liberal, but not on the extreme left or right. Only one judge for President Reagan and one judge for President Clinton were approved with more than 40 Senators in opposition. Between 2001 and 2005, President Bush had 6 federal judges confirmed in this matter. Under the 14-Senator compromise, more such confirmations may occur in the future.

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This new practice raises the possibility that judges more on the extremes of the political spectrum may be appointed to the federal bench than has occurred during the Nation’s first 200 years. Of course, many Republicans in the Senate supporting President Bush’s nominations take the position that these judges may be conservative, but that they are not on the extreme right. In some later Democratic administration, many Democrats in the Senate may take the position that any Democratic President’s nominations are merely centrist or liberal, and not on the extreme left. What seems clear is that Presidents in the future will feel slightly more comfortable nominating judges to the federal bench that can command 50 plus one support, but not 60 votes, than has occurred for most of our Nation’s history. Whether this change resulted from increased scrutiny given by Democratic Senators filibustering mainstream conservative nominations, which precipitated the “nuclear option” threat, as Republicans tend to allege, or was the product of President Bush nominating more extreme conservative judges than earlier Republican Presidents, and trying to get them confirmed by any means, as Democrats tend to allege, no doubt depends, in part, on one’s political perspective.239

As a final wrinkle on this process, the President has the power under Article II text to appoint federal officials, including judges, without Senate confirmation, even if those officials would normally require confirmation, if the Senate is not in session. Such “recess” appointments last only until the end of the next session of Congress (under current practice the end of the next calendar year). Although the President’s power under the Recess Clause may have been initially intended to apply only when the vacancy was created during a Senate recess, traditional practice permits Presidents to make recess appointments as long as the appointment is made during a Senate recess, as discussed at § 19.4.3.1. Presidents of both parties have used the power occasionally to appoint judges during a Senate recess who were blocked by the Senate. President Clinton used that power to appoint Roger Gregory to the 4th Circuit in December, 2000. President Bush used that power to appoint Charles Pickering, Sr. to the 5th Circuit in January, 2004, and William Pryor, Jr. to the 11th Circuit in February, 2004.

§ 7.4.3 The Process by Which the Supreme Court Decides Cases

Since 1988, all cases reach the Supreme Court by exercise of its discretionary power to grant petitions for a writ of certiorari, except for a few cases certified by a lower federal court of appeals or which, by specific act of Congress, may be directly appealed from a district court. The writ of certiorari, which must be petitioned for within 90 days of judgment below, is granted if at least 4 Justices vote in favor. Five Justices are necessary to form a majority for a decision if all 9 Justices vote, although under 28 U.S.C. § 1 only a quorum of 6 Justices is necessary for a decision, and by Court practice a ‘tie’ vote, of say 4-4, results in affirming the lower court but with no precedential

239 On the role of “ideology” in Senate consideration of Supreme Court nominations, see generally Emery G. Lee, III, The Federalist in an Age of Faction: Rethinking Federalist No. 76 on the Senate’s Role in the Judicial Confirmation Process, 30 Ohio N.U.L. Rev. 235 (2004); Symposium on Ideology in Judicial Selection, 15 Regent U.L. Rev. 1 (2002-2003). On use of the filibuster, or the alternative practice of Senator “holds” on judicial or executive branch nominations, which if such a “hold” is respected by a majority of Senators avoids a filibuster and “cloture” vote requiring 60 votes to end the filibuster, see generally Catherine Fisk & Erwin Chemerinsky, In Defense of Filiubusting Judicial Nominations, 26 Cardozo L. Rev. 331 (2005).
value. Under Court rules, decisions are official only when announced, so if Justices die or retire after voting in conference, but before the decision is announced, their votes do not count.240

The volume of certiorari petitions makes it impossible for every Justice to examine the papers in every instance and much of this work is delegated to law clerks, selected by the Justices, to do the initial screening.241 While each Justice can vote to grant certiorari for any reason whatsoever, Rule 10 of the Supreme Court states that cases more likely to receive certiorari occur when the lower court: (1) “has entered a decision in conflict with” another court on “an important federal question”; (2) “has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court’s supervisory power”; (3) “has decided an 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 pre-1988 history regarding Court jurisdiction, and the few non-certiorari cases that exist today, are discussed at § 17.2.2.2[S.

The process of deciding a case is described in “A Visitor’s Guide to Oral Argument.”242 The Guide explains 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. 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. The Guide notes that the Court grants review in approximately 100-120 of the more than 7,000 petitions filed with the Court each Term, although in recent years the Court has granted review in only 80-100 cases 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

240 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).


242 The Guide is available at the Court and is published in Stern, Gressman, Shapiro & Geller, Supreme Court Rules, 1997 Revisions (BNA Inc., 1997).
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 there is no official requirement, and it was different in the time of Chief Justice John Marshall, who tended to write a majority of the Court’s opinions himself, as noted at § 4.3.4 n.98, current practice is that each Justice is assigned roughly the same number of cases to write each Term. The consequences of having one majority opinion of the Court, rather than the English practice of each judge writing an opinion, is discussed at § 4.3.4 n.99.

The conference, although private, has been described by several of the Justices. Justice Clark has said that upon entering the conference room, each Justice shakes hands with the others. The Chief Justice handles the order of business, which usually involves: (1) determining which written opinions are ready to be announced, (2) discussing and voting on cases which have been argued during the week, (3) considering miscellaneous motions, (4) discussion and dealing with certiorari petitions and appeals, and (5) other items, such as Federal Rules or building items, budget, and salaries. When dealing with matters requiring a vote, the Chief Justice states his views, and makes his recommendation. Other Justices comment in order of seniority and a vote is taken.

With respect to order of voting, Chief Justice Rehnquist has written, “For many years there has circulated a tale that although the discussion in conference proceeds in order from the Chief Justice to the junior justice, the voting actually begins with the junior justice and proceeds back to the Chief Justice in order of seniority. I can testify that, at least during my fifteen years on the Court, this tale is very much of a myth; I don’t believe I have ever seen it happen at any of the conferences that I have attended.” This quote suggests that each Justice usually indicates his or her vote at the first opportunity to comment. In a few cases, a Justice may pass or indicate that the case should be decided. Based predominantly on reliable notes from Justice Powell between 1973 and 1986, such passing happened more often during the 1970s and 1980s by Chief Justice Burger, at a rate slightly higher than 10%, and Justice Rehnquist when he was Chief Justice, at a rate slightly higher than 5%, with all Associate Justices passing at less than 5%, and most below 2%. It has been speculated that this difference is explained by the fact that passing would preserve the Chief Justice’s option to vote with the majority and assign who writes the opinion.

With respect to the mechanism by which drafts of opinions are circulated, the Guide says, “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

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243 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).


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.” Of course, before the decision is announced, time is allowed for concurring and dissenting opinions to be circulated and responded to by other Justices.

During the natural law and formalist eras, more than 80% of the cases were by unanimous decision, while since 1937, differences among Holmesian, instrumentalist, modern natural law, and modern formalist Justices have meant more concurring and dissenting opinions. Typically, these opinions indicate a “respectful” concurrence or dissent, although in some cases the language used is more “caustic.” See generally John P. Kelsh, The Opinion Delivery Practices of the United States Supreme Court 1790-1945, 77 Wash. U.L.Q. 137 (1999) (80% of the decisions unanimous before 1937); Marie A. Failinger, Not Mere Rhetoric: On Wasting or Claiming Your Legacy, Justice Scalia, 34 U. Tol. L. Rev. 425 (2003) (discussion of more caustic concurring or dissenting opinions).

In a few cases, the Court’s opinion will not be identified as written by a particular Justice, but will be announced as a per curiam opinion of the Court. Typically, these opinions indicate a “respectful” concurrence or dissent, although in some cases the language used is more “caustic.” See Paul H. Edelman & Suzanna Sherry, All or Nothing: Explaining the Size of Supreme Court Majorities, 78 N. Car. L. Rev. 1225 (2000).

For court of appeals cases, judges sit in 3-judge panels, and a similar process is employed of circulating a majority opinion and allowing for concurring and dissenting opinions. Prior to appeal to the Supreme Court, a litigant can petition for an “en banc” review by a larger panel of court of appeals judges, traditionally all judges on the Circuit, but for the large Ninth Circuit a panel of 11 judges, where the decision is alleged inconsistent with the Circuit’s precedent. See generally Laura Krugman Ray, The Road to Bush v. Gore: The History of the Supreme Court’s Use of the Per Curiam Opinion, 79 Neb. L. Rev. 517 (2000).

A chief judge could, for example, select senior or district court judges on an ideological basis, [Further,] discretion . . . arises from the authority of a chief judge of a circuit to approve senior judges or district court judges who are added to the pool when determining panel composition. A chief judge could, for example, select senior or district court judges on an ideological basis, making the panel more likely to agree with the majority’s reasoning. See generally Christopher P. Banks, The Politics of En Banc Review in the “Mini-Supreme Court,” 13 J.L. & Pol. 377 (1997).
skewing the biases of the circuit and altering the outcome in at least some instances.  

§ 7.4.4 Rules Regarding Judicial Speech and Recusal

Codes of judicial conduct regulate the speech and conduct in which judges may engage. For state courts, each state will have adopted its own Code of Judicial Conduct. In practice, these state rules are all substantially based on the ABA Model Code of Judicial Conduct. Reflecting separation of powers concerns, this will typically have been done by the state Supreme Court in that state, not the legislature. Reflecting the greater control given to Congress over the federal courts, discussed at § 17.2.3.1, the federal system is governed by congressional rules, principally in 28 U.S.C. § 455, based on recommendations from the United States Supreme Court.

In addition, the Judicial Conference of the United States, the administrative arm of the federal judiciary, has adopted a Code of Conduct for United States Judges. As provided in 28 U.S.C. § 331, the Judicial Conference is chaired by the Chief Justice of the Supreme Court, and includes the Chief Judges of all the Federal Circuit Courts of Appeals, the Chief Judge of the Court of International Trade, and a district judge from each judicial circuit. Because the Judicial Conference holds no specific statutory grant of authority to enact binding ethical rules, there is no enforcement power behind their provisions. Nevertheless, their provisions are often given "great persuasive weight." Canon 3E of the ABA Model Code of Judicial Conduct and the similar Canon 3C of the Code of Conduct for United States Judges address recusal and disqualification. Congress intended that its official statutory rule in § 455 also conform to the ABA Model Code of Judicial Conduct. Thus, these Codes all have similar provisions and are intended to assure that judges do not engage in speech or behavior that compromises, or appears to compromise, the impartiality of the judge.

Two main kinds of rules have been adopted. One set of rules deal with the issue of conflict of interest and judicial recusal. These rules are based, in part, on constitutional concerns with ensuring litigants their Fifth or 14th Amendment due process rights in every case (Fifth Amendment for federal cases; 14th Amendment for state cases), and, in the case of criminal trials, the Sixth Amendment right to a fair trial. The American Bar Association's Model Code of Judicial Conduct Canon 3E(1), adopted in 1990, which provides the basis for the state and federal codes, provides:

(1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:
(a) The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding;
(b) The judge served as a lawyer in the matter in controversy. 

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judge previously practiced law served during such association as a lawyer concerning the matter, or the judge has been a material witness concerning the matter;
(c) The judge knows that he or she, individually or as a fiduciary, or the judge's spouse, parent or child wherever residing, or any other member of the judge's family residing in the judge's household, has an economic interest in the subject matter in controversy or in a party to the proceeding or has any other more than a de minimis interest that could be substantially affected by the proceeding;
(d) The judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person: (i) is a party to the proceeding, or an officer, director, or trustee of a party; (ii) is acting as a lawyer in the proceeding; (iii) has acted as a judge in the proceeding; (iv) is known by the judge to have an economic interest that could be substantially affected by the proceeding; (v) is to the judge's knowledge likely to be a material witness in the proceeding.

The previous version of this provision in the 1972 Model Code stated that in such situations a judge "should disqualify," while the 1990 Model Code mandates that the judge "shall disqualify." Although most courts construed the 1972 Code's "should disqualify" to signify a mandatory duty anyway, disqualification under the 1990 Code clearly became mandatory. The Preamble to the 1990 Code explains, "When the text uses 'shall' or 'shall not,' it is intended to impose binding obligations the violation of which can result in disciplinary action. When 'should' or 'should not' is used, the text is intended as hortatory and as a statement of what is or is not appropriate conduct but not as a binding rule under which a judge may be disciplined." Of the 49 states that have adopted some form of the ABA Code, Montana being the one exception, 33 use the term "shall" to describe the judge's responsibility to disqualify, while Alabama, Colorado, Delaware, Idaho, Iowa, Louisiana, Maryland, Massachusetts, Mississippi, New Hampshire, New Jersey, New York, North Carolina, Oklahoma, Pennsylvania, and Washington use the term “should.” Not surprisingly, Montana also "has a code of judicial conduct that 'bear[s] some degree of similarity to the Model Codes.'" Speech concerning the issues raised in a case that later comes before the court can raise an issue of impartiality. For example, Justice Scalia recused himself in a case reviewing the Ninth Circuit’s ruling that the words “under God” in the Pledge of Allegiance violated the Establishment Clause because, prior to the Court granting certiorari in the case, Justice Scalia had stated in a speech before a Knights of Columbus Chapter that he thought the ruling was a mistaken attempt “to exclude God from the public forums and from public life.” In contrast, mere friendship with a government official whose official actions come before the Court is typically not enough to require recusal. Justice Scalia provided a well-reasoned and well-documented defense of this principle in his refusal

254 Leslie W. Abramson, The Judge’s Relative is Affiliated with Counsel of Record: The Ethical Dilemma, 32 Hofstra L. Rev. 1181, 1183 n.12 (2004).


to recuse himself in *Cheney v. United States District Court for the District of Columbia*, 257 after participating in a hunting trip with a group of 12 other individuals, including Vice-President Cheney.

A second set of rules deal with the issue of permissible judicial speech in the context of campaigns for office, in those states where judges are elected. This issue is discussed at § 30.4.2.4 nn.332-38, which addresses First Amendment issues related to judicial speech and election campaigns.

In terms of who makes the decision to recuse, states administer motions to disqualify in three ways: (1) permit the challenged judge to exercise discretion and rule on the motion; (2) restrict the challenged judge to a determination of the sufficiency and timeliness of the motion, but then require the case to be transferred for decision on the merits of recusal; or (3) require the challenged judge to transfer the motion immediately upon receipt of the motion without ruling on its substance or facial compliance. 258

The rules regarding disqualification in the federal system are governed for district court judges by 28 U.S.C. § 144. Section 144 provides that a party may file in “good faith” one affidavit per case alleging the judge “has a personal bias or prejudice either against him or in favor of any adverse party.” When filed, “another judge shall be assigned” to rule on recusal.

For court of appeals judges and Justices of the Supreme Court, the practice is that each judge or Justice makes his or her own decision on whether to be recused from a case. 259 As a possible explanation for why appellate judges are granted greater flexibility to rule on their own recusal, as opposed to a single judge hearing a case, as at the trial court level, it has been noted, “A panel of judges can balance out one judge who has, for example, a view on abortion or the death penalty. On the Supreme Court there are nine different views to act as a check and balance procedure.” 260

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CHAPTER 8: THE PURPOSES OR ENDS OF CONSTITUTIONAL INTERPRETATION

As noted at § 1.2.1, the final cause or end of Aristotle’s silver bowl is the purpose for which the bowl is intended. From an Aristotelian perspective, the purpose of constitutional interpretation is to produce an array of judicial decisions that create and apply constitutional doctrine in a manner that embodies the purposes or ends of constitutional law. Fuller treatment of these ends is included in Part IV, at Chapters 17-32, as part of discussion on the details of the various constitutional doctrines. This Chapter will provide an overview, or summary, of these various constitutional ends.

It might be supposed that constitutional decisions would contain evaluations of consequences in terms of the goals stated in the preamble to the Constitution. That preamble 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.”

Opinions of the Justices, however, have not dealt with this language as if it were operative text. Instead, to find intended ends, they have looked to the specific details of constitutional text, context, history, practice, precedent, and prudential considerations. Among the goals discovered there are: government efficiency, advanced by the twin ends of competent decisionmaking and uniformity of results; the prevention of tyranny; certainty and predictability in law; fundamental fairness in each case; the protection, either directly or indirectly, of individual rights or group rights; the protection, either directly or indirectly, of autonomy rights or rights to substantially equal results; civil peace; material prosperity through economic growth; scientific progress; and rational liberty.

Although the Court has not organized its consideration of ends in this way, they can be organized consistent with the preamble to the Constitution, and consistent with an Aristotelian analysis of causes, to provide a structured account of the various ends of constitutional adjudication. So organized, these ends can be viewed as falling under one of the following four general categories:

1. Allocating government power (material causes).
2. Producing well-formed doctrine that gives principled treatment to constitutional text and precedent (formal causes).
3. Reconciling government power and individual rights (efficient causes).
4. Conducting a search for original or non-original intent (final causes).

Decisions whose primary ends involve the structure, or material base, of government include relations among government and the people, among the federal government and state governments, and among the branches of government. These cases are dealt with in Chapters 17-20. A summary of the ends involved in these cases, particularly balancing the ends of government efficiency versus the prevention of tyranny, is discussed at § 8.1. These ends primarily reflect those aspects of the preamble that focus on forming “a more perfect Union, . . . insure domestic Tranquility, provide for the common defence, [and] promote the general Welfare.”

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1 U.S. Const. pmbl.
References in opinions to ends that relate to producing well-formed doctrine, including the Court’s treatment of constitutional text and precedent, are discussed at § 8.2. These ends, which particularly involve balancing the goals of certainty and predictability in law versus the goal of fundamental fairness in each case, relate to the language in the preamble regarding the goal to “establish Justice.” Chapters 21-24 deal with the development of those constitutional doctrines that are principally connected to “establish Justice.”

The efficient causes of the ends of constitutional law, that is, what causes the form or shape of the ends to change, is reflected most in the changing perspectives, particularly since 1937, on how to accommodate the need for adequate governmental power with the need to protect individual rights, particularly in fast-changing areas of the law like due process, equal protection, the freedom of speech, and the religion clauses. In a broad sense, all of these issues are related to the language in the preamble regarding the need to “secure the Blessings of Liberty to ourselves and our Posterity.” These cases particularly involve the protection, either directly or indirectly, of individual or group rights, and the protection, either directly or indirectly, of autonomy rights or rights to equal results, as discussed at § 8.3. Treatment of these issues in the context of the Civil War Amendments and their protection of individual rights, including due process and equal protection, is discussed in Chapters 25-28. Treatment of these issues in the context of the various protections of the First Amendment, including freedom of speech and the religion clauses, is discussed in Chapters 29-32.

The final cause of the ends of constitutional law involves the purpose of constitutional interpretation, that is, whether the judge adopts an originalist or non-originalist decisionmaking approach. An originalist approach aims at arriving at interpretations of the Constitution that comport with what the framers and ratifiers intended. A non-originalist approach believes that constitutional decisionmaking should also reflect concepts of justice and social policy that are not necessarily part of what the framers and ratifiers intended. In this view, permissible ends of judicial interpretation are decisions that make certain desirable consequences more likely or make certain undesirable consequences less likely. This issue is related to how one should interpret that part of the preamble which states, “We the People of the United States . . . do ordain and establish this Constitution for the United States of America.” As noted at § 8.4.1, from an originalist perspective, four goals of the framing and ratifying generation were critical: civil peace; material prosperity through economic growth; scientific progress; and rational liberty. These ends are reflected in the specific goals stated in the preamble to “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.”

Whether the Court has succeeded in the effort to advance appropriate constitutional ends depends in part on the eye of the beholder because it depends on the beholder’s views about the process of constitutional interpretation. As discussed in Chapters 5, 6, and 7, within the ambit of American jurisprudence a number of different views are possible, and can be found in Supreme Court opinions on such things as what material is relevant in the process of constitutional interpretation, how to weigh the various kinds of relevant materials, and what techniques of reasoning to employ in deciding constitutional cases, given the proper ends of constitutional interpretation.

The Justices, speaking for themselves, a plurality, or a majority, often identify in their opinions some value or end judged to be a desirable consequence of the decision or an undesirable consequence of deciding otherwise. Sometimes such consequences are acknowledged to be influential in the
interpretation process, typically by relating them to purposes of the framers and ratifiers or to some constitutional text. Other times, however, the reference is not identified as a factor that influenced interpretation or application. Even so, the consequence can be regarded as a final cause of decisionmaking because it is presented as something toward which or away from which the decision tends. A practical impact of this fact is that it behooves advocates before the Court always to consider the value of identifying what consequences or values may hinge on the decision, regardless of how well that can be worked into the advocate’s formal argumentation on constitutional meaning.

No attempt has been made in this Chapter to present an exhaustive list of consequences referred to as ends by the Justices. That is dealt with more completely in consideration of individual cases in Part IV. On the other hand, there are enough references in Chapter 8 to make clear the considerable extent to which constitutional decisionmaking has included reference to values or consequences, some of which are not explicit in constitutional text, context, or history, but which derive from practice, precedent, or prudential considerations. In total, the Court’s constitutional decisionmaking, considering all of its various causes, forms a philosophy or jurisprudence that reflects the Court’s view on the principles or ends that our democratic society embodies, or, as discussed at § 8.4.2, from a non-originalist perspective should embody, in its culture, as reflected in its legal system.

§ 8.1 Allocating Government Power: Forming a More Perfect Union

James Madison wrote in *The Federalist Papers*, “What is government, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. 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.” Madison’s admonition suggests two great ends in the appropriate allocation of governmental power: efficiency (the ability of government to “control the governed”) and the prevention of tyranny (the requirement that government is able “to control itself”). The end of efficiency is usually advanced by the twin ends of competent decisionmaking and uniformity of results. These ends are relevant in each of the areas of governmental powers discussed at §§ 5.2.2.2 & 6.2.2.2: judicial review, federalism, separation of powers, and checks and balances.

§ 8.1.1 Judicial Review

When Chief Justice John Marshall and his colleagues evaluated consequences that related to the structure or operation of government, they envisioned as desirable a strong judicial branch and a powerful federal government, but with limits on government power that would preserve traditional rights considered to be “natural.” When the Court first justified judicial review over acts of Congress in *Marbury v. Madison*, discussed at § 17.1.2.1, Chief Justice Marshall said, “It is emphatically the province and duty of the judicial department to say what the law is.” This view is based in part of the belief that judges are more competent in the task of determining the

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2 The Federalist Papers No. 51 (Madison).

3 5 U.S. (1 Cranch) 137, 176 (1803).
constitutionality of action than officials in the other, more political, branches of government. As Lord Coke’s stated in his famous reply in 1607 to James I’s claim that since law was founded upon reason, the king could decide cases as well as judges, “[T]rue it was, that God had endowed his Majesty with excellent Science, and great Endowments of Nature, but his Majesty was not learned in the Laws of his Realm of England, and Causes which concern the Life, or Inheritance, or Goods, or Fortunes of his Subjects, are not to be decided by natural Reason but by the artificial Reason and Judgment of Law, which Law is an Act which requires long Study and Experience, before a Man can attain to the Cognizance of it.” The natural law tradition in 18th- and 19th-century America, followed by Chief Justice Marshall, shared this belief in “the artificial reason of the law.”

A second reference in *Marbury* to the consequences of not recognizing judicial review over acts of Congress focused on the prevention of legislative tyranny. Marshall stated:

> This doctrine [not recognizing the power of judicial review] would subvert the very foundation of all written constitutions. It would declare than 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.\(^5\)

Regarding judicial review by the Supreme Court over state action, including decisions by state courts, Justice Story held that the Court possessed such a power in *Martin v. Hunter’s Lessee*, discussed at § 17.1.2.2. Regarding consequences, he noted that the result was not motivated by a lack of respect for state tribunals, but rather a concern with uniformity. Justice Story stated:

> A motive of another kind, perfectly compatible with the most sincere respect to state tribunals, might induce the grant of appellate power over their decisions. That motive is the importance, and even necessity for uniformity of decisions throughout the whole United States, upon subjects within the purview of the constitution.\(^6\)

Despite the Court’s broad claim to be the ultimate authoritative source of constitutional law, or perhaps because of it, the Court has denied jurisdiction in a wide variety of circumstances because of respect for other branches or limits on judicial process, as discussed at §§ 17.2-17.3. On the other hand, the Court has sought to protect national uniformity on what is understood to be constitutional law, even if that has a restrictive effect on states. For example, when it is alleged that the Court lacks jurisdiction to review a state court decision because the case rests on an adequate and

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\(^5\) 5 U.S. at 178.

\(^6\) 14 U.S. 304, 347-48 (1816).
independent state ground, the Court will assume there are no such grounds if it is not clear from the state court’s opinion itself. Justice O’Connor explained that “it cannot be doubted that there is an important need for uniformity in federal law, and that this need goes unsatisfied when we fail to review an opinion that rests primarily upon federal grounds and where the independence of an alleged state ground is not apparent from the four corners of that opinion.”

The ends of governmental efficiency versus the need to prevent tyranny have also been used to justify the justiciability doctrines of standing, ripeness, mootness, and political questions. For example, the rule that a complainant must have standing to invoke federal jurisdiction, discussed at § 17.3.1, has been justified as implied in Article III’s textual reference to cases and controversies. However, Justices have also noted that the requirement of standing reflects a concern with competent judicial decisionmaking. Justice Kennedy has stated:

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 rarefied atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action.”

The Court’s ripeness doctrine reflects a similar concern with ensuring the ability of courts to make competent judicial decisions. As discussed at § 17.3.2, 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.

The Court’s mootness doctrine, discussed at § 17.3.3, presents another issue about the nature of judicial proceedings. For example, in DeFunis v. Odegard, the majority dismissed as moot a case challenging a law school’s affirmative action admissions program because the plaintiff, who had not brought a class action, was assured of graduation from the school. The case no longer touched the legal relations of the parties, and the issue was not capable of repetition yet evading review because future challenges would arise. Four Justices in dissent focused on efficient judicial decisionmaking, noting that the questions would inevitably return to the Court. They stated, “Because avoidance of repetitious litigation serves the public interest, that inevitably counsels against mootness determinations, as here, not compelled by the record. . . . Although the Court should, of course, avoid unnecessary decisions of constitutional questions, we should not transform principles of

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avoidance of constitutional decisions into devices for sidestepping resolution of difficult cases.”12

The Court’s refusal to decide political questions, discussed at § 17.3.4, also reflects aspects of a balance between the needs of efficient government operations and the prevention of tyranny. Under the six-factor analysis in *Baker v. Carr*,13 if there is not a demonstrable commitment in constitutional text that some issue is a political question, the Court considers factors related to competent decisionmaking (do judicially manageable standards exist to resolve the issue or does the issue call for resolution of a non-judicial policy decision) and the need for uniform results (whether the decision would represent a lack of respect for other branches, is there an unquestioned need for finality, or is there a potential of embarrassment of multifarious pronouncements on the particular issue). The Court addressed the concern with prevention of legislative tyranny in a political questions case when the Court held that whether Congress could refuse to seat an elected representative who met the constitutional requirements of age, citizenship, and residence was not a political question. The Court explained in *Powell v. McCormack* that “both the intention of the framers, to the extent it can be determined, and an examination of the basic principles of our democratic system persuade us that the Constitution does not vest in the Congress a discretionary power to deny membership by a majority vote.”14

These issues regarding judicial review, and their relationship to the ends of government efficiency and the prevention of tyranny, are discussed in greater depth in Chapter 17.

§ 8.1.2 Federalism

Issues of federalism are discussed generally in Chapter 18. In considering the extent of Congress’ power to legislate under the powers enumerated in Article I, Chief Justice John Marshall relied in *McCulloch v. Maryland*15 on constitutional text and context, legislative and executive practice, and judicial precedents, as discussed at § 18.1.2. However, he also relied on reflections about the undesirable consequences of not finding ample power to choose effective means of carrying out the great powers. Marshall stated, “[I]t 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.”

Modern Justices have also retained concerns with efficient governmental action. However, disagreements exist over where and how to draw the outer limits of federal power. For example, the more conservative members of the Court have found in the 10th Amendment a substantive limitation on federal power. Liberal instrumentalist Justices have not. With respect to the adequacy of federal power and the reserved power of states, the result has been an on-going debate about values and

12 *Id.* at 350.


15 17 U.S. 316, 342-43 (1819).
consequences. In Garcia v. San Antonio Metropolitan Transit Authority,\textsuperscript{16} a 5-4 majority held that by exercising its Commerce Clause authority, Congress could regulate state employment activity without violating the 10th Amendment, as discussed at § 18.4.4. Responding to an argument that the Court was removing Congress from judicial review respecting the scope of such an intrusion on State sovereignty, the majority alluded to views of the framers and said, “State sovereign interests, then, are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on state power.”

Justice Powell, dissenting, had two answers. One focused on a concern with the prevention of tyranny. Justice Powell stated, “By usurping functions traditionally performed by the States, federal overreaching under the Commerce Clause undermines the constitutionally mandated balance of power between the States and the federal government, a balance designed to protect our fundamental liberties.” The second answer focused on the role of judicial review, and the twin ends of competent decisionmaking and the prevention of tyranny. Justice Powell said, “More troubling than the logical infirmities in the Court’s reasoning is the result of its holding, \textit{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. . . . At least since Marbury \textit{v}. Madison 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.”\textsuperscript{17}

There has also been disagreement on the limits of Congress’ Commerce Clause power. A current majority of the Court has tried to limit federal power under the Commerce Clause in order to preserve some room for local law. As noted at § 18.2.5, Chief Justice Rehnquist concluded in United States \textit{v}. Morrison\textsuperscript{18} that “[t]he Constitution requires a distinction between what is truly national and what is truly local.” Earlier he had noted in United States \textit{v}. Lopez,\textsuperscript{19} “In Jones & Laughlin Steel, the Court warned that the scope of the interstate commerce power ‘must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government.’” These concerns supporting localism have been counterbalanced in some cases by the concern for government efficiency. For example, in 1948 the Court upheld a 1947 rent control Act under the “war power” even though by then the fighting in World War II had ended. To deny such power, the Court said, “would be paralyzing. It would render Congress powerless to remedy conditions the creation of which necessarily followed

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\textsuperscript{16} 469 U.S. 528, 553 (1985).
\textsuperscript{17} \textit{Id.} at 567, 572 (Powell, J., joined by Burger, C.J., and Rehnquist & O’Connor, JJ., dissenting).
\textsuperscript{18} 529 U.S. 598, 617-18 (2000).
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from the mobilization of men and materials for successful prosecution of the war.”

§ 8.1.3  Separation of Powers

Decisions on the separation of powers also reflect concerns about promoting efficient government versus preventing tyranny. Justice Jackson summed up the consequence intended to occur from application of the separation of powers doctrine in *Youngstown Sheet & Tube Co. v. Sawyer*, stating, “[The] Constitution diffuses power the better to secure liberty.” More recently, Justice Kennedy explained that liberty “is always at stake when one or more of the branches seek to transgress the separation of powers. 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.” On the other hand, implicit in all separation of powers cases is the additional concern that government retain the ability to engage in effective government action. These issues are discussed in Chapter 19.

§ 8.1.4  Checks and Balances

One kind of check and balance issue involves a separation of powers concern with legislative, executive, and judicial immunities from prosecution. In these cases, the courts have weighed the need to ensure governmental efficiency, in terms of office-holders having immunity from prosecution in the performance of their official duties, versus the concern with preventing tyranny, in terms of holding office-holders accountable for their actions. In some cases, this weighing has led to a finding of absolute immunity, as in legislative immunity cases governed by the “Speech or Debate Clause,” or presidential immunity from lawsuits seeking monetary damages for official actions taken while president, as in *Nixon v. Fitzgerald*. In other cases, this weighing of the factors has led the courts to adopt a balancing test, as in *United States v. Nixon*, where the court balanced the President’s need for confidentiality to ensure competent presidential decisionmaking versus the need to prevent tyranny by ensuring relevant information be produced by the President as part of a criminal trial into executive obstruction of justice. These issues are addressed at § 20.1.4.

A second kind of check and balance issue involves federalism concerns. Modern decisions on national power and federalism reflect concerns similar to those of John Marshall that federal power be adequate, though not unlimited, and that federal law be uniform throughout the land. This is involved in cases concerning preemption; dormant commerce clause doctrine; and Article IV, § 2 Privileges and Immunities Clause doctrine. These issues are discussed at §§ 20.3.1-20.3.3.

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21  343 U.S. 579, 635 (1952) (Jackson, J., concurring).


In particular, the Court has held although the Commerce Clause, taken literally, is merely a grant of power to Congress, it contains a negative, or dormant, aspect that prevents the states from imposing excessive burdens on interstate commerce. The policy underlying the Court’s concern to bring about this consequence was stated by Justice Jackson in *H.P. Hood & Sons, Inc. v. Du Mond*[^25]: “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 duties or regulations excluded them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any.”

The Court has felt so strongly about achieving this consequence of uniformity of free access to markets that even in the exercise of a state’s unquestioned power to protect the health and safety of its people, as in *Dean Milk Co. v. Madison*[^26] it may not discriminate against interstate commerce if reasonable nondiscriminatory alternatives are available that are adequate to preserve the local interests.

Similarly, in order to preserve uniformity in federal power, in *U.S. Term Limits, Inc. v. Thornton*[^27] the Court barred the states from adding any qualifications on candidates for federal office beyond those mentioned in the Constitution. The majority said that such power was not reserved to the states because electing representatives to the Congress was a new right arising from the Constitution itself. But a predicted consequence, not tied to text or history, was also mentioned. Justice Stevens stated, “Permitting individual States to formulate diverse qualification for their representatives would result in a patchwork of state qualifications undermining the uniformity and the national character that the Framers envisioned and sought to ensure.”[^28] Justice Kennedy, concurring, stated that there “can be no doubt, if we are to respect the republican origin of the Nation and preserve its federal character, that there exists a federal right of citizenship, a relationship between the people of the Nation and their National Government, with which the States may not interfere.”[^29]

### § 8.2 Producing Well-Formed Doctrine that Treats Constitutional Text and Precedents in a Principled Manner: Establishing Justice

The form or format of constitutional decisions depends in large part on whether the doctrine at issue in a particular case encompasses, at one extreme, a categorical test adopting simple sharp-cornered rules as elements of the test, or, at the other extreme, a balancing test adopting broader standards as factors to be weighed. The form is also affected by whether the formal statement of law remains stable or is changed by expanding, limiting, or overruling precedents. In addition to the concerns

[^28]: *Id.* at 822.
[^29]: *Id.* at 845.
with efficiency and preventing tyranny that primarily influence doctrinal choices regarding structural matters of constitutional law, noted at § 8.1, two other ends are often prominent in cases involving individual rights. On the one hand, there is a goal of certain and predictable decisionmaking. On the other hand, there is a goal of fundamental fairness in each case.

A range of constitutional doctrines have remained relatively stable over time, with the ends of those doctrines defined by constitutional text and precedents, and with the biggest shift being a change, as discussed at § 7.2.2, from a categorical, element approach of the traditional natural law and formalist eras of 1789-1937, to greater use of balancing or factor weighing approaches post-1937. Balancing or factors approaches tend to give greater weight to the end of ensuring fundamental fairness in each case, while doctrines phrased in categorical, element terms tend to give greater weight to the concern with certainty and predictability in the law.

As discussed in Chapter 21, the text of most constitutional doctrines regarding individual rights protects the individual only against infringement by some form of state action, not private action. As discussed at § 21.1.1, certain and predictable decisionmaking suggests the state action doctrine would be better framed as an element test; considerations of fundamental fairness in each case suggest that determining where private action is sufficiently connected to state action to trigger a finding of state action is better phrased as a factor approach. As noted at §§ 7.2.2 nn.54-56 & 21.1.5 nn.38-43, currently the Court has adopted a factor approach toward state action, though a formalist-inspired dissent would prefer an element approach. As discussed at §§ 21.2.4.1-21.2.4.3, where the relevant individual rights doctrine is phrased as a balancing approach, the considerations of certainty and predictability suggest the Court should systematize their various balancing approaches around the “base plus six” model of levels of review, discussed at § 7.2.1, rather than adopt a proliferation of different balancing tests reflecting many more different levels of review.

Cases involving economic rights, discussed in Chapter 22, similarly involve this tension between certain and predictable doctrine versus the needs of fundamental fairness. For example, under the Contracts Clause, the Court has sought to resolve conflicts between state police power and protecting expectations growing from a contract. The Court has stated:

[T]he general purpose of the [Contracts] Clause was clear: to encourage trade and credit by promoting confidence in the stability of contractual obligations. . . . Nevertheless, a State “continues to possess authority to safeguard the vital interests of its people.”

Traditionally, the Takings Clause was thought to relate only to a direct appropriation of property. Cases since the 1920s have found a taking when a property regulation went “too far.” The consequences sought to be advanced by modern Takings Clause doctrine were stated by Justice Scalia in Lucas v. South Carolina Coastal Council in terms of fundamental fairness and the prevention of tyranny, where he stated, “If, instead, the uses of private property were subject to

unbridled, uncompensated qualification under the police power, ‘the natural tendency of human nature [would be] to extend the qualification more and more until at last private property disappear[ed].’”

Cases involving non-economic individual rights, such as the rights of criminal defendants, similarly involve a tension between the ends of efficient governmental action versus preventing tyranny by the government, and a concern with certain and predictable doctrine versus fundamental fairness to each party involved in each case. These cases are dealt with in Chapter 23.

As noted at § 4.3.1, each style of decisionmaking, as a practical matter, starts with a presumption that precedents should be followed because of a concern that law have some degree of certainty and predictability. However, as noted at § 4.3.2, there are disagreements over how readily the Court should depart from that presumption and how precedents should be read when determining what has been held. For example, dissenting in Lawrence v. Texas, where the majority invalidated a Texas law criminalizing sodomy, and overruled Bowers v. Hardwick, Justice Scalia criticized the majority opinion for its treatment of precedent. Justice Scalia chided the majority for not paying sufficient heed to the need for stability and certainty in judicial use of precedent, stating:

I do not myself believe in rigid adherence to stare decisis in constitutional cases; but I do believe that we should be consistent rather than manipulative in invoking the doctrine. . . . Three members of today’s majority . . . in Planned Parenthood v. Casey . . . when stare decisis meant preservation of judicially invented abortion rights, [found] the widespread criticism of Roe . . . a strong reason to reaffirm it. . . . Today, however, the widespread opposition to Bowers, a decision resolving an issue as “intensively divisive” as the issue in Roe, is offered as a reason in favor of overruling it.

A response to Justice Scalia’s critique, from the perspective of the joint opinion in Casey criticized in this passage, would be that the opposition to Bowers was reflected not merely in political protest, but in a broad pattern of legislative, executive, and social practice rejecting enforcement of the state sodomy laws at issue in Bowers. In contrast, there was not the same level of substantial legislative, executive, and social practice rejecting Roe v. Wade, even though the level of political protest in both cases was substantially more equal. Each member of the Court has acknowledged that response to political protest is an inappropriate factor in judicial decisionmaking, as discussed at § 7.3.4.2. Given this legislative, executive, and social practice, the holding in Bowers was inconsistent with related doctrine regarding a right of privacy, as discussed at § 7.3.3.2, in a different way than Roe. This supported a different result regarding adherence to precedent in Casey versus Lawrence.

Justice Scalia made another strong criticism of the Court’s treatment of precedent when he dissented in Planned Parenthood v. Casey. The controlling plurality in that case said it was reaffirming the central holding of Roe, but it abandoned the trimester analysis and created an “undue burden” test.

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for accommodating the clash between the state’s interest in potential life and a pregnant woman’s interest in choosing an abortion. Justice Scalia responded by saying:

It is particularly difficult . . . to sit still for the Court’s lengthy lecture upon the virtues of “constancy,” of “remain[ing] steadfast,” of adhering to “principle.” Among the five Justices who purportedly adhere to Roe, at most three agree upon the principle that constitutes adherence (the joint opinion’s ‘undue burden’ standard) – and that principle is inconsistent with Roe. . . . To make matters words, two of the three, in order thus to remain steadfast, had to abandon previously stated positions.35

While Justice Scalia’s critique of the plurality opinion is factually accurate, a response from the Justices in the joint opinion in Casey might be that constancy, in the form of certainty and predictability, is not the only goal involved in the pursuit of justice. Rather, the end of fundamental fairness, while also advancing the ends of government efficiency versus the prevention of tyranny, supports the result in Casey of protecting the “core” principle in Roe v. Wade of providing women with protection from undue (“tyrannical”) burdens on abortion rights, while permitting greater governmental choice (“efficiency”) to enact less-than-undue burdens on abortion rights.

These kinds of issues regarding judicial reasoning are particularly important where constitutional text does not provide clear specific answers, and the judges are more on their own in the development of constitutional doctrine. For example, the concerns with certainty versus fairness are particularly relevant in deciding how to interpret the opened-ended language in the Ninth Amendment’s provision that “the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” The Ninth Amendment is discussed in Chapter 24.

§ 8.3 Reconciling Government Power and Individual Rights: Securing the Blessings of Liberty to Ourselves and Our Posterity

Decisions relating to the protection of individual rights regarding liberty reflect concerns that there be an appropriate balance between the need for effective government versus the need to prevent governmental tyranny, and the need for certain and predictable doctrine versus fundamental fairness in protecting various aspects of liberty, including personal privacy, equal treatment, freedom of speech, and the free exercise of religion. In addition to these ends, there is also the question whether the liberty interest involved protects, directly or indirectly, individual rights or group rights, or protects autonomy rights or rights to substantially equal results.

This difference in perspective between individual versus group rights is clearly apparent in cases on affirmative action. As discussed at § 26.2.1.4, a current majority of the Supreme Court believes that the 14th Amendment was intended to protect individual rights. Thus, any program that advantages some individuals because of race, and thus disadvantages other individuals, must be justified by strict scrutiny. The dissenters say that the 14th Amendment was more about protecting racial minorities, particularly African-Americans, as a group, and thus to level the playing field for

35 Id. at 997 (Scalia, J., joined by Rehnquist, C.J., and White & Thomas, JJ., dissenting).
racial minorities it is sufficient to test racially-based affirmative action programs by intermediate scrutiny.\textsuperscript{36}

The difference between autonomy rights versus rights to equal results often arises in constitutional law with respect to issues of government funding. Under the autonomy model, constitutional rights are there to protect individuals \textit{from} government regulation, and to ensure individuals have \textit{equal opportunities} to compete. The opposing view is that individuals should be better guaranteed \textit{equal results}, not just equal opportunity, and thus government should have some affirmative obligation to provide individuals \textit{funding}, not merely freedom from government regulation. This broader set of rights was suggested by President Roosevelt in his “Second Bill of Rights” State of the Union speech in 1944, and as appears in many modern European Constitutions and the Constitution of Japan.\textsuperscript{37}

In terms of modern philosophic treatises, an approach that argued that the better concept of equality is equality of results, rather than equality of opportunity, appeared in John Rawls’ book, \textit{A Theory of Justice}, published in 1971. An approach that argued that the better concept of equality is equality of opportunity appeared in Robert Nozick’s book, \textit{Anarchy, State, and Utopia}, published in 1974. A non-originalist jurist would need to decide, in part, which of these approaches represents the better approach to equality, or whether both should be rejected, since both begin first with a concept of individual rights, rather than focusing on group rights. Such a focus on group rights, combined with a focus on a right to funding, often appears in the constitutions of socialist states, like the People’s Republic of China, or the Soviet Union and Eastern European countries during the Cold War.

For an originalist jurist, the question would be not which approach is better in some normative sense, but which approach best represents the views of the framers and ratifiers of various constitutional provisions. As discussed with respect to various doctrines in Part IV, the predominant view during all eras of American constitutional law has supported an individual rights and autonomy view of constitutional provisions.\textsuperscript{38} Of course, rare exceptions exist, such as the Sixth Amendment right to counsel funded by the government for indigent criminal defendants, discussed at § 23.2.1.3.C.

\textbf{§ 8.3.1 \hspace{1em} Securing the Blessings of Liberty Under the Civil War Amendments}

The major provisions of the Civil War Amendments – the ban on slavery or involuntary servitude in the 13\textsuperscript{th} Amendment, the Due Process and Equal Protection Clauses of the 14\textsuperscript{th} Amendment, and


the ban on racial discrimination in voting rights of the 15th Amendment – all involve aspects of securing the blessings of liberty, broadly defined, to ourselves and our posterity. These provisions of the Constitution are dealt with in Chapters 25-28.

As discussed at § 27.3, in determining what activities and relationships should be constitutionally protected liberty interests under the substantive aspect of the Due Process Clause, the Court has held that the Constitution affords protection to personal decisions relating to marriage, procreation, contraception, family relationships, and child rearing. The rights in these cases are defined as rights of individuals to be free from unwarranted governmental regulation, not as group rights, even a group as small as a married couple. Thus, although Griswold v. Connecticut based its holding on the rights of married persons to have access to contraceptives, Eisenstadt v. Baird soon expanded that right to include all individuals. As stated in Eisenstadt, “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.”

This value of individual liberty was underscored in Lawrence v. Texas, where the Court held that substantive due process was denied by a law that criminalized sodomy. Writing for the majority, Justice Kennedy said that the statute furthered no legitimate state interest that could justify its intrusion into the personal and private life of individuals. Along the way he concluded that the law did not deal solely with a sexual practice. Instead, its purpose and effect was to control a personal relationship involving the exercise of personal autonomy.

The controlling analysis, said Justice Kennedy, citing Justice Stevens’ dissent in Bowers v. Hardwick, was 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.” The consequences at stake in affirming an application of that proposition to strike down the Texas law were said to be that 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.” In terms of ends, individuals are protected from governmental tyranny over this aspect of their personal lives.

In cases under the Equal Protection Clause, the Court has similarly engaged in an analysis of consequences based upon the rights of individuals to equal treatment under the law. As stated in

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42 Id. at 577, citing Bowers, 478 U.S. 186 (1986) (Stevens, J., dissenting).

43 Id. at 578.
Adarand Constructors, Inc. v. Pena, a case involving federal race-based affirmative action, it is a “basic principle that the Fifth and Fourteenth Amendments to the Constitution protect persons, not groups.” The same focus on the detrimental impact of racial discrimination on individuals was at the core of the Court’s decision in the famous case of Brown v. Board of Education, where the Court held that racial segregation in public schools was a denial of equal protection. Chief Justice Warren said that it was impossible to determine what the framers intended with respect to the matter as there was scant history relating to the 14th Amendment’s intended effects on public education. It was clear, however, that education currently was perhaps the most important function of government, and equal protection was not provided merely by equalizing buildings, curricular qualifications, and salaries of teachers, and other “tangible factors” because of the educational impacts upon individual children of racial discrimination in the public schools. Chief Justice Warren noted:

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[integrated] school system.

In Grutter v. Bollinger, a 5-4 majority of the Court upheld racial affirmative action in the admissions program of the University of Michigan Law School on the ground that there was a compelling interest in securing the educational benefits of a diverse student body. The admissions program could take race into account for that purpose. A number of consequences were mentioned in support of allowing this inequality. Two of the most important reflected a concern with efficient government action. They were phrased as “[e]ffective participation by members of all racial and ethnic groups in the civil life of our Nation is essential if the dream of one Nation, indivisible, is to be realized,” and “[i]n order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals.”

§ 8.3.2 Securing the Blessings of Liberty under the First Amendment

The provisions of the First Amendment also reflect the broad concern with ensuring the “Blessings of Liberty to ourselves and our Posterity.” Thomas Jefferson once penned the famous remark, “I have sworn upon the altar of God eternal hostility against every form of tyranny over the mind of man.” Remarks on the value of free speech, expressed by Justice Brandeis and joined by Justice Holmes, though first expressed in dissent, have in time found their way into Court precedents.

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Alluding to the ends of free speech doctrine, Justice Brandeis said in *Whitney v. California*:

Those who won our independence believed that the final end of the State was to make men free to develop their faculties, and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile, that with them, discussion ordinarily affords adequate protection against the dissemination of noxious doctrine; that the great menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of American government.48

Compelled affirmation of belief, such as requiring school children to recite the salute to the flag, was declared unconstitutional in *West Virginia State Board of Education v. Barnette*. Justice Jackson there made clear that it was important to avoid such compulsion of any individual by government tyranny over the mind of man. He did so in this oft-quoted language:

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.49

Cases involving the separation of church and state also reflect a concern with individual liberty and protection against government tyranny. For example, as discussed at § 32.1.2.2 nn.21-24, in the 1947 case of *Everson v. Board of Education*,50 the Court upheld in a 5-4 decision a New Jersey statute that authorized the reimbursement of parents for money expended by them on transportation of their children to school on buses operated by a public transportation system, including parents whose children attended parochial schools. In his majority opinion in that case, Justice Black noted:

A large proportion of the early settlers of this country came here from Europe to escape the bondage of laws which compelled them to support and attend government favored churches. The centuries immediately before and contemporaneous with the colonization of America had been filled with turmoil, civil strife, and persecutions, generated in large part by established sects determined to maintain their absolute political and religious supremacy. . . . [People] reached the conviction that individual religious liberty could be achieved best under a government which was stripped of all power to tax, to support, or otherwise to assist any or all religions, or to interfere with the beliefs of any religious individual or group.51

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48 274 U.S. 357, 375 (1927) (Brandeis, J., joined by Holmes, J., concurring).

49 319 U.S. 624, 642 (1943).

50 330 U.S. 1, 17-18 (1947).

51 *Id.* at 8-9, 11.
In 2002, in *Zelman v. Simmons-Harris*, discussed at § 32.1.3.1.B.1 nn.135-38, a 5-4 Court upheld an Ohio school voucher program against a challenge that it violated the Establishment Clause. Chief Justice Rehnquist’s majority opinion relied primarily on an analysis of precedents, emphasizing that the Court had upheld programs, as in *Everson*, that are neutral with respect to religion, and that the financial aid involved in the case reached religious schools only as the result of private choices — here the choice of parents below the poverty line to send their children to religious schools rather than to non-religious private schools. Judges in both the majority and dissent in *Zelman* referred to ends involved in the case. Justice Thomas, concurring, focused on concerns of efficient education, particularly efficient education for minority students. He stated, “While the romanticized ideal of universal public education resonates with the cognoscenti who oppose vouchers, poor urban families just want the best education for their children, who will certainly need it to function in our high-tech and advanced society. . . . If society cannot end racial discrimination, at least it can arm minorities with the education to defend themselves from some of discrimination’s effects.”

Dissenting, Justice Breyer, joined by Justices Stevens and Souter, focused more on the concern with the potential for religious conflict raised in Justice Black’s opinion in *Everson*. Justice Breyer stated, “In a society composed of many different religious creeds, I fear that this present departure from the Court’s earlier understanding risks creating a form of religiously based conflict potentially harmful to the Nation’s social fabric.” Another form of risk was explored in the dissent of Justice Souter, joined by Justices Stevens, Ginsburg, and Breyer. Justice Souter wrote, “When government aid goes up, so does reliance on it; the only thing likely to go down is independence. If Justice Douglas in [*Board of Education v. Allen*] was concerned with state agencies, influenced by powerful religious groups, choosing the textbooks that parochial schools would use, how much more is there reason to wonder when dependence will become great enough to give the State of Ohio an effective veto over basic decisions on the content of curriculum? A day will come when religious schools will learn what political leverage can do, just as Ohio’s politicians are now getting a lesson in the leverage exercised by religion.”

A similar tension between the needs of governmental efficiency versus a concern with individual liberty and protection from tyranny exists in Free Exercise Clause cases. For example, in 1990 in *Employment Division v. Smith*, discussed at § 32.2.2.5 nn.253-56, the Court rejected a claim that the Free Exercise Clause denied the State of Oregon the power to include religiously inspired peyote use within its general criminal prohibition on the use of that drug. The challenger called on the Court to apply a heightened level of scrutiny, as had been done in *Sherbert v. Verner*, with respect to a state’s refusal to pay unemployment compensation to a woman who refused to work on Saturday

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53 *Id.* at 682-83 (Thomas, J., concurring).

54 *Id.* at 728-29. (Breyer, J., joined by Stevens & Souter, JJ., dissenting).


because it was her sabbath. The majority limited *Sherbert* to its specific facts, and applied only minimum rational review. Focusing on a concern with government efficiency, Justice Scalia explained:

[The] government’s ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, “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” – permitting him, by virtue of his beliefs, “to become a law unto himself,” contradicts both constitutional tradition and common sense.57

Four Justices in the case emphasized the potential harm to individual religious liberties if government could regulate religious practices under a bare minimum rational review standard.58 All of these First Amendment issues are discussed in greater depth in Chapters 29-32.

§ 8.4 **Originalist versus Non-Originalist Approaches to Constitutional Interpretation**

There are two main approaches that a judge could adopt in deciding what is the final goal or end of constitutional interpretation: an originalist approach or a non-originalist approach. An originalist approach refers back to some aspect of the framers and ratifiers’ intent or action to justify a decision. A non-originalist approach bases the goal of constitutional interpretation in part on consideration of some justification independent of the framers and ratifiers’ intent or action.

As discussed at § 8.4.1, from an “original intent” perspective, the various interpretation questions discussed in Chapter 6 would be answered by trying to determine how the framers and ratifiers would have answered the questions. This would involve issues such as whether to adopt a subjective “original intent” approach to interpretation, or to focus on “original public meaning” as determined from the perspective of an “objective reasonable observer,” discussed at § 6.2.1.1; whether to focus on the specific examples held by the framing and ratifying generation about a particular provision of the Constitution or their general concepts, discussed at § 6.2.3.2; whether to adopt a “static” or “living” Constitution model of interpretation, discussed at §§ 6.3.1-6.3.4; and how to use “interpretive” and “non-interpretive” prudential considerations, discussed at §§ 6.4.1-6.4.4.

In contrast, as discussed at § 8.4.2, from a non-originalist perspective, the question of what interpretation theory to adopt would be answered by considering: (1) what is the best interpretation theory in terms of yielding the best consequences for society, a “consequentialist” approach; or (2) what theory of interpretation is best reflected in existing doctrine, a “current majority” or “Dworkian” approach; or (3) what theory of interpretation is most likely to be reflected in the future,

57 *Id.* at 885 (citations omitted).

58 *Id.* at 891-97 (O’Connor, J., joined as to Parts I & II by Brennan, Marshall & Blackmun, JJ., concurring); *id* at 907-09 (Brennan, J., joined by Marshall, J. & Blackmun, J., dissenting).
if that can be determined, a “progressive historicist” approach; or (4) whether to adopt a “pluralist” model of interpretation reflecting some combination of original intent, consequentialist, current majority, and progressive historicist reasoning. Such a non-originalist justification for interpretation could end up, of course, supporting some version of interpretive, static constitutional interpretation. For example, Professor Randy Barnett has argued for his version of “originalism” as an approach to constitutional interpretation not on “original intent” grounds that the approach was favored by the framers and ratifiers of the Constitution, but rather on consequentialist grounds.59 Thus, the approach is not really an “originalist” approach, but rather “consequentialist” in nature. Other authors have similarly supported their interpretation theories on non-originalist grounds. For example, among recent authors, Professor Cass Sunstein has supported “minimalist” constitutional interpretation where the Court is not sure of the proper judgment on “consequentialist” grounds; Professor James Fleming has argued for his version of “constitutional democracy” on “current majority” or “Dworkinian” grounds; and Professor James Fallon Jr. has argued for his interpretation theory on “pluralist” grounds.60

§ 8.4.1 An Originalist Approach: Following the Framers and Ratifiers’ Intent or Action

Under an originalist approach, a judge should always attempt to illuminate some aspect of the framers and ratifiers’ intent or action. The question for an originalist is how the framers and ratifiers expected their Constitution to be interpreted. Under an originalist theory, a judge should not read into the Constitution values different than those that would be expected by the framers and ratifiers. No matter how bad the judge thinks the consequences are of a particular interpretation, if a conclusion follows from an originalist consideration of sources of meaning, that meaning should be adopted.61 This approach is supported by viewing our constitutional enterprise as based on the Lockean concept of the “social contract” entered into by the framers and ratifiers, discussed at § 3.4 nn.84-87, and the judicial oath to “preserve, protect and defend” the Constitution into which they entered. As stated in the preamble, “We the People of the United States . . . do ordain and establish this Constitution for the United States of America.”

Under such an originalist approach, the judge must decide what theory of interpretation the framers and ratifiers intended to be applied: formalist, Holmesian, instrumentalist, or natural law. The question is not which theory of interpretation is best in some normative sense. Rather, the question is what does history suggest about the views of the framers and ratifiers on theories of interpretation. In particular, if some framers or ratifiers favored one theory of interpretation, and other framers or ratifiers favored another theory, the question is whether it is possible to come to some conclusion


about whether any theory was predominantly favored by the framing and ratifying generation, or by later framers and ratifiers for the interpretation of constitutional amendments.

For example, as discussed at § 6.2.1.1, there is a real debate on whether to adopt a subjective or objective approach to contract, statutory, or constitutional interpretation. A subjective approach focuses on the framers and ratifiers’ intent; an objective approach focuses on the framers and ratifiers’ action in adopting certain texts that are to be interpreted. As discussed at § 6.2.1.2., there is also a real debate over the proper weight to be given literal meaning versus purpose in interpretation. As discussed at § 6.2.3.1, there is also a debate over the proper use of material internal to drafting, such as legislative history or Notes of the Constitutional Convention. Further, as discussed at §§ 6.3.1-6.3.4, there is a debate over whether to adopt a model of a “living” versus a “static” Constitution. For a true originalist, resolution of these questions would not depend upon the judge’s own views about the best way to resolve these issues; rather, the question should be how would the framing and ratifying generation have expected judges to resolve those questions.

This analysis can get somewhat complicated to the extent that one concludes that the framing and ratifying generation believed in the model of a living Constitution – whether under a subjective intent approach, or as a matter of original meaning viewed from the perspective of an objective reasonable person at the time. As discussed at §§ 6.3.1-6.3.3, under such a model later legislative, executive, or social practice, or judicial precedents, can change the meaning of a constitutional provision. In such a case, it would be faithful to their theory of interpretation to interpret the Constitution today differently than they would have interpreted it years ago. In short, interpretation according to original meaning does not commit the interpreter to a static or fixed view of the Constitution, as it would for a formalist, as discussed at § 9.2.2.1. Instead, the original meaning of a provision can incorporate the principle that the provision was capable of evolution over time.

For example, as noted at § 5.3.2.1 n.92, and discussed in greater detail at § 18.1.2 nn.25-27, President James Madison concluded that a national bank was constitutional in 1815 and 1816 based upon practice and precedent, while never departing from his stated view in 1791 that a national bank was unconstitutional then. Similarly, under a living model of constitutional interpretation, the non-use of legislative or constitutional history in the late 18th century would not be conclusive on whether legislative or constitutional history should be used today. Given later practice and precedent, the framers and ratifiers might support judicial use of legislative or constitutional history today, even though they did not make use of it themselves.

In general, as discussed at § 4.4.1, the general predisposition of many jurists is to believe that the framers and ratifiers shared whatever theory of interpretation the jurist thinks is best. Thus, judges or commentators who feel comfortable with a formalist model of interpretation often conclude that the framers and ratifiers were predominantly formalists; Holmesian judges or commentators tend to view the framers and ratifiers as predominantly Holmesians; and so forth. Since there were many framers and ratifiers, and no votes by any framer or ratifier on the specific question of what theory of interpretation that framer or ratifier endorsed, there is no conclusive evidence regarding the best way to resolve this issue. Nonetheless, the following comments can be made.

The formalist, or analytic positivist, theory of jurisprudence found its first great spokesman in the Englishman John Austin, who published in 1832 his great book, *The Province of Jurisprudence*
Determined. One can find increasing discussion and acceptance of his ideas in the United States in the second half of the 19th century in all three areas of law: common law, statutory interpretation, and constitutional law. The Holmesian theory of decisionmaking found its first great spokesman in Oliver Wendell Holmes, Jr., who published in 1881 his great book, *The Common Law*, as a reaction against the formalist mentality of his times. That theory became more prominent during the first half of the 20th century. The instrumentalist theory of decisionmaking found its first great spokesman in Benjamin Cardozo, who published in 1921 his great book, *The Nature of the Judicial Process*. That theory became more prominent during the second half of the 20th century.

In the 17th and 18th centuries, however, virtually all discussion and writing about law and theories of interpretation approached the topic from the perspective of some version of natural law. Even Thomas Jefferson’s more formalist theory of interpretation, discussed at § 7.1, is best understood in this light, as discussed below at § 8.4.1 nn.107-10. A true originalist, therefore, is likely to find that the predominant view of the framing and ratifying generation was adherence to some version of natural law on either grounds of subjective original intent or objective original public meaning.

In general, there were two competing natural law approaches in the 18th century to which the framing and ratifying generation would have turned for guidance: the classic/Christian natural law tradition and the Enlightenment natural law tradition. Under the Enlightenment tradition, the ultimate source of natural rights is based upon human reason. This led to placing a high value on freedom of speech and religious toleration, and it supported a belief in civil peace, material prosperity through economic growth, scientific progress, and rational liberty. Under the classic/Christian tradition, the ultimate source of rights is God’s reason and will. As discussed below, at § 8.4.1 nn.85-94, in the 18th century this supported ends that were more conservative, aristocratic, and elitist.

The classic/Christian natural law tradition developed from Aristotle, through the Stoics and Cicero, to Augustine and Aquinas, and affected such English writers as Richard Hooker in the 16th century and the mature Edmund Burke in the 18th century. The qualifier “mature” is used here because although there is some debate on how much Burke's political philosophy evolved during his lifetime,62 it is probably more accurate to refer to the "mature" Edmund Burke when connecting Burke to the classic/Christian natural law tradition, rather than to the Enlightenment natural law tradition. Earlier in his career, Burke was more associated with "Whig," "reformist," and Enlightenment rhetoric. However, by the time of the French Revolution, and in part because of it, Burke had moved to the "conservative," "Tory," or "traditional" camp that rejected Enlightenment abstract theorizing of rights based on reason, and a hypothetical “social contract” replacing a “state of nature,” in favor of reform based on social connectedness arising from concrete, actual historical customs and traditions of family, locality, church, social class, and nation, not abstract theorizing.63

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This tradition has been described by Professor James McClellan as "classical and Christian, in the tradition of Cicero, Aquinas, Hooker, and Burke." As described by McClellan, this "older and once dominant traditional natural law, encompassing the classical and Christian tradition, subscribed to the view that a Divine Being, ruler of the universe through an eternal and universal law, is the supreme lawgiver, and that natural law is an emanation of God's reason and will.

This tradition is also the tradition closer to the views of William Blackstone, as McClellan noted when discussing the influences of "Christianity, the common law, and such legal and political thinkers as Blackstone and Burke," and contrasting these influences with the Enlightenment's "philosophical methods and rationalistic ideas." Professor Grant Gilmore similarly concluded in his book, *The Ages of American Law*, that Blackstone was more in the classic tradition than in the Enlightenment tradition. In his book, Professor Gilmore noted that while Blackstone's attempt to organize and restate the existing law of England in his *Commentaries on the Laws of England* was a classic kind of Enlightenment enterprise, Blackstone's goal was to preserve the substance of existing pre-Enlightenment legal categories from erosion, and thus preserve the substance of the classic tradition. Gilmore stated, "Blackstone's celebration of the common law of England glorified the past. . . . [C]hanges in an already perfect system can only lead to harm in ways which will be beyond the comprehension of even the most well-meaning and far-sighted innovators. . . . Indeed, the Blackstonian construct well may be taken as a conservative reaction to the fundamental changes which English judges were making in the apparently settled rules of English law. Using the tools of eighteenth-century analytical 'philosophy', Blackstone was in effect constructing a dike which, it could be hoped, would hold back the encroaching tide." The use of natural law reasoning in support of the existing common law of England has long roots from Bracton in the 13th century to Blackstone in the 18th century.

As noted by Professor Stephen Presser, this classic/Christian tradition is also the tradition embraced by some of the early Federalist judges, including Justice Samuel Chase. Like Edmund Burke, Chase was more associated in his youth with the reformist, Enlightenment spirit, but as he got older he also moved more into the traditionalist and conservative camp. More generally, as Presser noted, "In the Declaration of Independence, of course, natural law was cast in the form of natural rights to life, liberty, and the pursuit of happiness which governments were formed to perfect, pursuant to Locke’s *Second Treatise of Government* [an Enlightenment approach]. In the hands of the first federal

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64 James McClellan, Justice Story and the American Constitution 69 (1990).

65 *Id.* at 70.

66 *Id.* at 73.


judges, however, natural law was more about circumscribing the actions of government to protect traditional rights of property and person than it was about the creation of expansive new individual rights.”  

During the pre-Civil War period, Whig lawyers and judges, the political heirs of the Federalists, tended to share the Blackstonian focus on tradition, stability, and order. 

This tradition is what many writers think of when they use the term “natural law,” that law being an emanation of God’s reason and will. Of course, the classic natural law approach of Aristotle, the Stoics, or Cicero, and the Christian natural law approach are not identical in every respect. For example, Aristotle held the view that some men are by nature slaves, while the Stoics and Cicero rejected that view in favor of the equality of all men. They nevertheless did not call for the abolition of slavery, viewing it as the appropriate status for some individuals based upon the superior status of the conqueror, or the degraded condition of the conquered. The Christian natural law tradition, in its best moments, has rejected slavery as always immoral. However, St. Thomas Aquinas’ incorporation of Aristotelian notions into his *Summa Theologica* during the 13th century included the view that slavery was justifiable in some circumstances, quoting Aristotle in support.

Aristotle’s continuing influence through Aquinas that some men are by nature slaves, combined with the acceptance of slavery of conquered individuals by Cicero, was used by some Christian natural law writers, and even by some Popes, during the late middle ages to support mistreatment of the indigenous native population of the Americas during the period of Spanish and Portuguese colonization. Slavery was understood “in terms of the *ius gentium*, that is, in terms of the world as it existed, not as it ought to have been.” This is consistent with natural law at the time being based on custom and concrete operational thought, discussed at § 15.4.1 nn.50-56. For example, during the 15th century Pope Nicholas V wrote *Dum Diversas*, which granted to the kings of Spain and Portugal the right to reduce any “Saracens [Muslims] and pagans and any other unbelievers” to perpetual slavery; and during the 16th century, Pope Paul confirmed that “any individual may freely

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75 See id. at 76-91 (colonization period); id. at 93 (*ius gentium*).
buy, sell, and own slaves. Runaway slaves were to be returned to their owners for punishment.”

Influence of Aristotle and Aquinas supported the “natural justice” of the African slave trade by pro-slavery Americans before the Civil War, as discussed at § 25.1.

This analysis is inconsistent, of course, with the basic biblical imperative that all individuals are created by God, and thus entitled to equal natural rights. It has been noted, “The Abolitionist movement emphasized 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).” Throughout the 17th, 18th, and 19th centuries, mainstream Christian natural law, supported by the reasoning of Enlightenment natural law philosophy, gradually rejected the Aristotelian view, and came strongly to support the abolition of slavery as contrary to natural law. It has been noted, “Jurists and moral philosophers had justified the legal basis of slavery according to the doctrine enunciated in Aristotle’s Politics . . . . The origins of the abolition movement were . . . heavily influenced by the appropriation of Enlightenment ideology and the emergence of a network of non-conformist religious groups informed by radical dissenting Protestantism.”

As with biblical passages regarding the earth not moving and the sun revolving around the earth, modern Christian doctrine rejects the view that passages in the Bible regarding slavery are authoritative. Rather, such passages are viewed as mere references to historical practices and understandings existing in the ancient world, which the broader principles in the Bible reject. For example, Pope Leo XIII stated in 1888 that “through absolute forgetfulness of our common nature, and of human dignity, and the likeness of God stamped upon us all, it came to pass that in the contentions and wars which then broke out, those who were the stronger reduced the conquered into slavery; so that mankind, though of the same race, became divided into two sections, the conquered slaves and their victorious masters.” In 1965, the Vatican II document, Pastoral Constitution on the Church in the Modern World, stated, “Whatever violates the integrity of the human person, such as mutilation, torture . . . , whatever insults human dignity, such as . . . slavery, prostitution and selling of women and children . . . all these things and others like them are infamous. . . . Human institutions . . . should be bulwarks against any kind of political or social slavery and guardians of basic rights under any kind of government.”

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77 Slavery: In the Bible and Today’s World 2 (www.religioustolerance.org/slavery.html).


80 Final Abolition, supra note 78, at 4.
Despite such differences between classic Aristotelian doctrine and modern Christian natural law, there still remains a clear distinction between the classic/Christian tradition which rests on Aristotelian and Thomist foundations, and the Enlightenment tradition of the English, Scottish, and French Enlightenments. Similarly, there are naturally differences between Protestant and Catholic natural law traditions, such as the traditional Catholic natural law concept of the “just price” versus the Protestant’s tradition of greater acceptance of market capitalism, which may be relevant to interpreting provisions like the Takings Clause, and differences among Protestant traditions, such as differences among Baptists, Methodists, and Anglicans, which may be relevant to interpreting provisions like the Establishment Clause. As has been noted, “The framers lived in a world in which differences among Baptists, Methodists and Anglicans – not to mention Catholics – were very serious indeed.” When compared to the Enlightenment tradition, however, these other religiously grounded traditions all fall on the classic/Christian, not Enlightenment, side of the divide.

The second main natural law tradition of the 18th century was the Enlightenment natural law tradition of the English, Scottish, and French Enlightenments. This 17th- to 18th-century tradition included such writers as Hobbes, Locke, and Berkeley of the English Enlightenment; Hutchenson, Hume and Adam Smith of the Scottish Enlightenment; and Montesquieu, Rousseau, and Voltaire of the French Enlightenment. Under these approaches, rights derive from man and man’s reason. According to Professor McClellan, the Enlightenment "natural rights" tradition is "characterized by its rationalism, secularism, and radicalism . . . . Highly individualistic, [this tradition] rejected the divine origin of natural law, exalted the autonomy of human reason, and exhorted the mind of man to look for a law of nature in the secularized state of nature." As Professor Jefferson Powell has noted, the Enlightenment tradition of rational liberty is based on an "understanding of human nature as constituted by 'basic deliberative capacities' and by the potential for 'some measure of self-direction.' On that basis, liberalism pursues 'the preservation and enhancement of human capacities for understanding and reflective self-direction' as 'the core of the liberal political and moral vision.'"

One major difference between the classic/Christian and Enlightenment natural law traditions concerns which natural law principles will likely be viewed as incorporated into the Constitution's text. The set of natural law rights that are derived from Enlightenment philosophy is materially different from the set of rights that emerge from a classic or Christian natural law methodology. Stated briefly, the Enlightenment project emphasized four central goals of liberalism: "civil peace, material prosperity through economic growth, scientific progress, and rational liberty." The

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83 McClellan, supra note 64, at 71.
Enlightenment view of religion emphasized religious toleration.\textsuperscript{86} Enlightenment philosophy prized free speech very highly.\textsuperscript{87} Regarding political participation and democratic ideology, the Enlightenment concept of the social contract meant, as stated in 1788 by "the London Revolutionary Society, perhaps the key voice of English opposition ["Whig"] ideology, . . . '(1) That all civil and political authority is derived from the people; (2) That the abuse of power justifies resistance; (3) That the right of private judgment, liberty of conscience, trial by jury, the freedom of the press, and the freedom of election ought ever to be held sacred and inviolable."\textsuperscript{88} These views were embraced by the Democratic Party of Jefferson and Jackson.

In contrast, the natural law principles that flowed from Burke, Blackstone, and others in the 18th century classical/Christian natural law tradition were more elitist, aristocratic, and conservative. As Professor Ernest Young noted, Burke rejected the Lockean social contract and the Enlightenment faith in moral theory produced by human reason.\textsuperscript{89} Politically, Burke was on the "conservative" or "Tory" side of 18\textsuperscript{th}-century British politics, not the "Whig" side. As Professor Presser has noted, "The conservatives, as would Burke in 1791, conceived of the state as an organic entity, with hierarchical control, and a single set of correct answers to political problems to be elaborated and pronounced from the top down. Sovereignty in England, in other words, rested not in the people but in the 'holy trinity' of crown, lords, and commons."\textsuperscript{90} Under the standard "classic and Christian" approach of this time, judicial decisionmaking should reflect the view that Christian principles form the base of the common law, and the Constitution.\textsuperscript{91} This view would be particularly relevant for provisions in the Constitution like the First Amendment Free Exercise and Establishment Clauses, discussed in Chapter 32. While members of the Federalist Party embraced these views more readily, their political successors, the Whigs, embraced more the English Whig political ideology, which was necessary in the American context to remain a viable political party. Of course, as noted at § 8.4.1 n.71, the Whigs still shared the Blackstonian focus on stability and order.

Regarding the 18\textsuperscript{th}-century approach to freedom of speech and the press, Blackstone’s theory was developed against a background of protection of the state and easy resort to seditious libel, as Professor Leonard Levy has noted.\textsuperscript{92} However, by 1798, Professor Levy noted, "The Virginians [and their political leaders Thomas Jefferson and James Madison] repudiated Blackstone on freedom of the press and his distinctions between liberty and licentiousness and between prior restraint and

\begin{itemize}
\item See David Richards, Toleration and the Constitution Ch. 4-5 (1986).
\item See, e.g., Smith, supra note 85 at 92-119 (discussing liberalism and the freedom of speech).
\item See Young, supra note 62, at 644-53.
\item Presser, supra note 69, at 51.
\item See McClellan, supra note 64, at 118-93.
\end{itemize}
subsequent punishment. They argued that political opinions must be free from legal restraints and could not be measured or protected by the test of 'truth.'\textsuperscript{93} Levy also discussed James Madison's "Report of 1800 by the Virginia House of Delegates," which provided in Madison's "characteristically brilliant exposition" Madison's views on why "the common law [of libel as stated by Blackstone] could not be permitted to explain the terms used in the First Amendment."\textsuperscript{94} This issue of the early views regarding the First Amendment freedom of speech is discussed at § 29.1.1.

While many English, Scottish, and French Enlightenment writers contributed to the development of the Enlightenment tradition in the 17th and 18th century, it probably is true that the general political philosophy of John Locke had the greatest influence on the framing and ratifying generation. As Professor Rogers Smith has noted, "Locke is crucial . . . because the political philosophy of liberalism is historically linked with a whole range of distinctive developments that are best encompassed in his writings."\textsuperscript{95}

Of course this does not mean that Locke is the authoritative oracle for all aspects of Enlightenment liberalism. As Smith noted, "Four goals were central to Locke's original vision of liberalism: civil peace, material prosperity through economic growth, scientific progress, and rational liberty. . . . [However,] [l]iberals differed significantly on how these goals were to be achieved, particularly on how much positive governmental activity was needed to secure them."\textsuperscript{96} Furthermore, on some matters, like separation of powers doctrine, "the authorities on whom the colonists relied most often for such devices were the liberal heirs of the . . . Florentine tradition of republican discourse, such as James Harrington, Montesquieu, and Hume, and also the continental publicists, especially Vattel and Burlamaqui."\textsuperscript{97} On matters of international law, the writings of 17th-century Dutch Philosopher Grotius were influential.\textsuperscript{98}

More generally, the Lockean tradition and the civic Republican tradition of Harrington and others differed on a number of specific aspects of their approach. In particular, the Lockean concept of limited government focused on protecting liberty and property rights not adequately protected in the state of nature. The civic Republican tradition focused more on the role of government to help

\begin{itemize}
\item \textsuperscript{93} \textit{Id.} at 309.
\item \textsuperscript{94} \textit{Id.} at 315-17.
\item \textsuperscript{95} Smith, supra note 85, at 15.
\item \textsuperscript{96} \textit{Id.} at 18.
\end{itemize}
promote civic virtue in society. In discussing the differences between these two approaches, Professor Mark Tushnet has noted:

The liberal [Lockean] tradition stresses the self-interested motivations of individuals [sometimes called possessive individualism] and treats the collective good as the aggregation of what individuals choose . . . . Although it acknowledges the role of public institutions in providing the framework for individual development, the liberal tradition insists that such institutions be neutral toward competing conceptions of the good and tends to emphasize the risks of governmental overreaching. The republican tradition, seeing public institutions as important means by which private character is shaped, is less suspicious of government. . . .

[Republicans] understood that people would sometimes heed the call of self-interest rather than of public interest. They were therefore intensely worried about what they called corruption, the use of public offices for private interest. . . . They argued that alterations in institutional design can constrain corruption directly, by limiting opportunities in which self-interest can overcome civic-mindedness, and indirectly, by reinforcing the citizenry’s dedication to the public interest.

The republican tradition saw diffusion of power as an important element in institutional design. Federalism . . . makes it easier for citizens to participate. . . . Small scale dialogues lead citizens to understand that each of them has to subordinate self-interest to the public business if civic projects are to occur at all . . .

. . . . Legislatives might become corrupt and disregard the plain meaning of the Constitution, but the independence given the judges makes it unlikely that they too will be corrupted.

As this discussion suggests, and Professor Tushnet noted, “[A]s the framers considered questions of fundamental institutional design, they discovered that liberalism and civic republicanism converged on some important matters.” More generally, as between the Enlightenment tradition and the classical/Christian natural law tradition, the 17th- and 18th-century civic Republican tradition was more part of the Enlightenment tradition. Professor Jefferson Powell noted, "While some advocates of the civic republican interpretation of the founding view republicanism as antithetical to liberalism, republicanism is better understood as a possible historical complement to liberalism. . . . Even those whose commitment to Enlightenment politics was the most undeniable [citing James

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101 Id. at 7.
Madison, among others] saw no inconsistency in invoking the necessity of [the civic Republican concept of] civic virtue to free government as well.102

Because of these historical facts, determining the precise influences on the framers and ratifiers is likely to be controversial. As the preceding discussion suggests, there is a debate over whether the framers and ratifiers of our Constitution were influenced more by classic Lockean or classic civic Republican ideology. There are also debates over the influence on the framers and ratifiers of the Scottish versus the English Enlightenment. For example, the Declaration of Independence phrased “unalienable” rights as rights to “life, liberty, and the pursuit of happiness,” reflecting the “moral sense” of the Scottish Enlightenment of Frances Hutcheson, David Hume, and Adam Smith, and their view of “sympathy,” rather than “life, liberty, and property,” reflecting the focus of Locke and the English Enlightenment.103 The Scottish Enlightenment was closer in this manner to the civic Republican tradition, and the French Enlightenment’s phrasing of “liberty, equality, and fraternity.” The Due Process Clause of the Fifth Amendment, of course, adopted the Lockean concept that no person may be deprived of “life, liberty, or property without due process of law.” This phrasing was also used in the Due Process Clause of the 14th Amendment. However, as stated in 1923, in one of the foundational cases for modern 14th Amendment substantive due process doctrine, Meyer v. Nebraska,104 “liberty” includes “those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men,” the phrasing of the Scottish Enlightenment.105

Of course, there could also be debates over the influence of Adam Smith or John Locke during the pre-Civil War period leading up to the framing and ratifying of the 13th and 14th Amendments. As discussed at § 13.1 nn.5-16, both Adam Smith and John Locke were influential in the development of the common law in the pre-Civil War period. Further, as discussed at § 8.4.1 nn.62-94, there can be a debate surrounding the respective influence of classic/Christian versus Enlightenment natural law reasoning in the 18th and 19th centuries, particularly as it affected the Federalist, Democratic, Whig, Republican, and other political parties.

As discussed at § 16.2, the most cognitively-advanced rendition of the 18th-century natural law commitment to a reasoned approach to individual liberty and equality, whether phrased in Scottish, English, or French Enlightenment terms, or civic Republican terms, involves giving all individuals “equal concern and respect.” Under this modern rendition, the requirement of “equal concern and respect” rejects the self-interest of “possessive individualism,” and is perhaps closest to the civic Republican tradition. As discussed at § 16.2, the precise contours of this modern natural law are

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104 262 U.S. 390, 399 (1923), interpreting U.S. Const. Amend. XIV.

105 On all these varied influences, see generally Alan Gibson, Interpreting the Founding: Guide to the Enduring Debates Over the Origins and Foundations of the American Republic (2006).
dependent upon the logical elaboration of reason, which all of these approaches claimed as their intellectual foundation, without regard to any particular customary or traditional specific practice, or general aspiration, of any particular 17th-century or 18th-century natural law writer.

For this reason, as noted at § 12.3.3 nn.115-28, any specific substantive disagreements among the 17th-century and 18th-century natural law approaches are not as critical from a modern perspective as the view that each viewed natural rights as an evolutionary project of greater, and more enlightened, understanding of the demands of reason as applied to human nature. That more precise understanding would lead all of these traditions toward a convergence of their views based on that new understanding. Further, each viewed constitutional interpretation as intended to carry out the purposes of the framers and ratifiers, with those purposes heavily influenced by the natural law tradition and an expectation that the then-current natural law style of drafting documents would be understood and applied so that courts would interpret legislation and the Constitution in light of that tradition. While that model likely adopted more of an objective reasonable person approach toward interpretation, rather than a subjective original intent, as discussed at §§ 6.2.1.1 n.11 & 12.2.1.3 nn. 35-38, whether the focus is on framers’ intent at the Constitutional Convention, ratifiers’ intent, or original public meaning, all adopted a natural law approach toward interpretation.

In sum, both the classical/Christian and Enlightenment natural law traditions, in whatever version one adopts, shared many aspects of the common-law methodology of judicial decisionmaking. As discussed by Professor Ernest Young in *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*,106 the 18th-century and 19th-century natural law judicial decisionmaking tradition utilized a wide range of arguments regarding constitutional interpretation, including consideration of constitutional text and purpose, constitutional structure, the history of the framing and ratifying period, subsequent legislative and executive practice, and subsequent judicial precedents under the Constitution, which were held to constitute a gloss on meaning.

Professor Jefferson Powell has noted that this "progressive" mode of reasoning, dependent on judicial "tradition," was shared by Madison on the Republican side of early American politics, and by Alexander Hamilton and Chief Justice John Marshall on the Federalist side.107 Although some on the Republican side, including Thomas Jefferson, as noted at § 7.1 nn.15-20, adopted arguments that viewed "constitutional propositions [as] deductions from static principles" from which "no argument from subsequent precedent, practice, or experience could change," that approach to interpretation was rejected by early and continuous Supreme Court practice.108 Adopted by Jefferson in America, and Jeremy Bentham in England, that “static principles” approach was a forerunner of the formalism, or analytic positivism, made popular a generation later by John Austin in England.

Although this “quasi-formalist” or “static principles” argument of some early Jeffersonian Republicans is based upon one version of “Enlightenment rationalist” thinking, as noted at § 7.1


107 See Powell, *supra* note 84, at 95-100.

108 Id. at 92-95, 97-100, 117.
nn.1-4, and confirmed by Professor Powell, the "progressive" or non-static mode of reasoning also flows from a proper understanding of the Enlightenment philosophic enterprise. As Professor Powell stated, the "progressive" or "tradition-dependent" approach of Madison, Hamilton, and Marshall "shared the overall individualism of the Enlightenment," and the substantive principles that emerged in 19th-century America from "the common-law vision of discourse as tradition-dependent" were "thoroughly liberal: individualism, society as an artificial social compact, human relationships as the intersection of autonomous rights-bearers, the supremacy of the national empire over local communities."

This "progressive" use of tradition that embraced Enlightenment substantive principles differs from the "classic and Christian" use of tradition in writers like Blackstone, whose intent was to freeze existing law with classic/Christian principles, not to let it develop in progressive directions based upon the Enlightenment general concepts placed into the Constitution by the framers and ratifiers. Thus, while the “static principles” judicial decisionmaking methodology of some of the early Republicans, like Jefferson, did lose out on the Court to the progressive common-law methodology, this does not mean that the classic/Christian natural law approach prevailed. Instead, the common-law methodology of Madison, Hamilton, and Marshall won. This methodology consists of engaging in reasoned elaboration of the Enlightenment moral and political concepts placed into the Constitution by the framers and ratifiers. This approach agrees with Jefferson and other Jeffersonian Republicans in rejecting Blackstone and Burke as models for substantive natural law. It disagrees with Jefferson, however, by rejecting the “static principles” of the “Enlightenment rationalist” approach in favor of the traditional common-law methodology of the natural law tradition. This aspect of the natural law tradition is discussed in greater depth at §§ 12.2.1.3 & 12.2.2.1-12.2.2.3.

In the Anglo-American context, this view that rights emerge from the common-law process of judicial, legislative, and executive interaction is often called a “natural rights” or “common law” approach. While, analytically, one can draw a distinction between a “natural rights” approach based upon deducing principles of justice from an application of “reason,” and a “common law” approach grounded in judicial elaboration of societal “custom,” writers and scholars in the 18th century often confused “custom” and “reason,” and for them, a natural law approach toward “reason” was consistent with the “common law” methodology that emphasized “custom.” This confusion is addressed in an article by Professor James Q. Whitman entitled, Why Did the Revolutionary Lawyers Confuse Custom and Reason?, discussed at § 15.4.1 nn.53-56. Thus, although properly distinct in our understanding today, it is historically accurate to place “common law” and Enlightenment “natural rights” on one side of the 18th-century natural law debates, and the classic/Christian natural law tradition on the other side.

Despite these observations, a judge might conclude that the framers and ratifiers were predominantly formalists, or in any event shared Jefferson’s views regarding strict textual interpretation, discussed

109 Id. at 92-95, 117.
110 Id. at 94, 117.
at § 7.1. Under this view, the “original intent” of the framers and ratifiers would be for constitutional interpretation to give text a meaning fixed at the time of ratification. Alternatively, a judge might conclude that the framers and ratifiers expressed both specifics on some matters and general purposes in others, but that their “original intent” included a general purpose that the will of the people should prevail in virtually all circumstances. This result puts lawmaking power in the hands of the people’s representatives and calls for courts to exercise considerable deference to legislative and executive decisions, as under the Holmesian decisionmaking style. However, as both these approaches are positivist approaches to law, as discussed at §§ 3.1-3.2, and the framing and ratifying generation were predominantly believers in natural law, as discussed at § 8.4.1 nn.62-94 and at §§ 12.2 & 12.3.3, neither of these approaches likely reflects their views.

On the other hand, a judge might conclude that the “original intent” of the framers and ratifiers was for the courts to be sensitive not only to text and history, but also to contemporary views of social policy when interpreting and applying the Constitution. This is particularly true given that the content of values held in society tend to shift from time to time. Such a judge might conclude that the framers and ratifiers, aware of this fact and, in the words of McCulloch v. Maryland,112 “it is constitution we are expounding,” intended for the Constitution to be a living document whose meaning, as determined by judges, would evolve to encompass contemporary values relating to social policy, the instrumentalist style of Chief Justice Earl Warren. Under a natural law, social contract theory, that is not the role for judges, as noted at § 3.4 nn.84-87, 95-106. Thus, this is not likely the intent of the framers and ratifiers either. Additional reasons why it is unlikely the framers and ratifiers adopted any of these non-natural law approaches appear at §§ 13.1, 14.2 & 15.4.1.

§ 8.4.2 A Non-Originalist Approach: Reflect Justice or Sound Social Policy

§ 8.4.2.1 Non-Originalist Approaches Defined

An alternative approach to constitutional interpretation concludes that a judge should be committed in part to defining the end of constitutional interpretation as advancing some principle of justice or social policy independent of the framers or ratifiers’ beliefs, rather than interpreting the Constitution only in the manner advocated by the framers and ratifiers. Most judges do not affirmatively state that they hold this view, because the accepted social and political view in the United States, required for election by the people or appointment by the Governor in state courts, or nomination by the President and confirmation by the Senate in the federal system, is based on the social contract model and the judicial oath, which adopt the originalist approach. Nevertheless, some judges may secretly adopt this non-originalist approach toward interpretation and decide cases on that basis. A number of commentators on the law also share such a non-originalist view.

Under a non-originalist approach, the judge or commentator first has to decide what principles of justice or sound social policy should be advanced. With regard to principles of justice, should it be, as Justice Scalia has remarked, “the philosophy of Hume, or of John Rawls, or of John Stuart Mill,
or of Aristotle?"\(^{113}\) With regard to social policy, should it be the jurist’s own values,\(^{114}\) the values of a supposed community consensus or social tradition,\(^{115}\) the values that the jurist believes the community eventually will hold,\(^{116}\) or as some unspecified combination of all of the above?\(^{117}\) In terms of a typology of approaches, these approaches reflect four kinds of justificatory reasons: (1) what is the jurist’s own view as to the best interpretation theory in terms of yielding the best consequences for society in terms of principles of justice and/or social policy, a “consequentialist” approach; (2) what theory of interpretation is best reflected in existing doctrine, a “current consensus or tradition” approach, sometimes called a “Dworkian” approach, as noted at § 13.1 n.38; (3) what theory of interpretation is most likely to be reflected in the future, what the “community eventually will hold,” if that can be determined, a “progressive historicist” approach; or (4) a “pluralist” model of interpretation reflecting some “unspecified combination” of original intent, consequentialist, current majority, and progressive historicist reasoning.

Once a decision is made regarding what justificatory reason to adopt, the judge or commentator would then need to decide which interpretation style best advances those justificatory reasons. Whichever approach is adopted, it will be adopted because the judge believes that approach will best advance the principles of justice or social policy reflected in those justificatory reasons. The beliefs of the framers and ratifiers on matters of interpretation will not be critical to a non-originalist judge.

For example, a non-originalist judge based on “consequentialist” reasoning might decide to adopt a decisionmaking style, like instrumentalism, which permits greater resort to justice or social policy considerations. A non-originalist judge who is more analytically oriented, however, might place more importance on elaboration of law in terms of logic and doctrinal consistency, as under natural law. Alternatively, such a non-originalist judge might conclude that the best model of judicial interpretation is to acknowledge the “power of the purse” of the legislative branch, and the “power of the sword” of the executive branch, and thus adopt an interpretation style, like the Holmesian style, which places great reliance on deference to legislative and executive practice. Indeed, a non-originalist judge might decide to adopt a formalist judicial decisionmaking style because the judge thinks that a formalist style is best in terms of better promoting such elements as certainty and predictability in the law, and reducing as much as practicable opportunities for judicial activism.

\(^{113}\) Antonin Scalia, \textit{A Matter of Interpretation} 45 (1997).


A judge following a “current consensus” or “current majority” or “Dworkian” theory of justification would need to ask what interpretation style best reflects the current majority view. As reflected by the discussion at § 13.1, such an approach would have been most likely to adopt a traditional natural law model of interpretation between 1789-1873; a formalist approach between 1973-1937; a Holmesian approach between 1937-54; and an instrumentalist approach between 1954-86. Since 1986, no dominant majority approach has existed, although, as noted at § 13.4, the swing votes on the Supreme Court since 1986 have reflected a modern version of natural law which is broadly consistent, as noted at § 16.4, with Dworkin’s concept of “equal concern and respect.”

One weakness of this mode of justification is that it cannot explain why the interpretive approach should ever change, or criticize the interpretive approach of another era. For example, as discussed at §§ 26.2.1.1.B-26.2.1.1.D, the Supreme Court’s approach to race discrimination changed from the Plessy v. Ferguson doctrine in 1897, which focused on existing customs and traditions to determine reasonableness of legislation action, to Brown v. Board of Education in 1954, which focused more on the reasoned demands of human dignity and not treating any individual as a second-class citizen. From a “current majority” theory of justification, the Court could say after 1954 that race discrimination cases should follow Brown, but would have no grounds to reject Plessy as inappropriate for 1897 if the Plessy doctrine was consistent with majority legal doctrine in 1897, which it was, as discussed at § 26.2.1.1.B. Nor can this approach provide a justification for changing the legal approach from Plessy to Brown. This weaknesses in criticizing existence practice also applies to a Burkean version of natural law, which is based more on existing traditions, than Enlightenment natural law, based on the demands of reason, as discussed at § 12.3.3 nn.116-28.

Under a “progressive historicist” theory of interpretation, the focus of legal justification is on the theory of interpretation most likely to be reflected in the future. As discussed at §§ 15.4.1, an approach based on cognitive and moral developmental psychology suggests that the historical progression noted at § 13.1 from traditional natural law, to formalism, Holmesian, instrumentalism, and then a modern version of natural law, is no historical accident, but reflective of background forces based upon the logic of progressive reason. From this perspective, the views an enlightened community “eventually will hold” will also reflect a modern version of natural law. The growing convergence among Western industrialized democracies for judicial review based upon a modern version of natural law, noted by Justice Scalia in speeches in 2006, and discussed at §§ 12.3.3 nn.125-28 & 17.1.4 nn.65-70, is consistent with this view of progressive historicist reasoning.

In addition, as discussed at §§ 16.1-16.3, there are reasons to believe that the best moral theory from a “consequentialist” perspective also reflects a modern natural law approach. To the extent this is true, then the natural law theory of interpretation would be supported on all grounds of legal justification: subjective “original intent” or objective “original meaning” grounds, as discussed at § 8.4.1, and “consequentialist,” “Dworkinian,” and “progressive historicist” grounds, discussed here.

§ 8.4.2.2 Non-Originalism versus Originalism in Individual Cases

In any individual case, there may be an issue of whether a particular decision was the product of originalist or non-originalist decisionmaking. This issue is particularly prominent in the case of opinions of instrumentalist Justices, whose acknowledged use of background social policies in decisionmaking can be expected to provoke the criticism, noted at § 6.4.1, that the judge crossed the
line from actual background social policies, which might reflect an originalist approach if the framers and ratifiers were instrumentalists, into clear non-originalist judicial decisionmaking. Of course, if the framers and ratifiers were not instrumentalists, then resort to actual background social policies would be inappropriate anyway, as reflecting the wrong kind of originalist interpretation.

This concern is most likely to arise in cases where the right involved is not explicitly stated in the Constitution. For example, in *Griswold v. Connecticut*,118 discussed at § 27.3.3.2 nn.209-11, Justice Douglas justified invalidating a ban on contraception as applied to married persons by stating, “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.”

There seems little question but that the views of Justice Douglas on the nature of marriage had far greater impact on the decision than did reliance on explicit constitutional text. This raises the question whether this aspect of *Griswold* reflected originalist or non-originalist reasoning. As a fundamental right of marriage was acknowledged even during the formalist era in 1923 by formalist judges in *Meyer v. Nebraska*, as discussed at § 27.3.2.3, Justice Douglas’ conclusion in *Griswold* regarding fundamental marital rights is not clearly a departure from what at least formalist-era judges believed were historical views in which the framers and ratifiers would have believed.

Another famous example of possible non-originalist reasoning can be found in Justice Blackmun’s majority opinion in *Roe v. Wade*.119 In that opinion, the Court’s protection of a woman’s right to terminate her pregnancy was initially analyzed in terms of historical analysis of the state of abortion regulations at the time of the founding in 1789 and in 1868 at the time of the ratification of the 14th Amendment, analysis of legislative and executive practice between 1868 and 1973, and discussion of precedent and analogies to previous cases on the right to privacy, although those previous cases did not involve the same kind of intentional termination of potential life.120 However, that analysis was immediately followed by an allusion to the severely injurious consequences that would follow from denying the right. Justice Blackmun stated, “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.”121 It seems clear that these consequences affected the decision in *Roe*, as discussed at § 27.3.3.3 n.223. Since this paragraph is based upon social policy concerns, not on text, purpose, or any background moral principle embedded in the law, this paragraph marks the Blackmun opinion as representing an instrumentalist approach.

118 381 U.S. 479, 486 (1965).
120 Id. at 129-53.
121 Id. at 153.
Whether the opinion is originalist or non-originalist depends upon whether one views the particular policies advanced in the paragraph as policies sufficiently widely held to be part of the background social policy of the times. Not surprisingly, no such paragraph was included in the joint opinion in Planned Parenthood v. Casey, which affirmed the core principles of Roe, discussed at § 27.3.4.1 nn.243-48, as that opinion was written by the natural law Justices O’Connor, Kennedy, and Souter. As noted at § 3.4 nn.95-106, natural law judges reject background social policy reasoning of any kind, whether based on originalist widely-held social policy premises, or on non-originalist grounds.

Another opinion that presents a similar problem of originalist or non-originalist reasoning is Plyler v. Doe. In Plyler, in a 5-4 opinion by Justice Brennan, the Court held under the Equal Protection Clause that Texas could not deny undocumented children the free public education that it provided to children who are citizens of the United States or legally admitted aliens. One explanation for the result in Plyler, as discussed at § 5.4.2 n.123, was application of the background moral principle that individuals should not be punished for things over which they have no control. This principle supported natural law Justices joining the majority in Plyler, as did Justice Powell, because the children of illegal aliens are not responsible for being in this country. Their parents are responsible. In addition, Justice Brennan added a social policy reason for the decision. Reasoning from the consequences of denying education to such children, he stated, “[E]ducation provides the basic tools by which individuals might lead economically productive lives for the benefit of us all. In sum, education has a fundamental role in maintaining the fabric of our society. We cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests.”

As in Roe, whether this reason is a possibly originalist background social policy or non-originalist judicial activism depends on how wide-spread the social policy is held. In either case, this social policy would support liberal instrumentalists embracing the opinion in Plyler, as did all the liberal instrumentalists on the Court at the time, Justices Brennan, Marshall, Blackmun, and Stevens, as discussed at § 26.2.2.1.B nn.337-41. The background moral principle regarding individual responsibility engendered the support of Justice Powell, although it was not enough for Justice O’Connor to join the majority. This difference between Justices Powell and O’Connor is discussed at § 12.4.2 nn.191-93. As could be expected, formalist Chief Justice Burger, and Holmesian Justices Rehnquist and White, who reject any form of natural law background moral principle reasoning or instrumentalist social policy reasoning, dissented in Plyler. The dissent specifically accused the majority of relying on non-originalist social policy argumentation in making its decision."
PART III: THE EFFICIENT CAUSES OF CONSTITUTIONAL LAW

Efficient causes involve consideration of that aspect of a phenomenon which causes things to change, like the “hammering of the silversmith” in Aristotle’s silver bowl example, noted at § 1.2.1. Decisions on constitutional law are hammered out by application of the four judicial decisionmaking styles to the facts of particular cases in light of the available materials for interpretation. These four interpretation styles are thus the efficient causes of constitutional decisionmaking. The first sub-part of Part III will describe these efficient causes in detail. Chapter 9 will discuss formalism; Chapter 10 will discuss the Holmesian style of interpretation; Chapter 11 will discuss instrumentalism; Chapter 12 will discuss natural law.

For each of the four interpretation styles, there are a number of variations. For example, for any style of interpretation there can be judges who reflect an extreme version of that style or a moderate version. There will also be a difference depending upon whether the judge adopts a conservative or liberal version of that style. Thus, after an initial discussion of the basic elements of an interpretation style, each Chapter will consider aspects of these variations.

Each one of these four styles in their interpretive methodology place greater emphasis on one or the other of Aristotle’s four causes. The four styles and their related causes are: formalism (formal causes); Holmesian (material causes); instrumentalism (efficient causes); and natural law (final causes). Under the formalist style of interpretation, the formal definitions embodied in the law are the most critical element of interpretation to resolve hard cases that inevitably arise. For the Holmesian style, the material history or experience that lies behind a rule, and that frames the rule’s purpose, is the most critical element of interpretation to resolve hard cases. Instrumentalist sensitivity to social reality and change leads them to focus on the efficient causes of contemporary social policy when resolving leeways in the law that exist in hard cases. For natural law, the final cause or purpose of law is to reflect society’s background moral principles, where leeways exist in the law. Attention to such background moral principles is thus the most critical element of the natural law interpretation style in resolving hard cases.

The second sub-part of Part III discusses the causes that help explain why a majority of Justices on the Supreme Court at different times in our Nation’s history have adopted one of the four judicial decisionmaking styles. In discussing these efficient causes of why the dominant interpretation style in different eras has changed, Chapter 13 focuses on the formal fact of changes in American legal history from an initial natural law era, through formalist, Holmesian, and instrumentalist eras, to a modern natural law era today. Chapter 14 focuses on the material cause of these changes, that is, the changing background of social and political events in society which forms the material base from which constitutional law emerged in its various eras. Chapter 15 focuses on aspects of cognitive and moral developmental psychology that are part of the efficient causes related to explaining changes in the majority approach from one judicial era to the next. Finally, Chapter 16 relates the cognitive and moral developmental stages and the judicial eras to issues of contemporary societal development, the final cause or end of legal change being to reflect such societal developments.
CHAPTER 9: FORMALIST CONSTITUTIONAL INTERPRETATION

§ 9.1 Introduction to Formalist Decisionmaking

As discussed at § 3.1, being a positivist theory of law, the formalist sees the judge as an impartial declarer of the law who attempts to decide cases in light of existing positive law. Being an analytic, positivist theory of law, formalism has a preference for clear, bright-line rules that are capable of mechanical application. Thus, in its purest form, the formalist decisionmaking style views the judge's role as the logical, mechanical restatement of the meaning placed into the Constitution by the framers and ratifiers. The elements of this formalist style of interpretation are discussed at § 9.2.

As discussed at § 9.3, during the 20th century there have been on the Court extreme formalists, such as Justices Van Devanter, McReynolds, Sutherland, and Butler in the 1920s and 1930s, and Justice Scalia on the Court today. There have also been moderate formalists, such as Chief Justice Hughes and Justice Owen Roberts in the 1930s; Chief Justice Burger, during the 1970s and 1980s; and Justice Thomas on the Court today. All of these formalists are examples of conservative formalists. Justice Hugo Black, who served on the Court from 1939 to 1973, was an example of a liberal, extreme formalist. There are formalists who follow a subjective approach to interpretation, and thus place great reliance on the specific historical intent of the framers and ratifiers, such as commentator Raoul Berger. In contrast, most formalists, including Justices Scalia and Thomas, follow an objective approach to interpretation and thus place greater reliance on literal text. Finally, as exists with respect to each style of interpretation, a judge who predominately follows one style may have an affinity for another style. As discussed at § 9.3.2, Chief Justice Hughes and Justice Roberts had a slight affinity for Holmesian interpretation. As discussed at § 9.4, Chief Justice Burger also had a slight affinity for the Holmesian style; Justice Thomas has a slight affinity for natural law; Justice Black had a slight affinity for instrumentalism.

§ 9.2 Defining the Formalist Style of Constitutional Interpretation

§ 9.2.1 Treatment of Contemporaneous Sources of Interpretation

§ 9.2.1.1 Treatment of Text

On the question of subjective versus objective interpretation of text, most formalist jurists have followed the general temper of their times. Thus, during the 19th century, when Kant’s subjective will theory was predominant, as discussed at § 6.2.1.1, most formalists focused on the subjective intent of the drafter, whether under the “meeting of the minds” approach to contract law, or “intent of the legislator” approach to statutory interpretation, or “intent of the drafters and ratifiers” approach to constitutional law. As discussed at § 9.3.4, there are still some contemporary formalist jurists, like Raoul Berger, who support and follow a subjective approach to interpreting the Constitution that, in certain cases, can lead to a different result than is reached under an objective approach.

During the 20th century, the objective approach to interpreting text gained greater prominence. Particularly for formalists, inquiry into the subjective "in-fact" intent of any individual can be a messy proposition. Thus, formalist judges today typically dispense with original subjective intent
in favor of asking what a text’s words mean, since determining that meaning can be done in a more mechanical fashion. The formalist approach today was perhaps best stated by Justice Scalia in 1997, when he noted in *A Matter of Interpretation* that “[w]e look for a sort of ‘objectified’ intent – the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the corpus juris.”¹ In addition to certainty and predictability, Justice Scalia has given another reason for adopting this objective approach. He has said, “And the reason we adopt this objectified version is, I think, that it is simply incompatible with democratic government, or indeed, even with fair government, to have the meaning of a law determined by what the lawmaker meant, rather than by what the lawgiver promulgated. . . . It is the law that governs, not the intent of the lawmaker.”²

In the context of deciding a case, Justice Scalia phrased this point in 1991 by stating, “We are to read the words of the text as any ordinary Member of Congress would have read them.”³ While in most cases this phrasing will yield the same result as the phrasing above, logically there is a difference between interpretation according to how a “reasonable person” would read the law and interpretation according to a “reasonable” or “ordinary Member of Congress.” If the focus of interpretation is on the best way to determine subjective congressional intent, the “ordinary Member of Congress” phrasing would be more appropriate. If the focus is on notice to the average citizen, the objective “reasonable person” phrasing would be more appropriate. In most cases, of course, the same result is likely to be achieved under either phrasing. Particularly given formalism’s focus on clear, bright-line rules that are capable of formal, mechanical application, the better approach may be to focus on how a “reasonable person” would interpret the text, rather than attempt to delve into how a “reasonable Member of Congress” might have an interpretation different than that of a “reasonable person.” The “reasonable person” phrasing is reflected in Justice Scalia’s more recent 1997 writing.

On the question of literal meaning versus purpose in interpreting constitutional provisions, all formalist jurists emphasize the literal, plain meaning of the words.⁴ Formalists are concerned that attempting to determine a provision's purpose, or purposes, is not a clear, mechanical process that can yield unambiguous results. As stated by Professor Schauer, “The language in which a rule is written and the purpose behind that rule can diverge precisely because that purpose is plastic in a way that literal language is not. . . . It is because purpose is not reduced to a concrete set of words that it retains its sensitivity to novel cases, to bizarre applications, and to the complex unfolding of the human experience.”⁵ In contrast, formalists have a preference for clear, bright-line rules. For

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² *Id.*
⁵ Schauer, *supra* note 4, at 532.
example, in *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock, Co.*, Justice Thomas, joined by Justice Scalia, noted, "The test I have proposed would produce much the same result as the Sisson analysis without the need for wasteful litigation over threshold jurisdictional questions [based on the purposes of admiralty jurisdiction]. . . . Sisson . . . is easily replaced with a bright-line rule."

Three variations of the formalist approach have appeared in Anglo-American legal history regarding use of purpose. They are the Literal Rule, the Golden Rule, and the Plain Meaning Rule. Under the Literal Rule, the court should follow a text’s literal meaning even if that meaning leads to an absurd result. This literal meaning would be determined from considering the dictionary meaning of the text's words, as supplemented by basic rules of grammar as reflected in traditional grammatical maxims of construction. Thus, as stated in the 1892 English case of *Regina v. City of London Court Judge*, "If the words of an Act are clear, you must follow them, even though they lead to a manifest absurdity." Under this approach, only if the text is ambiguous, and thus has no plain meaning, should be court depart from what the text literally requires.

This pure literalness approach has attracted some adherents at various points in Anglo-American legal history. One author reports, "In theory, at least, this approach has attracted the attention of a number of courts, and was particularly popular in England in the Nineteenth Century. One reason for that popularity was the strong belief by the English courts in the primacy of Parliament. Paradoxically, the literal rule also attracted adherents because it limited the scope of legislation. For that reason, literalness was prevalent in [the United States] at the turn of the [20th] century, when judicial hostility toward the legislature reached its peak." Despite these observations, the United States Supreme Court never adopted such an extreme approach in practice. Indeed, even concerning lower courts, Judge Learned Hand stated in *Usatorre v. The Victoria*, "One school says that the judge must follow the letter of the law absolutely. I call this the dictionary school. No matter what the result is, he must read the words in their usual meaning and stop where they stop. No judges have ever carried on literally in that spirit, and they would not be long tolerated if they did."

A second version of formalism is the Golden Rule. The Golden Rule differs from the Literal Rule in that under the Golden Rule the plain meaning of a text should not be followed if it leads to an absurd result. Thus, a court should depart from literal text, whether statutory or constitutional text, if the text is ambiguous or the literal meaning would create an absurd result. Under this approach, factors outside the "literal" text can affect interpretation if "predictability, stability, and decisionmaker restraint" are not decreased too much and literalism would lead to "especially

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7 1 Q.B. 273, 290 (1892).


9 172 F.2d 434, 441-42 n.16 (2nd Cir. 1949)
outrageous" results. As stated in the famous English case of *Grey v. Pearson*,11 "[T]he grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnancy with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid the absurdity and inconsistency but no further." Similar is the famous American case of *Hamilton v. Rathbone*. In *Hamilton*, the Supreme Court stated:

The general rule is perfectly well settled that, where a [text] is of doubtful meaning and susceptible upon its face of two constructions, the court may look into prior and contemporaneous acts, the reasons which induced the act in question, the mischiefs intended to be remedied, the extraneous circumstances, and the purpose intended to be accomplished by it, to determine its proper construction. But where the act is clear upon its face, and when standing alone it is fairly susceptible of but one construction, that construction must be given to it.12

A third version of formalism is represented by the Plain Meaning Rule. Carefully stated, the Plain Meaning Rule does not constrain a court from considering purposes stated on the face of the text when determining the plain meaning of language. As Chief Justice Marshall's classic phrasing of the Plain Meaning Rule indicated in *Sturges v. Crowninshield*,13 "any other provision of the same instrument" may be consulted, including statements of purpose, to determine plain meaning. The same result occurred in *United States v. Fisher*,14 where Chief Justice Marshall considered the statute's title, purpose, and statutes in pari materia to help determine the text's meaning, stating, "It is undoubtedly a well-established principle in the exposition of statutes, that every part is to be considered, and the intention of the legislature to be extracted from the whole." In contrast, under the Golden Rule as stated in *Hamilton*, cited above at § 9.2.1.1 n.12, "the purpose intended to be accomplished" by the statute and the "mischief to be remedied" cannot be considered to create an ambiguity even if that purpose is stated in the statute itself. This refusal to consider purposes stated in the document itself in determining plain meaning applies even more strictly under the Literal Rule of *City of London County Judge*, cited above at § 9.2.1.1 n.7.

This aspect of the difference between the Golden Rule and Plain Meaning Rule of interpretation has not always been carefully noted by courts. For example, American courts have occasionally held that the Plain Meaning Rule constrains a court from considering purposes stated on the face of the

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10 See generally Schauer, supra note 4, at 547.

11 6 H.L. Cas. 61, 106 (1857).

12 175 U.S. 414, 420-21 (1899).


14 6 U.S. (2 Cranch) 358, 386-90 (1805).
text. Some courts have also held that the Plain Meaning Rule counsels a court not to consider such material intrinsic to the text as the text's title and preamble. As Chief Justice Marshall's use of the Plain Meaning Rule in Sturges and Fisher makes clear, however, such a narrow view of what material is properly considered is rejected under a proper application of the Plain Meaning Rule.

As discussed at § 9.3.2, in American legal history the more extreme formalist judges, such as Justices Sutherland, Van Devanter, McReynolds, and Butler, have typically adopted the Golden Rule of interpretation. In contrast, moderate formalist judges, like Chief Justice Hughes or Justice Roberts in the 1930s, have more often adopted the Plain Meaning Rule of interpretation, evincing a willingness always to consider statutory or constitutional purposes reflected in the statute or Constitution itself during the act of interpretation. On this issue, Justice Scalia typically adopts the extreme formalist position of the Golden Rule, concluding that arguments based upon purpose are appropriate to consider only if the text is ambiguous or the text's plain meaning is absurd, while Justice Thomas is more willing to adopt a moderate formalist position, allowing “purpose” and “structure” to be considered, in addition to literal meaning, in the initial act of “textual” interpretation. While all judges start interpretation with text, non-formalist Justices do not place inordinate weight on literal dictionary meanings.

§ 9.2.1.2 Treatment of Context

As noted in Table 5.1, and discussed at § 6.2.2.1, among the four basic arguments of context, two involve relatively specific interpretive tasks: verbal maxims and related provisions. The other two involve more general kinds of reasoning: policy maxims and arguments of structure. Because of the formalist preference for certain and predictable decisionmaking, formalist judges tend to be more receptive to arguments of context that involve specific interpretation.

For this reason, most formalist judges will resort not only to ordinary meanings of words, but also to verbal maxims of construction to help determine the plain meaning of text. For example, Justice Scalia “has invoked some of the venerable canons of statutory interpretation” in deciding cases, as noted at § 5.2.2.1. This use of verbal maxims is not dependent upon a prior finding that the plain meaning of the text is ambiguous or absurd. Rather, resort is had to verbal maxims in the initial determination of what is the plain meaning of the text.

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18 See generally Samuel A. Thumma & Jeffrey L. Kirchmeier, The Lexicon Has Become a Fortress: The United States Supreme Court’s Use of Dictionaries, 47 Buffalo L. Rev. 227 (1999).

19 Zeppos, supra note 17, at 1616.
With regard to arguments of related provisions, the formalist position is slightly more complicated. A narrow view, sometimes adopted by extreme formalists who adhere to the Literal or Golden Rule, rejects use of related provisions to aid in determining plain meaning, stating that the court is only to look to the provision under consideration to determine its plain meaning, unless the provision under construction is first determined to be ambiguous or absurd. Adherents of this narrow view argue that because related provisions are outside the particular provision being interpreted, such provisions should not be considered unless the provision being construed is ambiguous or absurd. This is the position adopted by the Supreme Court in the 1899 case of Hamilton v. Rathbone.20

A broader view, adopted more often by moderate formalists who adhere to the Plain Meaning Rule, counsels that like use of a provision's title, preamble, or statements of purpose on the face of the document, use of related provisions is always appropriate to determine a text's plain meaning. As Professor Reed Dickerson has noted, such use reflects “a sincere attempt by the courts to ascertain the [plain] meaning of the [text] as read in its proper context.”21 On this issue, Justice Scalia appears to adopt the broader, moderate approach that permits use of related provisions, both related provisions within a statute and statutes in pari materia, to determine a text's plain meaning.22

The formalist concern with ambiguous results leads most formalists to minimize arguments of context that involve more general reasoning, unless that argument yields clear, determinate insights or the literal meaning produces an absurd result. Thus, while most formalists often use verbal maxims, some formalist judges will embrace traditional policy maxims of construction only to help resolve ambiguities in literal meaning or to deal with absurd literal results. Justice Scalia’s cautionary observations regarding policy maxims, discussed at § 6.2.2.1, is evidence of this kind of concern.

With regard to arguments of structure, formalist judges are the least likely of the four interpretation styles to embrace fully such arguments when compared to arguments of literal text. For example, regarding the structural issue of separation of powers, formalist judges tend to be the least likely to allow general observations of the framer and ratifiers’ background theory of separation of powers and checks and balances to determine case results. Instead, formalist judges are likely to focus more on constitutional text. For example, as discussed at § 6.2.2.4 n.61, Justice Scalia stated in dissent in Morrison v. Olson,23 “[The majority’s opinion] is not analysis; it is ad hoc judgment. And it fails to explain why it is not true – as the text of the Constitution seems to require, . . . all purely executive power must be under the control of the President.” Justice Scalia was also the sole dissenter in Mistretta v. United States,24 where the majority also used general separation of powers observations to support a sharing of powers approach, as quoted at § 6.2.2.4 n.57.


21 Reed Dickerson, The Interpretation and Application of Statutes 232-33 (1975).

22 See Zeppos, supra note 17, at 1615.


Even when adopting general separation of powers reasoning, the formalist preference for clear, bright-line rules leads most formalists to adopt a strict separation of powers approach toward separation of powers issues, rather than the sharing of powers approach adopted by the other three interpretation styles. As Professor Rebecca Brown has noted, “The formalist approach is committed to strong substantive separations between the branches of government . . . Moreover, formalism, at least as promoted by Justice Scalia, appears to be concerned . . . with forcing the Court to adhere to bright-line rules to foster predictability and restraint in judging.” This difference between the formalist and non-formalist approaches to separation of powers doctrine is explored at § 19.4.

With regard to structural arguments of federalism, the formalist approach to congressional power under the Commerce Clause, as discussed at § 18.2.2, was dominated by literal interpretation of the terms “commerce” and “among the states,” with little focus on whether the results reached by that approach were consistent with the background theory of federalism in which the framers and ratifiers believed regarding the need for uniform federal regulation of commerce. Further, to the extent a formalist approach would consider background theories of federalism, the strong predisposition is for a theory of federalism that would yield clear, bright-lines for areas for federal versus state power. As discussed at § 9.3.3, conservative formalists have tended to adopt bright-line rules that favor state power; liberal formalists have tended to adopt bright-line rules favoring federal power.

Regarding the issue of judicial review, once the premise of judicial supremacy of *Marbury v. Madison* is accepted, formalist judges, like natural law judges, adopt the analytic view that courts should be willing to rule that certain governmental action is unconstitutional if the Court concludes that the other sources of meaning support that finding. Under this approach, there is no functional consideration of the role of courts, as there is under a Holmesian or instrumentalist approach, as discussed at §§ 5.2.2.2 & 6.2.2.2. Thus, an analytic approach will apply the same approach toward judicial review to any constitutional provision. As Justice Scalia has stated, “[T]he context of the Constitution tells us not to expect nit-picking detail, and to give words and phrases an expansive rather than narrow interpretation – though not an interpretation that the language will not bear . . . . [This] is not strict construction, but it is reasonable construction.”

On the other hand, the exercise of judicial review is not specifically authorized by the text of the Constitution. As discussed at § 17.1.1, judicial review was supported in *Marbury v. Madison* by arguments of the purpose of having a written Constitution, general separation of powers arguments regarding the “province of the judicial department to say what the law is,” and related provisions in the Constitution regarding bills of attainder, the ex post facto clause, the treason clause, and other such provisions. Because judicial review is not authorized by specific text, perhaps it is not surprising, as discussed at § 17.1.4, that among the most vigorous questioners of judicial exercise of the *Marbury v. Madison* power have been formalist commentators. As discussed at § 17.1.4, because of their posture of judicial deference to governmental action, some Holmesian

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26 See, e.g., Scalia, supra note 1, at 37-38.

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commentators have also questioned judicial exercise of the *Marbury v. Madison* power of judicial review.

§ 9.2.1.3 Treatment of History

As discussed at § 6.2.3.1, one major issue regarding use of history involves the permissibility of aiding interpretation by resort to materials intrinsic to the drafting of a document, such as legislative history of a statute, or Notes of the Constitutional Convention for constitutional interpretation. Despite disagreements among the Literal Rule, Golden Rule, and Plain Meaning Rule on issues of purpose and context, all three agree on the impermissibility of using legislative history to help determine the plain meaning of a text. Absent an ambiguous statute under the Literal Rule, or an ambiguous statute or absurd plain meaning under the Golden Rule or Plain Meaning Rule, all three rules preclude resort to bits of intrinsic history to ascertain the plain meaning of a text.27

An even more extreme approach toward intrinsic material is represented in the traditional English version of the Golden Rule, which precludes resort to such material even if the text being interpreted is ambiguous or absurd.28 Justice Scalia has written in favor of this approach, stating, “My view that the objective indication of the words, rather than the intent of the legislature, is what constitutes the law lead me, of course, to the conclusion that legislative history should not be used as an authoritative indication of a statute’s meaning.”29 Justice Scalia continued, “What is most exasperating about the use of legislative history, however, is that it does not even make sense for those who accept [subjective] legislative intent as the criterion. It is much more likely to produce a false or contrived legislative intent than a genuine one.”30 Thus, Justice Scalia concluded in 1997, “[I]f not for reasons of principle then for reasons of practicality, I have not used legislative history to decide a case for, I believe, the past nine terms. Frankly, this has made very little difference (since legislative history is ordinarily so inconclusive).”31

Prior to this time, Justice Scalia appeared to accept the American Golden Rule, which permits resort to legislative history where the literal meaning of the text is ambiguous or absurd. For example, in 1989, Justice Scalia stated in *Green v. Bock Laundry Mach. Co*32 that legislative history is appropriate to consider where "a statute, if interpreted literally, produces an absurd . . . result." It may be appropriate to note that the House of Lords recently changed their view, and adopted the American Golden Rule, which now permits English judges to consult legislative history of a

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29 Scalia, supra note 1, at 29-30 (emphasis added).

30 Id. at 31-32.

31 Id. at 36.

32 490 U.S. 504, 527 (1989) (Scalia, J., concurring in the judgment).
“statement made by a minister or other proponent of the bill” where “the legislative language is ambiguous or obscure, or if it would lead to an absurd result.”33 Thus, while Justice Scalia appears to have moved in the direction of the traditional English Golden Rule, the English courts have moved in the direction of the American Golden Rule.

As noted at § 5.2.3.2 n.69, a second issue regarding history concerns the use of historical sources such as social practice, newspaper accounts, statements of respected organizations, or reliable evidence of public opinion generally. If such events occur before ratification of a provision, they are properly denominated general historical evidence. If such events occur after ratification, they are properly denominated social practice. In either case, most formalists are reluctant to allow such general evidence to affect interpretation. As noted at § 6.3.3 n.121, Justice Scalia’s plurality opinion in Stanford v. Kentucky34 concluded that whether a right is so “deeply rooted in this Nation’s history and tradition” depends upon whether that tradition is established from “operative acts (laws and the application of laws),” that is, legislative and executive practice, and not from “public opinion polls, the views of interest groups, and the positions adopted by various professional associations.”

As discussed at § 5.2.3.3 nn.70-78, another issue regarding history is what level of generality should be used when viewing historical evidence. Because formalists are concerned about the possible ambiguity represented by a broad-based approach to historical intent, the formalist approach places greatest weight on the specific historical views held by the framers and ratifiers on specific issues, rather than any general historical intent, an aspect of what Professor Bobbitt called ethical argumentation, discussed at § 5.1 n.9. Thus, whether referring to evidence of traditions occurring before ratification, which is properly denominated history, or evidence of traditions after ratification, denominated practice, the typical formalist position agrees with Justice Scalia in Planned Parenthood v. Casey,35 citing Michael H. v. Gerald D., that the Court should start its analysis with, place great weight upon, and not “disregard,” the “most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified.” As a result, the formalist approach typically rejects the dynamic of reasoned elaboration of concepts based upon ethical argumentation, as did Justice Scalia in Casey,36 where he criticized, though clarified that Michael H. did not involve the rejection in all circumstances of, the “philosophical abstraction” of “reasoned judgment” about general historical intent. For this reason, the formalist approach is tied more to the specific historical views of the framers and ratifiers, views which may be the product of unthinking adherence to tradition, idiosyncratic preferences, or prejudice, as discussed at §§ 6.2.3.2 & 16.1.


36 505 U.S. at 891-92.
§ 9.2.2  Treatment of Subsequent Developments

§ 9.2.2.1  Legislative, Executive, and Social Practice

Because the formalist style views the judge's role as the logical, mechanical restatement of the meaning placed into the Constitution by the framers and ratifiers, theoretically the formalist style should focus exclusively on contemporaneous sources of meaning. Only such sources, not subsequent events or prudential considerations, are directly related to the specific meaning placed into the Constitution by the framers and ratifiers. This understanding follows from viewing the Constitution as a static document, where the meaning of a constitutional provision, fixed at the time of ratification, can only be changed by later formal constitutional amendment. As Justice Scalia has stated, the alternative view of the living Constitution is incompatible with the “antievolutionary purpose of a constitution.” However, as noted at § 12.3.3 nn.123-28, a living Constitution is not incompatible with an “antimajoritarian purpose” of a Constitution.

Based on the fact that in theory contemporaneous sources of meaning are exclusively used, and thus the Constitution has a strictly fixed meaning, rather than a living meaning, some individuals have called the formalist approach a “strict constructionist” approach to the Constitution. However, the formalist approach does not adopt a strict, or narrow, construction of constitutional text. While there is a policy maxim of strict construction of penal statutes, as noted at § 5.2.2.1.B, that policy maxim does not apply to constitutional provisions in general. Thus, as noted at § 3.1 nn.14-16, Justice Scalia has rejected use of the phrase “strict constructionist” to describe this formalist, or “textualist,” approach to constitutional interpretation. As Justice Scalia was cited at § 9.2.1.2 n.26, the formalist focus on literal text “is not strict construction, but it is reasonable construction.” As discussed at § 1.1, Justice Scalia’s phrase of “textualism” is not used to describe this interpretation style in this book because all four judicial decisionmaking styles start their constitutional analysis with “text.” In any event, as noted at § 3.1 n.16, Justice Scalia has embraced the term “formalism” as well.

This formalist emphasis on a static Constitution is not necessarily synonymous with interpreting the Constitution according to the “original intent” of the framers and ratifiers. As discussed at § 8.4.1, the framers and ratifiers may well have had more in mind the natural law theory of interpretation with which they were more familiar, with its greater emphasis on purpose, general historical intent, and practice and precedent creating a “gloss” on meaning, as discussed at §§ 12.2.1.1-12.2.2.3. Certainly early Congresses, President Washington, and the Marshall Court interpreted the Constitution in this manner. In contrast, under the formalist static view, subsequent developments should be used only to the extent they help illuminate what the provision meant at ratification. For example, the views of the First Congress in 1789 regarding Presidential removal power were used in this way in the formalist-era 1926 case of Myers v. United States, quoted at § 5.3.2.1 n.87.

37 Scalia, supra note 1, at 44.


39 See, e.g., id. at 218-27 (summarizing early congressional, executive, and judicial practice).
Despite these views regarding limited use of considerations of subsequent events, in practice most formalists make one exception regarding legislative or executive practice. Most formalists will allow a continued and consistent legislative or executive practice that indicates a clear tradition on a specific issue to provide some gloss on constitutional meaning. For example, even Justice Scalia will consider a tradition of legislative enactments since 1868 to influence the meaning of liberty under the Due Process Clause of the 14th Amendment. However, for Justice Scalia, this gloss affects meaning principally to the extent of "the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified." Furthermore, such a tradition will not be allowed to override clear text in the Constitution. For example, in Planned Parenthood v. Casey, Justice Scalia indicated in dicta his view that the clear text of the Equal Protection Clause requires a "color-blind" Constitution that overrides specific historical traditions, such as banning interracial marriages, or, presumably, permitting segregated public schools.

It should be noted that this "color-blind" interpretation of the Equal Protection Clause differs from the initial formalist-era interpretation of equal protection. As discussed at § 26.2.1.1.B, that initial interpretation was the "separate, but equal" doctrine of Plessy v. Ferguson. However, just as no modern formalist would likely counsel a return to the Lochner-era interpretation of liberty as protecting "liberty of contract," discussed at § 27.3.2.1, no modern formalist, except perhaps for Raoul Berger, discussed at § 9.3.4, would likely counsel return to the "separate, but in form equal" doctrine of Plessy. In Casey, Justice Scalia rejected both Lochner and Plessy.

In addition, reflecting the "positivist" view that law is an emanation of sovereign will, for most formalists a judge in determining an evolving tradition should not consider social practice evidence, such as "public opinion polls, the views of interest groups and the positions adopted by various professional associations." Rather, "[a] revised national consensus . . . must appear in the operative acts (laws and the application of laws) that the people have approved." Even more so, from this "positivist" perspective, the views of foreign precedents are not relevant in interpreting the United States Constitution, although they may be relevant with respect to identifying customary international law or interpreting treaties jointly ratified by the United States and other countries.

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40 See, e.g., David M. Zlotnick, Justice Scalia and his Critics: An Exploration of Scalia’s Fidelity to his Constitutional Methodology, 48 Emory L.J. 1377, 1394-98 (1999).


43 Id. at 980 n.1.


As noted at § 4.3.1 n.75, Justice Scalia has made it clear that respect for stare decisis “is not part of my originalist philosophy; it is a pragmatic exception to it.” Similarly, this use by Justice Scalia and other formalists of legislative or executive practice that indicates a clear tradition on a specific issue to provide some gloss on meaning is best viewed as a pragmatic exception to formalist reliance on contemporaneous sources only. Such an exception helps ensure that the formalist approach will be useful not only as an academic exercise but “as a workable prescription for judicial government.”46 Indeed, given use of such material by all three other interpretation styles, limited formalist use of such material can be understood as deference to the “settled law” of Supreme Court precedents on use of legislative and executive practice, or perhaps justified as based on the “substantial reliance” individuals may have based on existing government practices.47

It is perhaps useful to note that, with regard to statutory interpretation, most formalists will similarly allow later administrative agency practice to provide some gloss on meaning to the statute, even though such later agency practice is not directly indicative of the “static” meaning of the statute at the time of passage. As has been noted, "Justice Scalia is a fierce, sometimes strident defender of Chevron," the case most closely associated with the principle of judicial deference to agency interpretation of statutes, unless that interpretation is contrary to the expressed intent of Congress.48

In fact, reflecting his preference for bright-line rules capable of easy, mechanical application, Justice Scalia dissented in United States v. Mead Corp.,49 where the remaining Justices limited Chevron deference to cases “when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law,” that delegation more likely to occur when the agency acts pursuant to “notice-and-comment rulemaking or formal adjudication.” In contrast, the Court said in Mead that agency interpretations in “policy statements, agency manuals, and enforcement guidelines” are not entitled to Chevron deference, but only to Skidmore deference, which only requires the Court to consider the persuasiveness of the agency’s analysis given the “specialized experience and broader investigations and information” available to the agency and the “value of uniformity in its administrative and judicial understandings of what a national law requires.”50

46 Scalia, supra note 1, at 140.


Dissenting from this approach, Justice Scalia concluded in his Mead dissent that “all authoritative agency interpretations of statutes they are charged with administering deserve deference.” In Justice Scalia’s view, the majority’s approach will mean more judicial activism, since in more cases “ambiguity in legislative instructions to agencies is to be resolved not by the agencies, but by the judges,” and will mean more uncertainty and “protracted confusion” in the law, as the courts try to determine which kind of agency action is appropriate for the stronger Chevron deference, and which kind of agency action is appropriate only for the “empty truism” of Skidmore deference that a judge “should take into account the well-considered views of expert observers.”

§ 9.2.2.2 Judicial Precedents

Because of their concern with certainty and predictability of the law, the overruling of a case thought to be wrongly decided by a formalist judge is restrained if the precedent has become "settled law.” As noted at § 4.3.2 n.85, Justice Scalia made this point in his dissent in Planned Parenthood v. Casey, stating: “Justices should do what is legally right by asking two questions: (1) was Roe correctly decided? (2) Has Roe succeeded in producing a settled body of law. If the answer to both questions is no, Roe should undoubtedly be overruled.”

As discussed at § 4.3.2 n.79, 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).” In deciding whether a precedent represents or has produced settled law, many factors may be relevant. As discussed at § 4.3.2 nn.80-83, the age of the precedent is one factor, but other factors involve whether the precedent case was itself a departure from prior precedents and gave little weight to established traditions, and whether the precedent is susceptible of principled application. Justice Scalia has made it clear that this respect for stare decisis “is not part of my originalist philosophy; it is a pragmatic exception to it.” If stare decisis is not constitutionally required as part of the “judicial power” of the courts, but merely a pragmatic exception to it, it could be argued, as noted at § 7.3 n.73, that Congress by statute could direct how much weight this prudential principle should have, just as Congress can overrule prudential principles of standing, discussed at § 17.3.1.4. However, even under such an approach, it still could be argued that such a power would undermine the Marbury v. Madison

51 Id. at 241, 243, 245, 250 (Scalia, J. dissenting).


53 Scalia, supra note 1, at 138.

54 Id. at 139-40. See generally Can Originalism Be Reconciled with Precedent?: A Symposium on Stare Decisis, 22 Const. Com. 257-348 (2005).

principle that it is “the province of the judicial department to say what the law is,” as applied in cases like United States v. Klein, discussed at § 17.2.3.1 n.153, which limited Congress’ ability to direct the courts how to decide cases – in Klein the effect of a presidential pardon.

With respect to voting not to overrule a case because it represents settled law, four examples from opinions by formalist Justices Scalia and Thomas are discussed at § 7.3.2 nn.106-14. These examples concern cases involving the Due Process Clause, Free Exercise Clause, Commerce Clause, and dormant commerce clause analysis. Despite this willingness to follow “settled law,” most formalists will not go beyond the core holdings of precedents to adopt the precedent’s general reasoning. Unlike the natural law approach’s great respect for precedent, discussed at § 12.2.2.2, the formalist “pragmatic exception” permitting limited deference to precedent is typically not willing ever to let a “reasoned elaboration” of the precedent provide a “gloss” on meaning that would counsel the formalist to follow that general reasoning as “settled law” where the formalist concluded that the precedents’ general reasoning was flawed, based upon the formalist analysis of text, context, history, and practice. As Justice Scalia phrased the point in his dissent in Planned Parenthood v. Casey, 56 “Roe was plainly wrong – even on the Court’s methodology of ‘reasoned judgment,’ and even more so (of course) if the proper criteria of text and tradition [history and practice] are applied.”

§ 9.2.2.3 Prudential Considerations

As noted at § 5.4.1, prudential consideration can involve arguments concerning the consequences of a particular judicial decision from the perspective of: (1) the contemporaneous sources of constitutional text, context, and history; (2) the subsequent event sources of practice and precedent; (3) the mainstream normative concern with whether the decision would advance a particular background principle of justice or social policy that the judge believes is embedded in the law; or (4) the more radical normative concern with whether the decision would advance a principle of justice or social policy that is not so embedded in existing legal doctrine. As discussed at § 6.4.3, the formalist style of interpretation, with its static model of constitutional interpretation, resorts primarily to category (1)’s contemporaneous sources of prudential argumentation.

As discussed at § 5.4.2, examples of prudential argumentation in category (1) involve considering the consequences of a particular judicial decision from the perspective of text, context, and history. This includes use of the prudential principles to help govern the issue whether a party has standing to sue under the textual requirement of Article III that the dispute involve a “case” or “controversy,” discussed at § 17.3.1.4; prudential considerations in light of structural arguments about the proper role of the judiciary, noted in Ashwander v. Tennessee Valley Authority, discussed at § 17.1.3.2; and prudential considerations suggesting judges must be sensitive, in Justice Breyer’s language, to “the purposes, the effects, the practical virtues” of some governmental action, in addition to the “formal” “logic” of the “language of the Constitution.” 57 Just as formalist judges emphasize literal text and


the logic of language over purpose, as discussed at § 9.2.1.1, formalist judges give much less weight to this third kind of prudential consideration of purpose, as opposed to prudential considerations that derive from literal text or structural considerations. As discussed at § 11.4 nn.101-09, Justice Breyer, who embraces this third kind of prudential consideration, is best understood as a moderate instrumentalist judge with some natural law and Holmesian leanings, and in no sense a formalist.

Reflecting formalist predispositions, formalist jurists are the least likely of all the interpretation styles to embrace vigorous use of even category (1)’s prudential consideration of text, context, and history. Any use of prudential considerations inevitably invites judges today, subsequent to ratification, to substitute their prudential views for the views of the framers and ratifiers. As Justice Scalia has noted, “I do not think, however, that the avoidance of unhappy consequences is [an] adequate basis for interpreting a text.”58 This concern is even greater, of course, for category (2)’s prudential consideration in light of subsequent legislative and executive practice or judicial precedents, which specifically invites prudential consideration of events subsequent to ratification.

Prudential consideration category (3), which permits consideration of background principles of justice or social policy that the judge believes are embedded in the law, is completely out-of-bounds to a formalist judge. The formalist approach adopts a positivist perspective on the nature of the judicial task that rejects such normative background principles reasoning, as discussed at §§ 2.3.2.2 & 3.1. Naturally, the formalist approach is even more adverse to the legitimacy of using category (4)’s non-interpretive prudential arguments of justice or sound social policy not embedded in the law to affect the meaning of a constitutional provision. For positivists, social policy arguments are for the politically elected branches of government, the legislative and executive branches, not the courts. As Justice Scalia phrased this point in 2002 in a case regarding applying the death penalty to the mentally retarded, “‘[T]he Constitution,’ the Court says, ‘contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment.’ . . . The arrogance of this assumption of power takes one’s breath away.”59

In his dissent in Casey, Justice Scalia quoted a similar observation by Justice Curtis in 1857 in his dissent in Dred Scott v. Sandford. Justice Curtis wrote, “[W]hen a strict interpretation of the Constitution, according to fixed rules which govern the interpretation of law, is abandoned, and the theoretical opinions of individuals are allowed to control its meaning, we have no longer a Constitution; we are under the government of individual men, who for the time being have power to declare what the Constitution is, according to their own views of what it ought to mean.”60

Under a formalist approach, if a particular constitutional interpretation leads to an unsound policy result, the response should be for the political branches of government to follow the formal process of amendment in Article V of the Constitution, as was Jefferson’s approach, noted at § 7.1 nn.17-18.

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That requires 2/3 of the House and Senate to vote in favor of a constitutional amendment, and then
3/4 of the states to ratify the amendment, or for 3/4 of the states to call for a Constitutional
Convention. This process regarding constitutional amendments, including the question whether the
framers and ratifiers would have adopted this difficult amendment process if they expected the
Constitution to be given a formalist kind of interpretation, is discussed at § 20.1.1.3.

§ 9.3 Variations in the Formalist Approach

§ 9.3.1 Summary of the Basic Formalist Approach

Before considering variations in the formalist approach, it may be useful to sum up the basic points
of agreement among all the variations of formalism. The basic sources of constitutional meaning
were summarized in Table 5.1. A further elaboration of this Table appeared at Table 6.4.1. Using
these Tables as a backdrop, the following Table 9.3 summarizes the basic formalist approach with
respect to each source of constitutional meaning.

Entries listed in boldface in Table 9.3 represent the sources most utilized by formalist jurists, that
is, those sources given great weight by formalists. Entries listed in italics represent other sources
formalist jurists will use, particularly if the boldface sources produce an ambiguous or absurd result,
but these sources are typically given lesser weight. Entries underlined in the Table represent sources
underplayed or of limited use by formalist jurists, that is, sources given only some weight. Entries
combined with a strike-through mark indicate sources not used by formalist jurists.

Table 9.3
Formalist Use of Sources of Constitutional Meaning

<table>
<thead>
<tr>
<th>Contemporaneous Sources</th>
<th>More Specific Interpretive Tasks</th>
<th>General Kinds of Reasoning</th>
</tr>
</thead>
<tbody>
<tr>
<td>Text</td>
<td>Literal or Plain Meaning of Text</td>
<td>Purpose or Spirit of Text</td>
</tr>
<tr>
<td>Context</td>
<td>Verbal Maxims</td>
<td>Policy Maxims</td>
</tr>
<tr>
<td>History</td>
<td>Related Provisions</td>
<td>Structural Arguments</td>
</tr>
<tr>
<td></td>
<td>Specific Historical Evidence</td>
<td>General Historical Evidence</td>
</tr>
<tr>
<td></td>
<td>Specific Historical Intent</td>
<td>Specific Historical Intent</td>
</tr>
<tr>
<td></td>
<td>General Historical Intent</td>
<td>General Historical Intent</td>
</tr>
<tr>
<td>Subsequent Considerations</td>
<td>Legislative or Executive Practice</td>
<td>Social Practice</td>
</tr>
<tr>
<td></td>
<td>Core Holdings of Precedent</td>
<td>Reasoned Elaboration of Law</td>
</tr>
<tr>
<td>Prudential Considerations</td>
<td>Judicial Restraint Considerations</td>
<td>Other Prudential Concerns</td>
</tr>
<tr>
<td></td>
<td>(1a) Text (e.g., prudential principles of standing, ripeness, mootness)</td>
<td>(2) Practice &amp; Precedent</td>
</tr>
<tr>
<td></td>
<td>(1b) Context/Structure (e.g., political questions and Ashwander factors)</td>
<td>(3) Principles of Justice and/or Social Policy Embedded in the Law</td>
</tr>
<tr>
<td></td>
<td>(1c) Purpose/History (e.g., sensitivity to the needs of government)</td>
<td>(4) Justice and/or Social Policy Not So Embedded</td>
</tr>
</tbody>
</table>
Regarding entries listed in boldface versus italics, the listing of “related provisions” appears in boldface in this Table reflecting the moderate formalist willingness always to consider related provisions in determining a text’s plain meaning, as discussed at § 9.2.1.2. For extreme formalists, the listing of “related provisions” should appear in italics, given their view of resorting to “related provisions” only in the event that the plain meaning of a text is ambiguous or absurd. The listing for specific historical intent, as revealed by specific historical evidence, is listed in boldface as that is the best kind of historical evidence from the perspective of a formalist jurist. The more general the evidence or intent becomes the less likely it is that a formalist jurist will give it great weight, as discussed at § 9.2.1.3 nn.35-36. Thus, general historical intent from general historical evidence is of limited use by formalist jurists.

Entries underlined in this Table represent sources underplayed or of limited use by formalist jurists. As noted at § 9.2.2.1, formalist jurists theoretically reject any use of subsequent considerations in favor of original “contemporaneous to drafting and ratification” sources of interpretation. However, in practice, most formalist jurists will use practice arguments to the limited extent of a clear and consistent legislative or executive practice on a specific tradition. As discussed at § 9.2.2.2, formalist jurists will follow judicial tradition of core holdings of precedents if they represent “settled law.” As discussed at § 9.2.2.3, formalist jurists will make limited use of prudential considerations of practicality, particularly those related to possible interpretations based upon a formalist analysis of the boldface sources of text, context, and history, which often support notions of judicial restraint, as noted at § 5.4.2 nn.115-16. A description of the formalist approach embodying these aspects of “originalism, traditionalism, and restraint” has been described by Professor Michael McConnell.61

Entries combined with a strike-through mark indicate sources never used by formalist jurists, either in theory or practice. These involve arguments of social practice, reasoned elaboration based upon the general reasoning in judicial precedents, and prudential arguments based upon subsequent considerations, whether embedded in the law or not so embedded.

Because the formalist approach is unique in placing great weight only on the specific interpretive tasks involving contemporaneous sources of meaning, the formalist approach may yield with some regularity a different result than all the other interpretation styles regarding interpretation of a constitutional provision. As noted at § 1.1, in each Term of the Court since 1991, there have usually been a few 7-2 cases where formalist Justices Scalia and Thomas were alone in dissent. At least five such cases involving constitutional law issues were decided between 2000-2004.62 At least five such


cases involving statutory interpretation issues were decided between 2000-2004.63

§ 9.3.2 Extreme versus Moderate Formalism

Some formalist judges are extreme in their formalism, in that their reliance on literal text, verbal maxims, and specific historical intent so dominates their interpretation that it substantially drowns out reliance on the other contemporaneous sources – purpose, related provisions, policy maxims, structure, and general historical intent – as well as even limited reliance on practice, precedent, or prudential considerations of text, context, and history. Other formalist judges are more moderate and thus are willing to give these other sources their regular formalist weight, particularly if such weight were given in precedents or legislative and executive practice. A few examples from Commerce Clause, substantive Due Process, and Contracts Clause doctrine may help illuminate this difference.

With respect to the Commerce Clause, the formalist-era Court between 1873 and 1937 gave the phrase “commerce . . . among the several States” a narrow reading that prevented Congress from regulating much economic activity under the Commerce Clause, as discussed at § 18.2.2. This occurred either because: (1) the formalist-era Court viewed the activity as not literally being “commerce,” but instead “manufacturing,” “mining,” or “agriculture,” or (2) the activity was not literally commerce “among the States,” that is, not literally “interstate” commerce. An extreme formalist judge would follow this literal approach to its complete logical conclusion, while a moderate formalist judge might be willing to depart from extreme literalism in some cases.

For example, in 1903 in Champion v. Ames, the Court was faced with the first of these two questions, whether Congress could criminalize the carrying of lottery tickets across state lines based on the view that carrying such lottery tickets was a regulation of “commerce.” The 4-Justice extreme formalist dissent, taking a literal approach to its logical conclusion, stated, “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.”64

In contrast, the 5-Justice majority in Champion v. Ames adopted a more moderate view in noting that “the lottery company offered a large capital prize, to be paid to the holder of the ticket”; that the statute properly regulated only the “interstate” transportation of the ticket; and that cases before
1873, such as *Gibbons v. Ogden* in 1824, had concluded that a practical understanding of the term “commerce,” as well as specific legislative and executive practice of early Congresses, had led to the conclusion that “navigation” and “traffic,” in addition to “buying” and “selling,” were activities covered by “commerce” under the Commerce Clause. The majority, composed of Justice Harlan, joined by Justices Brown, White, McKenna and Holmes, followed this moderate approach.\(^{65}\)

In terms of their overall decisionmaking styles, Justices Brown, White, and McKenna are probably best categorized as moderate formalist judges. Justice Holmes is, of course, a Holmesian. This Justice Harlan, like the second Justice Harlan discussed at § 10.4, is probably best categorized as a Holmesian, with an affinity for natural law. Justices Brown and White are clearly formalists of some kind, as they joined the formalist majority in *Plessy v. Ferguson*,\(^{66}\) noted at § 9.2.2.1 and discussed at § 26.2.1.1.B, while Justice Harlan’s solo dissent in *Plessy* was based on a Holmesian focus on the purpose of “separate, but equal” segregation to disadvantage African-Americans. Justices Brown and McKenna also joined the formalist majority in *Lochner v. New York*,\(^{67}\) discussed at § 27.3.2.1, while Justices Harlan and Holmes filed dissents. The difference between Justice Holmes more pure Holmesian dissent in *Lochner*,\(^{68}\) which rejected the entire formalist “liberty of contract” analysis, versus Justice Harlan’s greater natural law respect for precedent and working within the *Lochner* framework in his dissent, is discussed at § 27.3.2.1 nn.150-54. Reflecting a moderate formalism, Justice White joined Harlan’s dissent in *Lochner*, although Justice White was in the majority in *Allgeyer v. Louisiana*, the foundational “liberty of contract” case on which *Lochner* was based.\(^{69}\)

In 1914, the Court was faced in *Houston, East & West Texas Railway v. United States (The Shreveport Rate Cases)*\(^{70}\) with the second of the two commerce clause issues stated above, whether the federal government could regulate railroad rates not only between Shreveport, Louisiana and Dallas, Texas, clearly “interstate commerce,” but also between Dallas, Texas and Houston, Texas, literally “intrastate commerce.” The majority opinion, reflecting a moderate formalist approach, made an exception to pure literalism and focused on the purpose behind the Commerce Clause and a practical, or prudential, construction of the clause. The Court concluded, “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.” Two extreme

\(^{65}\) *Id.* at 346-54 (Harlan, J., for the Court, joined by Brown, White, McKenna & Holmes, JJ.).

\(^{66}\) 163 U.S. 537, 540 (1896); *id.* at 552 (Harlan, J., dissenting).

\(^{67}\) 198 U.S. 45, 52 (1905).

\(^{68}\) *Id.* at 74 (Holmes, J., dissenting).

\(^{69}\) *Id.* at 65 (Harlan, J., joined by White & Day, JJ., dissenting); *Allgeyer*, 165 U.S. 578, 583 (1897).

\(^{70}\) 234 U.S. 342, 351-52 (1914); *id.* at 360 (Lurton, J., joined by Pitney, J., dissenting).
formalists dissented without opinion. Probably they concluded that the federal government could not regulate the intrastate rate, since that was literally intrastate commerce, not interstate commerce.

The 1934 substantive due process case of Nebbia v. New York\(^1\) provides another example of this difference between extreme and moderate formalism. In Nebbia, the issue was whether a milk control ordinance was unconstitutional as an infringement on the Lochner era’s concept of “liberty of contract.” Under that doctrine, government was prevented from economic regulation that burdened individual’s “liberty of contract” unless the regulation was one of health or safety, morals, or was regulating a business “affected with the public interest.” As noted by the majority in Nebbia, one definition of “affected with the public interest” – a definition reflecting more extreme formalist literalness – “is one in which property is devoted to an enterprise of a sort 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.” Based on such a definition, the extreme formalists on the Court in the 1930s – Justices Sutherland, Van Devanter, McReynolds, and Butler, described by some as “the Four Horsemen” – held that the dairy industry was not a business affected with the public interest and thus the state statute at issue was unconstitutional under the Lochner doctrine. The reference to the “Four Horsemen” is not a favorable reference to “the Four Horsemen” of Notre Dame football during the 1920s, but rather a negative reference to the Four Horsemen of the Apocalypse: War, Famine, Pestilence, and Death.\(^2\)

In contrast, a definition based on the purpose of regulation would hold that “[t]he phrase ‘affected with the 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.”\(^3\) Adopting this definition, the two moderate formalists on the Court in the 1930s, Chief Justice Hughes and Justice Roberts, joined the three non-formalists, Justices Brandies, Stone, and Cardozo, to permit state regulation of the dairy industry as a “business affected with the public interest.” As discussed at §§ 14.2.2 nn.46-51 & 27.3.2.1 nn.154-62, such a moderate formalist approach tempered the Lochner doctrine during most of its existence. Lochner turned out “to be neither the stuff of libertarian dreams nor of Progressive nightmares.”\(^4\)

A further example of this difference between moderate and extreme formalists occurred in 1934 in Home Building & Loan Association v. Blaisdell.\(^5\) This case involved whether a state statute providing for a 2-year moratorium on foreclosures of real estate mortgages to deal with the financial

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\(^1\) 291 U.S. 502, 531 (1934).


\(^3\) 291 U.S. at 536.


\(^5\) 290 U.S. 398, 450, 453-54 (1934) (Sutherland, J., joined by Van Devanter, McReynolds & Butler, JJ., dissenting).
crisis caused by the Great Depression was constitutional or an infringement of the Contracts Clause, which provides, “No State shall . . . pass any . . . Law impairing the Obligation of Contracts.” Looking predominantly to literal text and specific historical intent, the Four Horsemen 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.” The dissent emphasized the formalist view that contemporaneous sources should dominate constitutional interpretation, because the Constitution should have a fixed meaning at the time it is adopted. As phrased by the dissent, “The Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted, it means now.”

The moderate formalist majority, per Chief Justice Hughes, did not directly challenge this position, but did note, “While emergency does not create power, emergency may furnish the occasion for the exercise of power.”76 Looking to Court opinions from the founding era, the majority noted that those opinions had given greater weight to the purpose of the Contracts Clause, not a rigid literalism. Chief Justice Hughes noted that Justice Johnson had stated in Ogden v. Saunders,77 a case from 1827, “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.” The two moderate formalists on the Court, Chief Justice Hughes and Justice Roberts, again joined the 3 non-formalists on the Court to form a majority, just as they did in Nebbia v. New York, decided the same year.

In reaching this decision, the moderate formalist majority opinion of Chief Justice Hughes also chided the dissent. Chief Justice Hughes stated:

If by the statement that what the Constitution meant at the time of its adoption it means to-day, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation. It was to guard against such a narrow conception that Chief Justice Marshall uttered the memorable warning: “We must never forget, that it is a constitution we are expounding . . . .” When we are dealing with the words of the Constitution, said this Court in Missouri v. Holland, . . . “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. . . . 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.”78

This passage suggests an affinity by Chief Justice Hughes and Justice Roberts for the Holmesian approach, based on the citation to Missouri v. Holland, an opinion by Justice Holmes, as noted at § 6.3.1 n.112, and the acceptance of some limited version of a living Constitution based upon the

76  Id. at 426 (Hughes, C.J., for the Court).


78  Id. at 442-43 (citations omitted).
purpose of the Constitution to “endure for ages to come.” It was the shift in votes by Chief Justice Hughes and Justice Roberts in 1937 in Commerce Clause and Substantive Due Process cases that brought an end to the formalist era and singled the beginning of the Holmesian era, as discussed at §§ 13.1 nn.17-23 & 14.2.3 nn.59-63.

As indicated by these cases, during the formalist era of the Supreme Court, 1873-1937, the basic doctrine reflected a moderate formalist approach toward the Constitution. There were never 5 extreme formalists on the Court at any one time, although sometimes, as between 1895-1903, with the four dissenters in Champion v. Ames, or between 1922-37, with the Four Horsemen, 4 extreme formalists were simultaneously on the Court for extended periods of time.

§ 9.3.3 Conservative versus Liberal Formalism

During our Nation’s history, the two major political parties have typically had disagreements over the federalism issue of state versus federal power, and the separation of powers issue of legislative versus executive power. As discussed at § 6.2.2.3 regarding federalism, in the period before the Civil War, the major federalism issues involved slavery and tariff policy. The Federalist Party, and their 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. After the Civil War resolved these issues in favor of federal power, federalism issues turned to matters of federal regulation of economic and civil rights matters. Since that time, conservatives in both the Republican and Democratic parties have resisted such federal economic and civil rights legislation, and emphasized states’ rights on these issues; liberals in both the Republican and Democratic parties embraced federal power to legislate on these matters. Thus, the conservative formalist majorities on the Court during the first third of the 20th century – conservative Republicans like Chief Justice Taft, or Justices Van Devanter, Butler or Sutherland, or conservative Democrats, like Justice McReynolds – were very protective of states’ rights, as discussed in Chapter 18.

As discussed at § 6.2.2.3, since the 1960s the Republican Party has become more conservative as a party, and the Democratic Party has become more liberal. Thus, today, conservatives/Republicans more often favor states’ rights, while liberals/Democrats more often favor federal power. As discussed in Chapter 18, recent conservative formalists, like Chief Justice Burger, and Justices Scalia and Thomas, tend to favor states’ rights. The one liberal formalist on the Court in the last 50 years, Justice Black, favored federal power while voting to uphold New Deal regulation in the 1930s and 1940s and grants of power to Congress under the Commerce Clause during the 1960s.

As discussed at § 6.2.2.4, with respect to legislative versus executive power, 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 trusting of the legislative branch. Given these facts, conservative formalists, more likely to be appointed by Republican presidents, are more likely to favor broad grants of executive power to the president. In contrast, liberal formalists, more likely to be appointed by Democratic presidents, are more likely to restrain executive power in favor of legislative prerogatives. As discussed in Chapter 19, recent conservative formalists, like Chief Justice Burger, and Justices Scalia and Thomas, tend to favor broad grants of executive power. The one liberal formalist on the Court in the last 50 years, Justice Hugo Black, limited executive power, as in Youngstown Sheet & Tube Co v. Sawyer in 1952, discussed at § 19.3.1 n.28.
§ 9.3.4  Literal Text versus Specific Historical Intent Formalism

There is one additional major variation of the formalist approach. As indicated at §§ 9.2.1.1 & 9.2.1.3, formalists place great weight on literal text and specific historical intent. Among these two sources, formalists who follow an objective approach to meaning place greater emphasis on literal text. Those who follow a subjective approach place greater emphasis on specific historical intent.

For example, in his writings commentator Raoul Berger rejected the "textualist"-driven formalism of Justice Scalia and argued for a formalist "originalism" that would hold that the specific historical intent of the framers and ratifiers should be determinative, and that all sources of historical inquiry, including any reliable evidence of societal traditions, should be examined to determine these views. In contrast, reflecting an objective approach to interpretation, more dominant in the 20th century, as discussed at § 6.2.1.1 nn.18-22, Justices Scalia and Thomas have rejected subjective interpretation and Raoul Berger’s criticism of Brown v. Board of Education on the specific historical intent grounds that segregated schools were wide-spread and thought permissible in 1868 when the 14th Amendment was adopted. Dissenting in Planned Parenthood v. Casey, Justice Scalia stated his view that the literal meaning of “equality” requires a "color-blind" Constitution, which overrides specific historical traditions, such as banning interracial marriages or, presumably, permitting segregated public schools or some limited affirmative action based on historical practices of the post-Civil War Republican Congress, noted at § 26.2.1.4.A n.210. Where literal text is not so clear, as for defining “liberty” under substantive due process analysis, and how that differs from “license,” Justice Scalia will rely more on specific historical practices, as noted at § 27.1.1 nn 10, 12-14.

As a version of formalism, Raoul Berger’s approach disagrees with the standard natural law model, with its willingness to consider fully both letter and purpose, and both specific historical intent, where present, and general kinds of ethical argumentation. Of course, Raoul Berger's approach, like all formalist theories, is in contrast to the more activist interpretation style of instrumentalism. Raoul Berger also disagreed with the Holmesian approach and its broader use of purpose, general historical intent, and practice. For example, Berger disagreed with Holmesian Justice Frankfurter for his statement, in a file memorandum concerning Brown, that "the equality of laws enshrined in a constitution which was 'made for an undefined and expanding future' . . . is not a fixed formula defined with finality at a particular time."


83  Berger, supra note 79, at 131-33.

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§ 9.4 The Formalist Approach, Combined with Affinity for Another Style

As exists with respect to each style of interpretation, a judge who predominately follows one style of interpretation may have an affinity for another style. Among formalist Supreme Court Justices in the second half of the 20th century, the best examples of this are Chief Justice Burger, who occasionally demonstrated an affinity for the Holmesian style; Justice Thomas, who has suggested an affinity for natural law; and Justice Black, who was accused of an affinity for instrumentalism.

In his decisions, Chief Justice Burger reflected more of a moderate formalism reminiscent of Chief Justice Hughes and Justice Owen Roberts. As noted at § 9.3.2 n.78, Chief Justice Hughes and Justice Roberts shared an occasional affinity for Holmesian interpretation. Chief Justice Burger’s occasional affinity for Holmesian interpretation is perhaps best seen in his joining the majority in Posadas De Puerto Rico Associates v. Tourism Company of Puerto Rico, a First Amendment case involving commercial speech. In that case, per Holmesian Justice Rehnquist, the Court held that Puerto Rico may restrict ads for casino gambling aimed at residents. As discussed at § 30.3.2.1 n.246-48, Posadas adopted a Holmesian deference-to-government approach to commercial speech doctrine. In contrast, a formalist approach toward commercial speech tends to be more supportive of a bright-line rule protective of free speech. For example, in 44 Liquormart, Inc. v. Rhode Island, Justice Thomas, concurring with the majority’s overruling of the deferential approach of Posadas, stated that where the state has not outlawed or directly restricted transactions within its own borders, all attempts to dissuade legal choices by citizens by keeping them ignorant are impermissible.

Justice Thomas’ affinity for a natural law style of interpretation, particularly of the classic or Christian kind, has been noted by some commentators. For example, Professor Stephen Presser has compared Federalist Justice Chase and “Clarence Thomas or any other Supreme Court Justice who might embrace an historically valid American natural law jurisprudence.” Further, Justice Thomas did comment during his confirmation hearing that “to understand what the framers meant . . . it is important to go back and attempt to understand what they believed,” which was a theory of “natural rights,” but that in interpreting the Constitution, “You don’t refer to natural law or any other law beyond that document [the Constitution].” However, in his decided cases, Justice Thomas interpretation style most often mirrors that of Justice Scalia, not natural law. As Professor Rodney Smith noted early on, Justice Thomas has “fallen under the sway” of Justice Scalia.

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85  517 U.S. 484 (1996); id. at 518-26 (Thomas, J., concurring).
Occasionally, however, Justice Thomas departs from voting with Justice Scalia in a manner suggesting the influence of natural law. For example, Justice Thomas has focused on the natural law principle of proportionality to favor parties who were at a disadvantage relative to the government. For example, in *Sims v. Apfel*,^89^ Justice Thomas joined with natural law Justices O’Connor and Souter, along with instrumentalist Justices Stevens and Ginsburg, to hold that a social security claimant did not waive judicial review of an issue even though the claimant failed to exhaust that issue by presenting it to the Social Security Appeals Council for review. In *United States v. Bajakajian*,^90^ Justice Thomas joined Justice Souter, along with instrumentalists Justices Stevens, Ginsburg, and Breyer, to hold that forfeiture of an entire amount of money, $357,144, merely for failure to report that the money was concealed in defendant’s luggage, was a violation of the principle of proportionality embedded in the Excessive Fines Clause.

With respect to Justice Black and instrumentalism, Justice Harlan’s concurrence in *Griswold v. Connecticut* is perhaps most telling. In *Griswold*,^91^ Justice Black supported once again his bright-line rule that the 14th Amendment Due Process Clause incorporated all of the Bill of Rights, but no other rights. In response, Holmesian Justice Harlan noted that this approach does not guarantee that a judge will not resort, in some cases, to arguments of social policy. Justice Harlan remarked:

*Johnston’s* approach does not rest on historical reasons, which are of course wholly lacking, but on the thesis that by limiting the content of the Due Process Clause of the Fourteenth Amendment to the protection of rights which can be found elsewhere in the Constitution, in this instance the Bill of Rights, judges will thus be confined to “interpretation” of specific constitutional provisions, and will thereby be restrained from introducing their own notions of constitutional right and wrong into the “vague contours of the Due Process Clause.”

...[Judicial “self-restraint” is an indispensable ingredient of sound constitutional adjudication, [but] the formula suggested for achieving it is more hollow than real. “Specific” provisions of the Constitution, no less than “due process,” lend themselves as readily to “personal” interpretations by judges whose constitutional outlook is simply to keep the Constitution in supposed “tune with the times.” Need one go further than to recall last Term’s reapportionment cases, Wesberry v. Sanders and Reynolds v. Sims, where a majority [including Justice Black] “interpreted” “by the People” and “equal protection” to command “one person, one vote,” an interpretation that was made in the face of irrefutable and still unanswered history ...?^92^

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^89^ 530 U.S. 103, 112 (2000) (Thomas, J., for the Court).

^90^ 524 U.S. 321, 344 (1998) (Thomas, J., for the Court). In a few cases, Justice Thomas has given even less respect to precedent and to rule-based doctrine than Justice Scalia, whose views are noted at § 4.3.1 nn.75-77 & § 4.2.3 nn.54-56, in favor of a conclusion supported by a formalist reading of literal text alone. Randy E. Barnett, *Scalia’s Infidelity: A Critique of “Faint-Hearted” Originalism*, 75 U. Cin. L. Rev. 7, 2006 (Justice Thomas only true “originalist” on the Court).


^92^ *Id.* at 500-01 (1965) (Harlan, J., concurring).
CHAPTER 10: HOLMESIAN CONSTITUTIONAL INTERPRETATION

§ 10.1 Introduction to Holmesian Decisionmaking

As discussed at § 3.2, the Holmesian approach, as a positivist theory of law, shares with the formalist approach a strong belief in judicial restraint and a limited role for the judge who attempts to decide cases in light of existing positive law. However, because the Holmesian approach is a functional approach to decisionmaking, not an analytical approach, the Holmesian judge does not have a predisposed preference for rigidly mechanical application of rules. As Oliver Wendell Holmes stated in *The Common Law*,1 "The life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed." Thus, as Holmes stated in *New York Trust Co. v. Eisner*,2 "[A] page of history is worth a volume of logic." The basic elements of this Holmesian style of constitutional interpretation are discussed at § 10.2.

As discussed at § 10.3, in the 20th century there have been on the Court extreme Holmesians, such as Justice Holmes himself and Justices Brandeis and Frankfurter, and moderate Holmesians, such as Justices Jackson, the first and second Harlans, and Stewart. Justices Frankfurter and Brandeis would both be described as liberal Holmesians, while Justices Holmes, Stewart, and both the first and second Harlans would be described as conservative. Justice Jackson would best be described as a centrist Holmesian. Among other Justices on the Vinson Court, Chief Justice Vinson and Justices Reed, Minton, and Clark can properly be described as moderate, conservative Holmesians. Among Justices on the Warren Court, Justice Whittaker was a moderate, conservative Holmesian. Among Justices on the Burger and Rehnquist Courts, Chief Justice Rehnquist is best categorized as an extreme, conservative Holmesian, while Justice White was an extreme, liberal Holmesian. Noteworthy Holmesians on the Courts of Appeals include Judge Learned Hand, who was never nominated to the Supreme Court, and Judge Robert Bork, who was nominated but was not confirmed. Noteworthy commentators espousing Holmesian themes include Professor James Bradley Thayer in the late 19th century, as discussed at § 10.2.1.2 n.16, and University of Texas School of Law Professor Lino Graglia today.3

Finally, as exists with respect to each style of interpretation, a judge who predominately follows one style may have an affinity for another style. As discussed at § 10.4, moderate Holmesians Justice Harlan and Stewart occasionally demonstrated a slight affinity for natural law. Despite being an extreme Holmesian most of the time, Chief Justice Rehnquist had a slight affinity for formalism. Justice White had a slight affinity for instrumentalism.

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1 Oliver Wendell Holmes, Jr., The Common Law 1 (1881).

2 256 U.S. 345, 349 (1921) (Holmes, J., for the Court).

§ 10.2 Defining the Holmesian Style of Constitutional Interpretation

§ 10.2.1 Treatment of Contemporaneous Sources of Interpretation

§ 10.2.1.1 Treatment of Text

Regarding the question of subjective versus objective interpretation of text, the Holmesian approach follows Justice Holmes, who always spoke of searching for objective meaning, not subjective intent. As Holmes noted, “[W]e ask not what this man meant, but what those words mean in the mouth of a normal speaker of English, using them in the circumstances in which they were used.”\(^4\) Justice Felix Frankfurter, a follower of Holmes, similarly noted, “We are not concerned with anything subjective. We do not delve into the minds of the legislators or their draftsmen, or committee members. . . . Legislation has its aim. . . . That aim, that policy is . . . evinced in the language of the statute, as read in light of other external manifestations of purpose.”\(^5\) However, as discussed at § 10.2.1.3, despite this view both Justices Holmes and Frankfurter welcomed use of legislative history to determine the meaning of a statute, an approach more consistent with a concern about the subjective intent of the drafters, rather than a pure objective approach to the words’ meaning. Thus, in practice, the Holmesian approach to interpretation follows much more closely the Landis/Breyer practical objective approach to interpretation, as discussed at § 6.2.1.1 nn.9-10, rather than the Radin/Scalia pure objective approach.

Being a functional approach to judicial decisionmaking, and not an analytic approach, the Holmesian approach tends to emphasize the functional purpose behind a constitutional or statutory provision, not merely the word’s formal, literal meaning. As Justice Holmes stated in United States v. Whitridge,\(^6\) "[T]he general purpose is a more important aid to the meaning than any rule which grammar or formal logic may lay down." In an article on statutory interpretation, Justice Felix Frankfurter made the same point regarding the importance of considering purpose in interpreting any document.\(^7\) Judge Learned Hand, a similar believer in the Holmesian style of judicial restraint, made a similar point about considering background purposes in constitutional interpretation in his 1958 Oliver Wendell Holmes, Jr. Lecture at Harvard. He stated there, "For centuries it has been an accepted canon in interpretation of documents to interpolate into the text such provisions, though not expressed, as are essential to prevent the defeat of the venture at hand [ut res magis valeat quam pereat]; and this applies with especial force to the interpretation of constitutions, which, since they are designed to cover a great multitude of necessarily unforeseen occasions, must be cast in general

\(^4\) Oliver Wendell Holmes, Jr., A Theory of Interpretation, 12 Harv. L. Rev. 417, 417-18 (1899).


\(^6\) 197 U.S. 135, 143 (1905) (Holmes, J., for the Court).

\(^7\) Frankfurter, supra note 5, at 538-44 (discussing the interpretation theory of Holmes under the headings "Proliferation of Purpose" and "Search for Purpose").
language, unless they are constantly amended.\textsuperscript{8} Columbia University School of Law Professor Louis Lusky similarly commented on use of the maxim \textit{ut res magis} to ensure that judicial review is "not confined to the written text but still kept within some verifiable, 'principled' limit."\textsuperscript{9} Use of this maxim to advance the purposes behind a document is also consistent with the natural law sensitivity to purpose, as discussed at § 6.2.1.2 nn.32-38, when considering Justice Story’s citing with approval the \textit{ut res magis} maxim of construction. Of course, as noted at § 6.2.1.2 nn.30, 42, if the literal text of the provision is clear, both Holmesian and natural law judges will be reluctant to let a contrary meaning derived from purpose override the clear meaning of the statutory or constitutional provision.

\section*{§ 10.2.1.2 Treatment of Context}

This same functional concern leads Holmesians to be sensitive to arguments of context, in addition to arguments of text and purpose, in order to effectuate the true intent of the framers and ratifiers. As noted by Holmes, “A word generally has several meanings, even in the dictionary. You have to consider the sentence in which it stands to decide which of those meanings it bears in the particular case, and very likely will see that it there has a shade of significance more refined than any given in the wordbook.”\textsuperscript{10} Holmesian judges are quite willing to resort to verbal or policy maxims of construction to interpret text, as long as those maxims are not used rigidly, or mechanically, but are always related back to the functional goal of determining the drafter’s intent. As stated by Justice Frankfurter, “[T]hese rules of construction are not in any true sense rules of law. So far as valid, they are what Mr. Justice Holmes called them, axioms of experience. . . . Out of them may come a sharper rephrasing of the conscious factors of interpretation; new instances may make them more vivid but also disclose more clearly their limitations. Thereby we may avoid rigidities which, while they afford more precise formulas, do so at the price of cramping the life of law.”\textsuperscript{11}

Holmesian judges are also sensitive to arguments of related provisions, understanding that any particular text must be read against the backdrop of related provisions to get functionally its full intended meaning. As Justice Frankfurter stated:

\begin{quote}
Frequently the sense of a word cannot be got except by fashioning a mosaic of significance out of the innuendoes of disjointed bits of statute. Cardozo phrased this familiar phenomenon by stating that “the meaning of a statute is to be looked for, not in any single section, but in all the parts together and in their relation to the end in view.” And to quote Cardozo once more on this phase of our problem: “There is a need to keep in view also the structure of the statute, and the relation, physical and logical, between its several parts.” The generating consideration is that legislation is more than composition. It is an active instrument of government which, for
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\textsuperscript{8} Learned Hand, The Bill of Rights 14 (1958).


\textsuperscript{10} Holmes, supra note 4, at 417.

\textsuperscript{11} Frankfurter, supra note 5, at 544-45, citing Boston Sand & Gravel Co. v. United States, 278 U.S. 41, 48 (1928) (Holmes, J., opinion ).
purposes of interpretation, means that laws have ends to be achieved.\textsuperscript{12}

With regard to arguments of constitutional structure, this same functional concern leads Holmesians to adopt a pragmatic, sharing of powers, checks and balances approach to issues of separation of powers, as discussed at § 19.4.3.1,\textsuperscript{13} and to be sensitive to the functional needs of governmental power when considering federalism issues of federal versus state power, as discussed at § 18.2.3.\textsuperscript{14} As discussed at § 10.3.3, following the same conservative versus liberal bias that exists for formalist jurists, conservative Holmesians, like Chief Justice Rehnquist, tend to favor the executive branch and the states; liberal Holmesians, like Justice White, tend to favor the legislative branch and the federal government.

This functional concern with sensitivity to the needs of governmental power also animates the Holmesian view concerning the proper role of the courts regarding issues of civil rights. As discussed at § 3.2 nn.24, 37-40, the role of the law, in Holmes' view, was to accommodate to what the dominant group in society wants. As Holmes famously stated, "The first requirement of a sound body of law is, that it should correspond with the actual feelings and demands of the community, whether right or wrong."\textsuperscript{15} Thus, in Holmes' view, legislatures, as representatives of the majority in our democratic society, are the proper balancers of public policy in society, not courts.

As noted at § 10.1, the Holmesian approach rejects the pure logic of the formalists in favor of the "felt necessities of the times" and "intuitions of public policy." Because of the difficulty sometimes in determining these "felt necessities" or "intuitions of public policy," Holmesian judges are very cautious before deciding that some "intuition" in a constitutional provision renders governmental action unconstitutional. Thus, while formalist and Holmesian jurists, as positivists, share a belief in judicial restraint, the extreme Holmesian approach adopts as a general theory Professor Thayer's extremely strong judicial restraint view that courts should defer to governmental action out of respect for the other branches of government, the dominant forces in society, unless the

\textsuperscript{12} Id. at 538 (citations omitted).

\textsuperscript{13} See, e.g., Morrison v. Olson, 487 U.S. 654 (1988) (Rehnquist, J., opinion for the Court), discussed § 19.4.3.1.

\textsuperscript{14} See, e.g., NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (Congress can regulate any activity, even though it has an intrastate character when separately considered, if the activity has such a close and substantial relation to interstate commerce that control is appropriate to attain a legitimate end); United States v. Darby, 312 U.S. 100 (1941) (a purpose to control some aspect of local activity is irrelevant; Congress can exclude from interstate commerce all goods produced in substandard conditions because Congress can choose means reasonably appropriate to a legitimate end even though that involves control of intrastate activities); Wickard v. Filburn, 317 U.S. 111, 124 (1942) (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; testing Congress' power by using the relevance of economic affects "has made the mechanical application of legal formulas no longer feasible."). These cases are discussed at § 18.2.3.

\textsuperscript{15} Holmes, supra note 1, at 36.
unconstitutionality of the governmental action is "so clear that it is not open to rational question."  

As one author has noted, “Holmes’ job at the Supreme Court consisted of, in many instances, reviewing the constitutionality of actions of a legislature. In such cases, Holmes forged his famous attitude of deference.”  

A modern version of this approach appears in the works of University of Texas Law School Professor Lino Graglia, cited at § 10.1 n.3. As discussed at § 9.2.1.2, there is no such extreme deference to the government under the formalist approach to judicial review.

A moderate Holmesian approach does not go as far as Professor Thayer, but does counsel judicial restraint before determining that some governmental action is unconstitutional. This is reflected in the prudential factors summarized in Justice Brandeis’ opinion for the Court in Ashwander v. Tennessee Valley Authority, and in Professor Alexander Bickel’s “passive virtues” approach, both discussed at § 17.1.3.2, and in Justice Frankfurter’s plurality opinion in Poe v. Ullman, joined in, among others, by Justice Whittaker, finding Poe not ripe for resolution, discussed at § 27.3.3.2 n.206. It is also embodied in Professor John Hart Ely’s approach to constitutional interpretation in Democracy and Distrust.  

In that book, Professor Ely advanced the view that courts should be “representation-reinforcing” in their decisionmaking, making the political process, which reflects the dominant forces in society, more efficient, but deferring to the political process where that process is efficient.

§ 10.2.1.3 Treatment of History

The Holmesian approach’s functional concern with text, purpose, and context is equally reflected in the Holmesian approach regarding history. This functional concern means that a Holmesian judge will engage in broad-based historical inquiry, using both specific and general historical evidence, to help determine a provision's purpose and context. This broad-based historical inquiry in constitutional interpretation mirrors the Holmesian approach to statutory interpretation, as discussed at § 3.2 nn.43-47, which always permits resort to legislative history in order to help determine the legislature's intent, as noted at § 6.2.1.1 nn.9-10. As stated in the 1940 case, United States v. American Trucking Associations, Inc., "When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination'.” Thus, this approach rejects any formalist Literal, Golden, or Plain Meaning Rule limitation on resort to legislative history materials.


19 310 U.S. 534, 543-44 (1940).
Of course, as with statutory interpretation, under the Holmesian approach to the Constitution a judge must be careful to use historical evidence only to advance the intent of the framers and ratifiers, not to enlarge or narrow it. As Justice Frankfurter noted when talking about statutory interpretation, "Spurious use of legislative history must not swallow the legislation so as to give point to the quip that only when the legislative history is doubtful do you go to the statute. While courts are no longer confined to the language, they are still confined by it."20

One commentator has made the argument that Judge Learned Hand, a famous Holmesian judge, might change his mind and would not consult legislative history today given the spurious use of legislative history over the last generation.21 Justice Scalia made the same point about Dean Jerome Landis’ support in the 1930s of using legislative history. Justice Scalia stated, “I think that Dean Landis, and those who joined him in the prescription of legislative history as a cure for what he called ‘willful judges,’ would be aghast at the results a half century later. On balance, it has facilitated rather than deterred decisions that are based upon the courts’ policy preferences, rather than neutral principles of law.”22 Whether or not Judge Hand or Dean Landis would agree with these observations, one can never know. As discussed at § 6.2.3.1 nn.75-90, recent Holmesian justices on the Supreme Court, like Justice White or Chief Justice Rehnquist, have routinely used legislative history, although, in the case of Chief Justice Rehnquist, with some reservations.

Likewise, a true Holmesian would reject the formalist extreme focus on evidence of specific historical intent, and would be willing to consider fully whether history suggests that the framers and ratifiers intended a particular provision to reflect a general ethical concept. For example, such an historical investigation might reveal that the general concept at the base of the Equal Protection Clause is one of racial equality.23 Thus, a principled Holmesian would be willing to interpret the Equal Protection Clause in light of this general concept, an aspect of what Professor Bobbitt called ethical argumentation, discussed at § 5.1 n.9, and not merely in light of the specific examples held by the framers about equal protection, as might a specific historical intent formalist like Raoul Berger, as discussed at § 9.3.4. As cited at § 6.2.3.2 n.100, Holmesian Judge Robert Bork wrote:

> The Court cannot conceivably know how [the framers and ratifiers] would have resolved [specific] issues had they considered, debated and voted on each of them. Perhaps it was precisely because they could not resolve them that they took refuge in the majestic and ambiguous formula: the equal protection of the laws. But one thing the Court does know: [the Equal Protection Clause] was intended to enforce a core idea of black equality against...

20 Frankfurter, supra note 5, at 543-44.


governmental discrimination. It has been noted that in deciding cases Judge Bork was not a “textualist,” in the sense of being a formalist, nor did he search for the framers and ratifiers’ “subjective intent.” Rather Judge Bork searched for the “objective” understanding of how a reasonable person of the time would have interpreted the words used, combined with a deference to government mentality, all of which reflects a Holmesian approach.

Justice Frankfurter made the same point about a judge being willing to consider both specific and general historical intent when discussing statutory interpretation. He noted, “[T]he purpose which a court must effectuate is not that which Congress should have enacted, or would have. It is that which it did enact, however inaptly, because it may fairly be said to be imbedded in the statute, even if a specific manifestation was not thought of, as is often the very reason for casting a statute in very general terms.”

As noted at § 9.2.1.3 n.35, whether referring to evidence of traditions occurring before ratification, which is properly denominated history, or evidence of traditions after ratification, denominated practice, the typical formalist position is that of Justice Scalia in Michael H. v. Gerald D. that the Court should predominantly consider “the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified.” As noted above, the Holmesian approach rejects such limited use of historical evidence. Thus, Justice Scalia’s position was rejected by Holmesian Justice White in Michael H., as well as being rejected by the natural law and instrumentalist Justices in the case. Only Chief Justice Rehnquist joined Justice Scalia’s “specific tradition” analysis in the case. As discussed at § 10.4, Chief Justice Rehnquist had an occasionally affinity for the formalist style of interpretation.


26 Frankfurter, supra note 5, at 538-44.

27 491 U.S. 110, 127 n.6 (1989) (Scalia, J., joined by Rehnquist, C.J., announcing the judgment of the Court).

28 Id. at 132 (O’Connor, J., with Kennedy, J., concurring in part); id. at 132-34 (Stevens, J., concurring in the judgment); id. at 136-37 (Brennan, J., joined by Marshall & Blackmun, JJ., dissenting) (“[O]nly one other Member of the Court [Chief Justice Rehnquist] fully endorses Justice SCALIA’s view . . . .”); id. at157-60 (White, J., joined by Brennan, J., dissenting).
Despite this rejection of Justice Scalia’s “specific tradition” approach in theory, considerations of general interpretive predispositions, discussed at § 4.4.1, suggest that Holmesian judges are less likely than natural law judges to conclude that the framers and ratifiers intended a particular provision of the Constitution to reflect a general natural law concept, because the Holmesian approach rejects any notion of natural rights as "naive," noted at § 3.4 n.92. Instead of concluding the framers and ratifiers expected some concept to evolve over time in response to natural law reasoning and an interplay between social change and constitutional concepts, Holmesian judges are more likely to conclude that the framers and ratifiers expected the concept to remain static.

This is mostly a product of the fact that the Holmesian approach to judicial decisionmaking is a positivist approach, and thus shares the formalist view that judges should not test their decisions by an external standard of moral rightness. Judges holding such a view are more likely to conclude that the framers and ratifiers of a provision had in mind some specific intent that it is the task of the judge to implement. For example, dissenting in Wallace v. Jaffree, Justice Rehnquist relied upon historical evidence of the specific intent of the framers and ratifiers of the Establishment Clause, and contrasted that with any general concept of separation of church and state that might be developed from reliance on the general views of Thomas Jefferson or James Madison. Justice White indicated in his dissent in Wallace that he appreciated Justice Rehnquist's explication of history.

Nevertheless, to the extent that a Holmesian judge can be convinced from general historical evidence, or otherwise, that the framers and ratifiers themselves embedded in the Constitution a particular general concept that was expected to be elaborated over time by judges against a background of purpose and context, a Holmesian judge should remain faithful to that intent. For example, with respect to the issue of incorporation of the Bill of Rights under the 14th Amendment's Due Process Clause, Justice Frankfurter's conclusion was that due process involves "those canons of decency and fairness which express the notions of justice of English-speaking peoples . . . . These standards are not authoritatively formulated anywhere as though they were prescriptions in a pharmacopoeia. But [judges] must move within the limits of accepted notions of justice."30

§ 10.2.2 Treatment of Subsequent Developments

§ 10.2.2.1 Legislative, Executive, and Social Practice

Because of the Holmesian posture of deference to government, a Holmesian will quite willingly allow a continued and consistent legislative or executive practice on an issue to provide a gloss on meaning. As stated by Justice Frankfurter in his concurrence in Youngstown Sheet and Tube Co. v. Sawyer, "[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." Justice Holmes had underscored

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29 472 U.S. 38, 91-106 (1975) (Rehnquist, J., dissenting); id. at 90 (White, J., dissenting).
31 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring).

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this point 30 years earlier in Missouli v. Holland, stating, "[W]hen we are dealing with words that are also 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 light of our whole experience and not merely in that of what was said a hundred years ago."

On the other hand, as a positivist theory of law, a pattern of legislative and executive action should not be allowed to create a gloss on meaning that can override the framers and ratifiers' clear intent. For example, in INS v. Chadha, Justice Rehnquist joined the majority opinion which held that Congress may not act legislatively through a one-house veto, despite congressional practice of including such veto provisions in many statutes for 50 years prior to Chadha, because the one-house veto violated the literal text of the bicameralism and presentment clauses of Article I. As discussed at § 10.3.3 n.79, despite this fact Holmesian Justice White preferred to defer to the extensive legislative practice of one-house and two-house vetoes that had occurred for the 50 years prior to Chadha, concluding this practice was consistent with the purposes of bicameralism and presentment.

Justice White’s dissent in Chadha reveals the extent to which some extreme Holmesian jurists will go in order to defer to legislative and executive practice. Further, the Holmesian posture of judicial deference to the other branches of government, discussed generally at § 3.2, constantly reminds Holmesian jurists that it is up to the legislature and executive to respond to social change and "the felt necessities of the times," not the courts. Reflecting this fact, virtually all Holmesian references to a notion of evolving concepts in the Constitution occur in the context of a deference-to-government decision.

With regard to social practice, a true Holmesian would reject the formalist view in Stanford v. Kentucky, discussed at § 9.2.1.3 n.34, that historical investigation or evidence of social practice should be limited to "laws and the application of laws" for purposes of determining our societal traditions. Instead, a true Holmesian would follow Justice Holmes' view in Lochner v. New York that our tradition derives from both "our people and our laws." Nevertheless, perhaps because of the extreme Holmesian posture of deference to government under Professor Thayer’s approach,

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32 252 U.S. 416, 433 (1920) (Holmes, J., for the Court).
36 198 U.S. 45, 75-76 (1905) (Holmes, J., dissenting).
some extreme Holmesians have adopted the *Stanford* limitation of looking only to governmental acts, that is, legislative and executive practice, to determine traditions. Of course, even under the broader view of Holmes, judges should only consider American social practice. As a positivist theory of law, like formalism, as discussed at § 9.2.2.1 n.45, foreign laws or foreign social practice are not relevant considerations to interpreting the United States Constitution, unless directly related to choices made by the framers and ratifiers, such as for English practice at the time of ratification. Such directly related foreign practices have been denominated by some as “geneological comparativism,” as discussed at § 5.2.3.2 n.67.

§ 10.2.2.2 Judicial Precedents

As a positivist theory of law, the Holmesian approach shares the formalist concern with certainty and predictability of the law. However, as a functional approach, certain and predictable rules are prized more for their functional utility in helping society better govern itself, rather than being prized for their logical clarity or doctrinal neatness. As cited at § 3.2 n.26, Professor Patrick Kelley noted:

Holmes believed a judge could do a number of things to improve the law within the limits imposed by his society’s prevailing beliefs. First, a judge can increase the effectiveness of current law in achieving its socially desirable consequences by making it more fixed, definite, and certain. . . . So, too, the positivist judge ought to adhere strenuously to the doctrine of *stare decisis*, as that makes the law more reliable, certain, and knowable, and hence more effective in achieving its socially beneficial consequences.

As Chief Justice Rehnquist stated in *Payne v. Tennessee*, 39 “*Stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process. Adhering to precedent ‘is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than it be settled right.’” For this reason, Holmesian judges share the formalist view, discussed at § 9.2.2.2, that wrongly decided cases should not be overruled if they represent "settled law.”

In addition, it is a familiar notion in many branches of the law 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 individual’s reliance interest. This can also be true of precedents. As Chief Justice Rehnquist


observed in *Payne v. Tennessee*, “Considerations in favor of *stare decisis* are at their acme in cases . . . where reliance interests are involved.” This issue of “substantial reliance” being an important consideration in deciding to follow a precedent was discussed at § 7.3.2 nn.116-26. As noted there, because Holmesian judges are more attuned to this functional inquiry into whether individuals have actually substantially relied than are judges from a more analytic tradition, such as formalist or natural law judges, Holmesian judges can be predicted to be more sensitive to the existence of actual substantial reliance before applying this restraint to overruling precedent.

Despite this Holmesian willingness to follow “settled law” or precedents upon which individuals have “substantially relied,” most Holmesian jurists will not go beyond the core holdings of these precedents to adopt the general reasoning of the precedents, as noted at § 7.3.2 n.127. As a positivist approach to law, Holmesians share with formalists a reluctance to let a judicial “reasoned elaboration” of the reasoning in prior precedents provide a “gloss” on meaning to the Constitution if the Holmesian concludes that the precedents’ general reasoning is flawed, based upon the Holmesian analysis of text, context, history, practice, and prudential considerations. As Holmesian Justice Brandies was cited at § 4.3.1 n.7, “[T]his Court has often overruled its earlier decisions. The Court bows to the lessons of experience and the force of better reasoning.”

Such a judicial “gloss” on meaning is embraced by judges adopting a normative perspective on the judicial task, as is true for natural law judges, as discussed at § 12.2.2.2. Holmesian jurists thus differ from the natural law approach to “reasoned elaboration of law.” For this reason, it is not surprising that Holmesian Chief Justice Rehnquist and Justice White, and formalist Justice Thomas, all joined formalist Justice Scalia’s dissent in *Planned Parenthood v. Casey*, where he stated, “*Roe* was plainly wrong – even on the Court’s methodology of ‘reasoned judgment,’ and even more so (of course) if the proper criteria of text and tradition are applied.”

§ 10.2.2.3  **Prudential Considerations**

As a functional approach, the Holmesian approach embraces using prudential considerations to ensure that decisions advance functionally the proper consequences in light of the Constitution’s text, context, history, practice, and precedent. Thus, of the four categories of prudential considerations listed at § 5.4.1, Holmesian judges will follow the prudential categories (1) and (2): (1) the contemporaneous sources of constitutional text, context, and history; and (2) the subsequent event sources of practice and precedent. Particularly because of the Holmesian posture of judicial restraint, the structural prudential factors listed in *Ashwander v. Tennessee Valley Authority*, discussed at § 17.1.3.2, are the particular province of Holmesian judges.

On the other hand, as a positivist theory of law, the Holmesian approach shares with the formalist approach a rejection of the propriety of normative background principles reasoning, as discussed at

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§§ 2.3.2.2 & 3.2. Thus, prudential consideration category (3), which permits consideration of background principles of justice or social policy that the judge believes are embedded in the law, is out-of-bounds to a Holmesian judge. The Holmesian approach is even more adverse to the legitimacy of using category (4)’s non-interpretive prudential arguments of justice or sound social policy not embedded in the law to affect constitutional interpretation. Particularly for Holmesian judges, such non-interpretive review represents an usurpation by courts of their proper role in our democratic system. As Holmesian Justice Felix Frankfurter noted about statutory interpretation, a judge should not use a provision's words as “'empty vessels into which [the judge] can pour anything he will' -- his caprices, fixed notions, even statesmanlike beliefs in a particular policy.”

Justice Frankfurter’s dissent in West Virginia State Board of Education v. Barnette is even more direct on this point. As Frankfurter noted, “As a member of this Court I am not justified in writing my private notions of policy into the Constitution, no matter how deeply I may cherish them or how mischievous I may deem their disregard. . . . It can never be emphasized too much that one’s own opinion about the wisdom or evil of a law should be excluded altogether when one is doing one’s duty on the bench.” Chief Justice Rehnquist has made the same point. In an article focusing on the topic of an evolving Constitution, Chief Justice Rehnquist embraced Justice Holmes' notion of an evolving Constitution based upon sensitivity to legislative and executive practice, as stated in Missouri v. Holland, but rejected an evolving Constitution based upon judicial consideration of evolving social values used to strike down statutes of democratically elected representatives.

§ 10.3 Variations in the Holmesian Approach

§ 10.3.1 Summary of the Basic Holmesian Approach

As with the formalist approach, it is useful to sum up the basic points of agreement among Holmesian jurists before considering variations in the Holmesian approach. The basic sources of constitutional meaning were summarized in Table 5.1. A further elaboration of this Table appeared at Table 6.4.1, which summarized the basic approach of each of the four judicial decisionmaking styles to using these sources. Using these Tables as a backdrop, the following Table 10.3 summarizes the basic Holmesian approach with respect to each source of constitutional meaning.

Entries listed in boldface in Table 10.3 represent the sources most utilized by Holmesian jurists, that is, those sources given great weight by Holmesians. Entries listed in italics represent other sources Holmesian jurists will use, but these sources are typically given lesser weight. Entries underlined represent sources underplayed or of limited use by Holmesians, that is, sources given only some weight. Entries combined with a strike-through mark indicate sources not used by Holmesian jurists.

43 Frankfurter, supra note 5, at 529.

44 319 U.S. 624, 647 (1943) (Frankfurter, J., dissenting).

45 See Rehnquist, supra note 34, at 694-95, 699-706.
Table 10.3
Holmesian Use of Sources of Constitutional Meaning

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<tr>
<th>Contemporaneous Sources</th>
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In Table 10.3, the listings of “literal or plain meaning of text” appears in italics, while the listing of “purpose or spirit of text” appears in boldface because of Holmesian functional greater reliance on purpose versus literal text. As Justice Holmes was cited at § 10.2.1.1, "[T]he general purpose is a more important aid to the meaning than any rule which grammar or formal logic may lay down." The listing of “general historical evidence” appears in boldface reflecting the Holmesian willingness always to consider such general historical evidence. Regarding historical intent, however, the listings for general historical intent appear only in italics because of the Holmesian predisposition to conclude that the framers and ratifiers had in mind some specific historical intent that it is the task of the judge to implement, not a general concept, as discussed at § 10.2.1.3. Thus, while embracing both specific and general historical evidence fully, Holmesian judges usually use this evidence in support of a search for specific historical intent. The listing for “legislative or executive practice” appears in boldface because of the strong Holmesian predisposition of deference to the other branches of government as part of Holmesian deference to the dominant forces in society, and belief in a living Constitution, at least to the extent of being deferential to later legislative or executive views on the constitutionality of various courses of governmental action.

The listing for “core holdings of precedent” appears in italics, rather than underlined as in Table 9.3 summarizing the formalist approach, because of the Holmesian greater willingness to follow precedents both which are “settled law” and precedents on which individuals have “substantially relied.” As discussed at § 4.3.2, and reflected in Table 4.3, Holmesian judges are somewhat more willing than formalist judges to follow the core holdings of precedents. The listings for the “text, context, and history” prudential considerations, as well as “practice and precedent” prudential considerations, appears in italics because of the receptiveness of the Holmesian approach, as a pragmatic, functional approach to law, to consider prudential considerations in categories (1) and  

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Entries underlined in this Table 10.3 represent sources underplayed or of limited use by Holmesian jurists. The underlining of “social practice” reflects the position embraced by Justice Holmes himself, as noted at § 10.2.2.1. Some extreme Holmesian jurists have taken the Stanford position that social practice should never be used. For these Holmesians, “social practice” should be listed with a strike-through mark.

Entries combined with a strike-through mark indicate sources never used by Holmesian jurists in theory or practice. These involve reasoned elaboration of law, and prudential arguments of background principles of justice or social policy, whether embedded in the law or not so embedded.

As summarized, the Holmesian approach is an intermediate approach between the formalist great reliance on plain meaning of text, and the natural law and instrumentalist willingness to consider not only arguments of purpose, structure, verbal maxims, and general historical evidence, which Holmesian judges will consider, but also general background principles of justice or social policy embedded in the law, which Holmesian judges will not consider. As an intermediate approach, there are thus few cases where Holmesian judges are alone in dissent. However, the Holmesian greater predisposition for deference to legislative and executive practice has meant that in a few cases Holmesian judges have been alone in dissent. Two prominent examples of this strong deference-to-government posture are Justice White’s solo dissent in INS v. Chadha, discussed at § 19.4.2.1 nn.81-82, which would have upheld a congressional one-house veto, and Justice Rehnquist’s solo dissent in Wengler v. Druggists Mutual Insurance Co., discussed at § 26.3.1.2 n.369, which would have continued to apply minimum rational review in cases of gender discrimination, rather than an intermediate level of review.

§ 10.3.2  Extreme versus Moderate Holmesians

Just as there are extreme and moderate formalists, there are also extreme and moderate Holmesians. An extreme Holmesian judge places tremendous reliance on the fundamental Holmesian principle of deference to government. Such a judge embraces fully Professor Thayer’s view on the limited role for judicial review, discussed at § 10.2.1.2 n.16. In contrast, a more moderate Holmesian, while adopting the principle of respect for legislative and executive practice, will be more willing to give the other sources of constitutional interpretation – text, context, history, precedent, and prudential considerations – their due. The split between Justices Frankfurter and Jackson in 1943 in West Virginia State Board of Education v. Barnette provides a good example of this difference.

The issue involved in Barnette was whether a local school board could require all teachers and pupils to salute and pledge allegiance to the Flag. In his extreme Holmesian deference-to-government dissent, Justice Frankfurter quoted extensively from Professor Thayer’s famous law

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46 319 U.S. 624 (1943).

47 Id. at 647, 649, 669 (Frankfurter, J., dissenting) (citations omitted).
review article, noting Thayer’s statement, “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.” Justice Frankfurter 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.” Justice Frankfurter acknowledged that were “my purely personal attitude relevant, I should wholeheartedly associate myself with the general libertarian views in the Court’s opinion, . . . [but] it would require more daring than I possess to deny that reasonable legislators could have taken the action which is before us for review.”

In contrast, the Court’s majority opinion in Barnette, authored by Justice Jackson, for a 6-3 Court, took a more moderate Holmesian position, balancing the legislative action against the requirement, even under a Holmesian approach, that legislative acts that are clearly unconstitutional must be deemed so. As Jackson noted, “The very purpose of the 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.”

A case from 1952, Beauharnais v. People, provides another example of this difference between Justices Frankfurter and Jackson. In this 5-4 case, Justice Frankfurter was in the majority, while Justice Jackson was in dissent. In the majority opinion for the Court, Justice Frankfurter upheld a state criminal libel statute which forbade, among other things, any person from exhibiting any lithograph which portrayed lack of virtue of a class of citizens. Making extensive reference to existing state practices regarding such statutes, Frankfurter concluded that “we would deny experience to say that the Illinois legislature was without reason in seeking ways to curb false or malicious defamation of racial and religious groups.” In contrast, Justice Jackson, in dissent, concluded that the law infringed on due process and the freedom of speech. Justice Jackson based his opinion on the approach of Justice Holmes and Justice Brandeis considering criminal libel statutes in cases such as Abrams v. United States, Schaefer v. United States, and Near v. Minnesota. Justice Jackson concluded that under these precedents the “Illinois statute, as applied in this case, seems to me to have dispensed with accepted safeguards for the accused.”

48 Id. at 638.

49 343 U.S. 250 (1952).

50 Id. at 261.

51 Id. at 289-92 (Jackson, J., dissenting), citing Abrams, 250 U.S. 616 (1919); Schaefer, 251 U.S. 466 (1920); Near, 283 U.S. 697 (1931).

52 Id. at 299.
Different reactions to the issues presented in *Baker v. Carr* and *Reynolds v. Sims* also provide an example of the difference between an extreme and moderate Holmesian approach. The basic issue in these cases was whether the Court should declare that questions of malapportioned legislative districts were political questions for the legislative and executive branches to resolve, discussed at § 17.3.4.4, or whether the Court should mandate under the Equal Protection Clause a “one person/one vote” requirement in the reapportionment of legislative districts, discussed at § 26.5.3 n.520. An extreme deference-to-government position would hold that such an issue is a political question for legislative and executive consideration only. This view appeared in Justice Frankfurter’s dissent in *Baker v. Carr*, which was joined by Justice Harlan.

A more moderate deference-to-government approach, based on John Hart Ely’s “representation-reinforcing” model of judicial decisionmaking, discussed at § 10.2.1.2 n.18, would hold that malapportioned legislative districts represent a deficiency in the political process that courts need to correct, particularly since incumbents elected under the existing malapportioned scheme could not be realistically expected to correct the problem on their own. This view supports the votes of moderate Holmesians, like Justices Clark and Stewart, who voted with the majority in *Baker v. Carr* and *Reynolds v. Sims*. More generally, this view supports the approach toward the Equal Protection Clause and Due Process Clause in paragraph 4 of *United States v. Carolene Products Co.*, discussed at § 26.1.2.2 nn.68-80, which provides for special court scrutiny in cases where deficiencies may exist in the political processes, including for legislation which impacts against discrete and insular minority groups who may not be able to protect themselves adequately in the political process.

On this *Reynolds v. Sims* issue, it is important to note that, reflecting their Holmesian deference-to-government posture, Justices Clark and Stewart did not embrace Chief Justice Warren’s more instrumentalist opinion that adopted the “one person/one vote” standard. Justice Clark noted that the “Court goes much beyond the necessities of this case in laying down a new ‘equal population’ principle for state legislative apportionment.” Justice Clark would have preferred to decide the case on simple rational basis grounds, holding that the apportionment at issue in the case was an irrational “crazy quilt.” Justice Stewart, in a companion case, *Roman v. Sincock*, similarly voted to strike down a malapportioned districting on rational basis grounds. Indeed, in another companion case, *Lucas v. Forty-Fourth General Assembly of Colorado*, Justices Clark and Stewart dissented from applying the “one person/one vote” standard and concluded that the legislative districting in that case met the rational basis standard. This preference for rational basis scrutiny under the Equal Protection Clause is typical of a Holmesian deference-to-government approach, as discussed at § 26.1.2.2 nn.73-80. In his concurrence in *Reynolds*, Justice Stewart also emphasized that part of the majority’s opinion which concluded that “it was proper for the District Court, in framing a

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53 369 U.S. 186, 266 (Frankfurter, J., joined by Harlan, J., dissenting).
54 377 U.S. 533, 587-88 (1964) (Clark, J., concurring in the judgment).
56 377 U.S. 713, 744 (1964) (Stewart, J., joined by Clark, J., dissenting).
57 377 U.S. at 588-89 (Stewart, J., concurring).
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 Constitution, to devise its own system of legislative apportionment.” This sensitivity to the other branches of government is also typical of a Holmesian style of interpretation.

This analysis of *Baker v. Carr* and *Reynolds v. Sims* along the lines of extreme versus moderate Holmesians leaves the votes of Justices Harlan and White to explain. As a moderate Holmesian, one might have expected Justice Harlan to join with Justices Stewart and Clark. As an extreme Holmesian, one might have expected Justice White, once he joined the Court in 1962, to adopt Justice Frankfurter’s view in *Reynolds v. Sims*. But each voted in the opposite direction.

As discussed at § 10.4, Justice Harlan had an affinity for the natural law style of interpretation, particularly its great respect for precedent. As noted at § 17.3.4.3 n.552, pre-*Baker v. Carr* precedents strongly supported the Frankfurter view that reappointment was a political question. As has been noted, Justice Brennan’s majority opinion in the case “coolly shatter[ed] decades of precedent.”58 This, alone, can help explain Justice Harlan’s vote in *Baker v. Carr*. Further, as noted at § 10.2.1.2, conservative Holmesians tend to defer more to state governments than liberal Holmesians, who tend to emphasize more aspects of federal power. Justice Harlan’s dissent in *Baker v. Carr* emphasized this issue of states’ rights very heavily.59

On the other hand, by the time Justice White was on the Court, *Baker v. Carr* had already been decided and a clear majority of the Court was going to find malapportioned legislative districting to be unconstitutional. The real issue in *Reynolds v. Sims* was thus the question of the appropriate remedy. As discussed at § 10.3.3, when dealing with the power of federal courts to enforce rights against states, Justice White, as a liberal Holmesian judge with a predisposition to favor federal power, often joined liberal instrumentalist Justices in favor of broad federal court remedial power.

§ 10.3.3  **Conservative versus Liberal Holmesians**

With regard to the structural issues of federalism and separation of powers, the same conservative/liberal split that applies to formalist judges also applies to Holmesian judges. This difference is particularly important for Holmesian judges, since they have the strong predisposition for deference to the government in their decisions. The issue posed by these cases is which governmental entity to defer to most, state versus federal government, or executive branch versus legislative branch. In general, for the same reasons discussed at § 9.3.3, conservative Holmesians, like conservative formalists, are more likely to be appointed by Republican presidents, and are more likely to favor states’ rights and broad grants of executive power to the president. In contrast, liberal Holmesians, more likely to be appointed by Democratic presidents, are more likely to favor exercises of federal power and to restrain executive power in favor of legislative prerogatives.


59 369 U.S. at 330-34 (Harlan, J., joined by Frankfurter, J., dissenting).
This difference can be seen in the famous Steel Seizure case of *Youngstown Sheet & Steel Tubing Co. v. Sawyer*. In this case, the more centrist and liberal Holmesians, Justices Jackson and Frankfurter, held against the President’s exercise of power. In contrast, the more conservative Holmesians on the Court, Chief Justice Vinson, and Justices Reed and Minton, supported President Truman’s executive action to seize the steel mills. *Youngstown Sheet* is a good reminder that, particularly in the period before the 1960s, Democratic Presidents sometimes appointed conservative Justices to the Court, particularly Southern conservatives, as part of the existing Democratic coalition of the time. When that happened, those conservative Holmesian Justices did tend to vote as conservatives, different than the way most Democratic-appointed judges would vote today.

As discussed in Chapters 18-20, with respect to more recent Holmesian Justices on the Court, Chief Justice Rehnquist, as a conservative Holmesian, appointed by Republican President Nixon, often was on the side of protecting states’ rights and executive prerogatives. In contrast, Justice White, a liberal Holmesian, appointed by Democratic President Kennedy, was often on the side of protecting federal power, with special deference given to the prerogatives of Congress.

Justice White’s votes are a particularly good example of a liberal Holmesian judge. As a committed Holmesian, Justice White, like Chief Justice Rehnquist, dissented in *Roe v. Wade* on the grounds that abortion regulation is consistent with state legislative practice. Justice White, along with Justice Rehnquist, also refused to extend the right of privacy to cover homosexual sodomy in *Bowers v. Hardwick*. In each of these cases, Justice White deferred to the political processes to decide which rights to protect.

Where the question was not the existence of a constitutional right, however, but a matter of federal power to enforce a right that unquestionably exists, Justice White often joined with liberals on the Court in favor of broad federal power. Thus, in the school desegregation cases, Justice White often joined with other liberals to uphold broad federal judicial power to enforce *Brown v. Board of Education*, including joining in dissent Justices Douglas, Brennan, and Marshall in favor of interdistrict school remedies in *Milliken v. Bradley*. In a number of close cases involving the state action doctrine, such as *Reitman v. Mulkey*, *Flagg Bros., Inc. v. Brooks*, and *Lugar v. Edmondson Oil Co., Inc.* Justice White joined with liberals to conclude that state action existed, and thus federal judicial review was triggered. Justice White also dissented in *Banco Nacional de Cuba v.*

\[60\] 343 U.S. 579, 589 (1952) (Frankfurter, J., concurring); *id.* at 592 (Jackson, J., concurring); *id* at 667 (Vinson, C.J., joined by Reed & Minton, J.J., dissenting).


Sabbatino, declaring, “I am dismayed that the Court has, with one broad stroke, declared the ascertainment and application of international law beyond the competence of the court of the United States in a large and important class of cases.” Reflecting his Holmesian posture of deference, Justice White noted, “If my view had prevailed I would have stayed further resolution of the issues in this Court to afford the Department of State reasonable time to clarify its views in light of the opinion. In the absence of a specific objection [by the executive branch], I would have proceeded to determine the issue and resolve this litigation on its merits.” In a similar later case where the executive branch did express its views that the Court should not get involved, First National City Bank v. Banco Nacional de Cuba, Justice White joined Justice Rehnquist’s plurality opinion deferring to executive branch wishes in the case.

As a liberal Holmesian, Justice White was a strong supporter of the prerogatives of the federal government in cases involving the 10th and 11th Amendments. For example, with respect to the 10th Amendment, Justice White joined Justices Brennan, Marshall, and Stevens in dissent in National League of Cities v. Usery and in Gregory v. Ashcroft, and joined the majority opinion overruling Usery and upholding federal regulatory power in Garcia v. San Antonio Metropolitan Transit Authority. Justice White also dissented with Justices Blackmun and Stevens in New York v. United States, arguing that the federal government has the constitutional power to “commandeer” state legislative processes for federal aims. With respect to the 11th Amendment, Justice White joined Justices Brennan, Marshall, Blackmun, and Stevens in Pennsylvania v. Union Gas Co. to give Congress the power to abrogate a State’s 11th Amendment immunity when acting pursuant to the Commerce Clause. This case was overruled 5-4 in Seminole Tribe of Florida v. Florida, after Justices Brennan, White, Marshall, and Blackmun had all left the Court. In all of these 10th and 11th Amendment cases, conservative Holmesian Justice Rehnquist was on the other side.

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66 Id. at 472.


68 426 U.S. 833, 856 (1976) (Brennan, J., joined by Marshall & White, JJ., dissenting); id. at 880 (Stevens, J., dissenting).


70 469 U.S. 528, 530 (1985) (Blackmun, J., for the Court).

71 505 U.S. 144, 188 (1992) (White, J., joined by Blackmun & Stevens, JJ., concurring in part and dissenting in part).

72 491 U.S. 1, 45, 55 (1989) (White, J., concurring in the judgment in part).

Justice White was also a strong supporter of congressional power under the 14th Amendment and the Commerce Clause. Justice White joined Justice Brennan’s majority opinion in *Katzenbach v. Morgan*,74 over the dissents of conservative Holmesians Justices Harlan and Stewart. Justice White also joined Justice Brennan and Marshall in their opinion granting Congress broad power under § 5 of the 14th Amendment in the fragmented case of *Oregon v. Mitchell*.75 A particularly prominent example of Justice White’s deference to Congress occurred in *Metro Broadcasting, Inc. v. FCC*.76 In that case, Justice White joined Justices Brennan, Marshall, Blackmun, and Stevens to hold that federal race-based affirmative action should be tested by intermediate scrutiny, despite Justice White’s view in *Richmond v. J.A. Croson Co.* that state and local race-based affirmative action triggered strict scrutiny. The majority opinion stated in *Metro Broadcasting*,77 “It is of overriding significance in these cases that the FCC’s minority ownership programs have been specifically approved – indeed mandated – by Congress.” As with *Pennsylvania v. Union Gas Co.*, *Metro Broadcasting* was overturned by a 5-4 vote, this time in *Adarand Constructors, Inc. v. Pena*,78 decided once again after Justices Brennan, White, Marshall, and Blackmun had all left the Court.

Justice White’s dissents in *INS v. Chadha* and *Bowsher v. Synar* are also quite instructive. In *Chadha*, eight members of the Court were convinced that the specific language in the Constitution requiring Congress to exercise legislative power only through the bicameralism and presentment clauses meant that a one-house veto of administrative agency action was unconstitutional. Based upon a strong predisposition to defer to Congress, Justice White struggled to find a way to uphold what he referred to as “a necessary check on the unavoidably expanding power of the agencies, both executive and independent, as they engage in exercising authority delegated by Congress.”79 As discussed at § 19.4.2.1 nn.81-82, Justice White was able to conclude that functionally bicameralism and presentment were met, even if literally they were not complied with in the case.

In *Bowsher*, the majority struck down the Gramm-Rudman-Hollings balanced budget Act based upon clear precedent preventing Congress from having removal power over an individual exercising executive functions. Justice White, in dissent, found a way to uphold “one of the most novel and far-reaching legislative responses to a national crisis since the New Deal,” stating the congressional removal power has “laid dormant” for many years, and thus that power does not pose “a genuine threat to the basic division between the lawmaking power and the power to execute the law.”80

74 384 U.S. 641, 643 (1966); *id.* at 659 (Harlan, J., joined by Stewart, J., dissenting).
77 497 U.S. 547, 563 (1990) (Brennan, J., for the Court) (intermediate scrutiny applied).
With respect to deference to executive power, however, Justice White was less willing to engage in the same kind of deferential review. This, too, is typical of the liberal Holmesian approach. Thus, in *Nixon v. Fitzgerald*, Justice White refused to give the President absolute immunity from suit for money damages for official acts as President. The majority, including conservative Holmesians Justices Rehnquist and Stewart, gave the president absolute immunity from such lawsuits.

§ 10.4 The Holmesian Approach, Combined with Affinity for Another Style

As previously noted, sometimes a judge may predominantly adopt one interpretation style, but have an affinity for some other decisionmaking style in some cases. For example, most of Chief Justice Rehnquist’s votes are in line with the position likely to be taken by a conservative, extreme Holmesian. In some cases, however, Chief Justice Rehnquist has indicated an affinity with a formalist approach. For example, on the issue of the use of legislative history in statutory interpretation cases, Chief Justice Rehnquist has indicated, more than other Holmesian jurists in the 20th century, greater sympathy toward adopting the formalist Golden Rule or the Plain Meaning Rule to ban the use of legislative history unless the plain meaning of the statute is ambiguous or absurd. Thus, in a number of cases in the 1970s and 1980s, Justice Rehnquist raised questions about the use of legislative history where the statute appeared plain on its face, thus supporting formalists like Chief Justice Burger and Justices Scalia and Thomas in such questioning. In later cases, Chief Justice Rehnquist abandoned any such formalist limitation on use of legislative history.

As discussed at § 10.3.3, most of Justice White’s votes with extreme instrumentalists like Justice Douglas, Brennan, Marshall, or moderate instrumentalists, like Justices Blackmun and Stevens, can be explained as consistent with the approach of a liberal Holmesian. However, there are a few cases that cannot be so explained. They suggest that Justice White had a slight affinity in some cases for the instrumentalist approach. For example, as noted at § 4.4.3 n.107, Justice White's background and beliefs regarding his strong commitment to civil rights, may have affected his decision to join Justice Brennan's more instrumentalist, pro-civil rights majority opinion in *United Steelworkers v.*

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81 547 U.S. 731, 751-58 (1982) (Powell, J., for the Court); id. at 764 (White, J., joined by Brennan, Marshall & Blackmun, JJ., dissenting).

82 *See, e.g.*, United Steelworkers v. Weber, 433 U.S. 193, 221 (1979) (Rehnquist, J., dissenting) (“Accordingly, without even a break in syntax, the Court rejects ‘a literal construction of [the statute]’ in favor of newly discovered ‘legislative history.’”); Tennessee Valley Auth. v. Hill, 437 U.S. 153, 184 n.29 (1978) (Burger, C.J., opinion) (“When confronted with a statute which is plain and unambiguous on its face, we ordinarily do not look to legislative history as a guide to its meaning.”); Nicholas S. Zeppos, *Justice Scalia’s Textualism: The “New” New Legal Process*, 12 Cardozo L. Rev. 1597, 1599 (1991). This issue is addressed at §§ 6.2.3.1 nn.72-75.


84 *See Kate Stith, Byron R. White, Last of the New Deal Liberals*, 103 Yale L.J. 19, 26-27 (1993).
Weber, discussed at § 3.3 nn.65-68, rather than following his more typical Holmesian approach and join Justice Rehnquist’s more judicially restrained Holmesian dissent. Reflecting his general predisposition towards Holmesian interpretation, Justice White later rethought his vote in Weber.

A Holmesian jurist could also have an affinity for a natural law style of interpretation. As discussed at § 27.3.3.2, Justice Harlan’s approach in Poe v. Ullman and Griswold v. Connecticut blended aspects of a Holmesian focus on the “novelty of the legislative enactment” with a natural law “reasoned elaboration of the law.” As Justice Harlan stated in Poe, “[The] full scope of 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 [such specific guarantees as speech and religion]. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints.” The natural law concern with “articulate consistency,” discussed at § 3.4 nn.93-94, is also reflected in Justice Harlan’s concern that his decisions reflect reasoning based upon “neutral principles.” Indeed, Professor Kent Greenawalt concluded in 1978 that Justice Harlan’s efforts to perform his responsibilities in accordance with a neutral principles model of adjudication were unparalleled among modern Supreme Court Justices. This notion of background principles of liberty, and respect for articulate consistency, was also prevalent in the views of Justice Jackson, particularly in his role as Chief Prosecutor of Nazi war criminals at Nuremberg.

Justice Harlan also had a great respect for precedent, typical of the natural law decisionmaking style. With regard to this respect for precedent, it has been noted that Justices O’Connor, Kennedy, and Souter “have taken as their model the second Justice Harlan. . . . ‘Respect for the Court,’ Harlan once wrote to another Justice, ‘is not something that can be achieved by fiat.’ . . . The true conservative, Harlan believed, adhered to stare decisis, normally following even precedents against which he had originally voted.” Justice Stewart also had this great respect for precedent. For example, as discussed at § 27.3.3.3 n.226, though dissenting in Griswold, Justice Stewart adopted the general reasoning of Griswold to join the majority opinion in Roe v. Wade. In contrast, Holmesians without this affinity for natural law, like Chief Justice Rehnquist and Justice White, dissented in Roe on grounds that abortion regulation is consistent with state legislative practice, and were unwilling to support Roe based on the general reasoning of the Court’s opinion in Griswold.

85 443 U.S. 193, 205-07 (1979); id. at 219 (Rehnquist, J., dissenting).
86 See Stith, supra note 84, at 28 n.69.
CHAPTER 11: INSTRUMENTALIST CONSTITUTIONAL INTERPRETATION

§ 11.1 Introduction to Instrumentalist Decisionmaking

As discussed at § 3.3, under an instrumentalist approach the judge must test the formulation of each rule by its purpose or policy. As a functional approach, where the reason for the rule stops, there stops the rule. As a normative approach, the judge should take into account principles of justice or social policy where leeways exist in the law. These leeways can be created because no law exactly covers the particular situation, ambiguities exist in a particular law which does apply, or two or more conflicting rules each arguably apply. The instrumentalist approach to law generally is perhaps best summed up in the classic works of Justice Benjamin Cardozo and Professor Karl Llewellyn.¹

As discussed at §§ 5.4.1 & 5.4.2, an instrumentalist judge could follow an interpretive approach to deciding constitutional cases and take into account only those background principles of justice or social policy embedded in the Constitution or existing legislative, executive, or social practice, or judicial precedents. However, as noted at §§ 5.4.3 & 6.4.1, as an historical matter the instrumentalist approach has always been accused of a willingness to embrace non-interpretive review. As Professor Michael Perry has said, "The decisions in virtually all modern constitutional cases of consequence . . . cannot plausibly be explained except in terms of noninterpretive review, because in virtually no such case can it plausibly be maintained that the Framers constitutionalized the determinative value judgment."² The basic elements of the instrumentalist approach are discussed at § 11.2.

As discussed at § 11.3, in the 20th century there have been on the Court extreme, liberal instrumentalists, such as Justices Murphy and Rutledge during the 1940s; and Chief Justice Warren, and Justices Douglas, Brennan, Goldberg, Fortas, and Marshall, during the Warren Court in the 1960s. There have also been moderate, liberal instrumentalists, such as Justice Byrnes during the 1940s; and Justices Blackmun, Stevens, Ginsburg, and Breyer during the Burger and Rehnquist Courts. There have also been moderate, centrist instrumentalists, such as Chief Justice Stone and Justice Cardozo during the 1930s. Some conservative instrumentalists, such as Judge Richard Posner, have served on the Courts of Appeals. Among the commentators, a number of variations of instrumentalism can be found, including those espousing “non-critical” approaches, such as pragmatism, utilitarianism, or Kantian ideals, and those espousing “critical” approaches, such as Critical Legal Studies, feminist theory, or critical race theory.

As exists with respect to each style of interpretation, a judge who predominately follows one style of interpretation may have an affinity for another style. Thus, as discussed at § 11.4, Justice


Blackmun occasionally demonstrated an affinity for natural law interpretation, as do Justice Ginsburg and Justice Breyer today. Justice Breyer also occasionally has demonstrated an affinity for the Holmesian decisionmaking style. Legal philosopher H.L.A. Hart, while typically advocating an instrumentalist approach, sometimes appeared to support a formalist mode of interpretation.

§ 11.2  Defining the Instrumentalist Style of Constitutional Interpretation

§ 11.2.1  Treatment of Contemporaneous Sources of Interpretation

§ 11.2.1.1  Treatment of Text

The instrumentalist approach typically adopts an objective theory of interpretation, rather than a subjective approach. This reflects that instrumentalism is a 20th-century style of interpretation, and the predominance in the 20th century of objective theories of interpretation, as discussed at § 6.2.1.1 nn.18-22. As Justice Brennan observed about the subjective approach, “Indeed, it is far from clear whose intention is relevant – that of the drafters, the congressional disputants, or the ratifiers in the states – or even whether the idea of an original intention is a coherent way of thinking about a jointly drafted document drawing its authority from a general assent of the states.”

Justice Brennan also noted the practical difficulty of determining subjective intent, stating, “Apart from the problematic nature of the sources, our distance of two centuries cannot but work as a prism refracting all we perceive. . . . It is arrogant to pretend that from our vantage we can gauge accurately the intent of the Framers on application of principle to specific, contemporary questions.”

Despite this rejection of subjective interpretation, the instrumentalist approach is tempered by a willingness to consider all elements of context and history, including legislative history, and subsequent practice and precedent. As Justice Brennan stated, “Current Justices read the Constitution in the only way that we can: as twentieth-century Americans. We look to history of the time of framing and to the intervening history of interpretation.”

Thus, similar to the Holmesian approach, the typical instrumentalist approach to interpretation follows more closely the practical objective approach of Landis/Breyer, discussed at § 6.2.1.1, rather than the pure objective approach of Radin/Scalia. As Justice Brennan remarked, “Thus, if I may borrow the words of an esteemed predecessor, Justice Robert Jackson, the burden of judicial interpretation is to translate ‘the majestic generalities of the Bill of Rights, conceived as part of the pattern of liberal government in the eighteenth century, into concrete restraints on officials dealing with the problems of the twentieth century . . . .’”

As discussed at § 10.3.2, Justice Jackson was a moderate Holmesian on the Court.


4  Id.

5  Id. at 438.

6  Id. at 437, quoting West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943) (Jackson, J., for the Court).
With regard to literal versus purposive interpretation of texts, the instrumentalist approach states that the judge must test the formulation and application of each rule by its purpose. As stated by Professor Karl Llewellyn in *Jurisprudence: Realism in Theory and Practice*, and Professor Grant Gilmore in *The Ages of American Law*, where the reason for the rule stops, there stops the rule. Rules are not tested merely by literalness or logical symmetry; rather, rules must be interpreted functionally in light of social ends to which they are the means. Placing greater weight on the purpose of text, rather than literal meaning, Justice Brennan cautioned:

Interpretation must account for the transformative purpose of the text. Our Constitution was not intended to preserve a preexisting society but to make a new one, to put in place new principles that the prior political community had not sufficiently recognized. Thus, for example, when we interpret the Civil War amendments – abolishing slavery, guaranteeing blacks equality under law, and guaranteeing blacks the right to vote – we must remember that those who put them in place had no desire to enshrine the status quo. Their goal was to make over their world, to eliminate all vestige of the slave caste. . . . For the Constitution is . . . a bold commitment by a people to the ideal of libertarian dignity protected through law. . . . As augmented by the Bill of Rights and the Civil War amendments, this text is a sparkling vision of the supremacy of the human dignity of every individual."

Given this similarity in the instrumentalist and Holmesian functional emphasis on purpose, rather than literal text, some authors have used the phrase “pragmatic instrumentalism” to include the functional pragmatism of Holmes and the instrumental pragmatism of modern-day instrumentalism, when distinguishing these two approaches from formalist reasoning. However, there are clear differences between instrumentalist and Holmesian interpretation. The differences among Holmesian Justices Frankfurter, White, and Rehnquist and instrumentalist Justices Douglas, Brennan, and Marshall underscore this fact.

The main difference between these two approaches is the instrumentalist’s lack of strong Holmesian deference to legislative and executive practice, and the instrumentalist willingness to engage in prudential consideration of background principles of justice and social policy so as to keep the Constitution, in Holmesian Justice Harlan’s prejorative phrase in his concurrence in *Griswold v. Connecticut*, in supposed “tune with the times.” With regard to legislative and executive practice, Justice Brennan has stated:

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10 381 U.S. at 499, 500-01, discussed § 9.4 n.92.
Faith in democracy is one thing, blind faith quite another. Those who drafted our Constitution understood the difference. One cannot read the text without admitting that it embodies substantive value choices; it places certain values beyond the power of any legislature. Obvious are the separation of powers; the privilege of the writ of habeas corpus; prohibition of bills of attainder and ex post facto laws; prohibition of cruel and unusual punishments; the requirement of just compensation for official taking of property; the prohibition of laws tending to establish religion or enjoining the free exercise of religion; and, since the Civil War, the banishment of slavery and official race discrimination. . . . To remain faithful to the content of the Constitution, therefore, an approach to interpreting the text must account for the existence of these substantive value choices . . . .11

Concerning keeping the Constitution in “tune with the times,” Justice Brennan has remarked, “[T]he ultimate question must be: What do the words of the text mean in our time? For the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs. What the constitutional fundamentals meant to the wisdom of other times cannot be the measure to the vision of our time.”12

§ 11.2.1.2 Treatment of Context

The instrumentalist emphasis on functional interpretation means that, like a Holmesian judge, an instrumentalist judge will be sensitive to arguments of context, in addition to arguments of text and purpose. This is so because arguments of context can help a judge place into context the social ends to which a provision is the means. As Justice Frankfurter stated concerning moderate instrumentalist Justice Cardozo’s approach to statutory interpretation, “Cardozo phrased this familiar phenomenon by stating that ‘the meaning of a statute is to be looked for, not in any single section, but in all the parts together and in their relation to the end in view.’ And to quote Cardozo once more on this phase of our problem: ‘There is a need to keep in view also the structure of the statute, and the relation, physical and logical, between its several parts.’ The generating consideration is that legislation is more than composition. It is an active instrument of government which, for purposes of interpretation, means that laws have ends to be achieved.”13

This willingness extends not only to the specific contextual interpretative sources of verbal maxims and related provisions, but also to general contextual interpretation. For example, instrumentalists are quite willing to embrace policy maxims, particularly if those maxims advance a principle of justice or social policy in which the judge believes. For liberal instrumentalists, who tend to have a preference to protect the unempowered in society, this occurs more often for policy maxims such as to construe penal provisions strictly and remedial provisions broadly; presume reasonableness of

11 Brennan, supra note 3, at 437-38.
12 Id. at 438.
the drafters' action; permit no one to profit from his own wrong; and ambiguities in treaties and statutes dealing with Native Americans are to be resolved in favor of Native Americans. Policy maxims not as related to protecting the unempowered are not as likely to be as readily embraced. Thus, liberal instrumentalist judges are not as likely as other judges to rely on maxims such as waivers of sovereign immunity are to be narrowly construed, a clear statement is needed for a federal statute to eliminate state sovereign immunity, a clear expression is needed for a provision to have retroactive application, or statutes in derogation of the common law are to be narrowly construed.

With regard to elements of constitutional structure, the instrumentalist functional concern leads instrumentalisists, like Holmesians, to adopt a sharing of powers approach to issues of separation of powers, and to be sensitive to the functional needs of governmental power when considering issues of state and federal power. Regarding separation of powers issues, Justice Blackmun wrote in *Mistretta v. United States*, 14 “In adopting [a] flexible understanding of separation of powers, we simply have recognized Madison’s teaching that the greatest security against tyranny – the accumulation of excessive authority in a single branch – lies not in hermetic division between the Branches, but in a carefully crafted system of checked and balanced power within each Branch.”

Regarding federalism issues, Justice Blackmun wrote in *Garcia v. San Antonio Metropolitan Transit Authority*, 15 “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.” Justice Blackmun continued in *Garcia*, 16 “[T]he 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. . . . James Madison explained that the Federal Government ‘will partake sufficiently of the spirit [of the States], to be disinclined to invade the rights of the individual States, or the prerogatives of their governments.’ The Federalist No. 46. . . . 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 [judicially mandated] ‘sacred province of state autonomy.’”

This functional concern with the needs of governmental power also animates the instrumentalist view concerning the proper role of the courts in our democratic system. However, unlike a Holmesian approach, the instrumentalist approach does not adopt a deferential posture of judicial restraint. Instead, instrumentalist judges tend to see the judiciary more as a co-equal third branch in a "tripartite" system of government, and thus strongly reject Professor Thayer's rule of striking

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14 488 U.S. 361, 381 (1989) (Blackmun, J., for the Court).
15 469 U.S. 528, 546 (1985) (Blackmun, J., for the Court) (citations omitted).
16 Id. at 550-54 (citations omitted).
down statutes only if their unconstitutionality is “so clear that it is not open to rational question.”17 Under the instrumentalist view, judges, as well as legislators, have a responsibility to advance pragmatically sound social policies, at least where leeways exist in current, positive law. As Justice Brennan observed, "The view that all matters of substantive policy should be resolved through the majoritarian process has appeal under some circumstances, but I think it ultimately will not do. . . . It is the very purpose of our Constitution . . . to declare certain values transcendent, beyond the reach of temporary political majorities. . . . To remain faithful to the content of the Constitution, therefore, an approach to interpreting the text must account for the existence of these substantive value choices and must accept the ambiguity inherent in the effort to apply them to modern circumstances."18

In embracing this interpretive task, Justice Brennan remarked, "[H]undreds of thousands of Americans live entire lives without any real prospect of the dignity and autonomy that ownership of real property could confer. Protection of the human dignity of such citizens requires a much modified view of the proper relationship of individual and state. . . . It has been well said that there is no better test of a society than how it treats those accused of transgressing against it. . . . The constitutional vision of human dignity [also] respects the rights of each individual to form and express political judgments, however far they may deviate from the mainstream and however unsettling they might be to the powerful or the elite."19 Justice Thurgood Marshall similarly argued for the need to view the Constitution with a special focus on "the Bill of Rights and the other amendments protecting individual freedom and human rights."20

§ 11.2.1.3 Treatment of History

With regard to historical context, the instrumentalist's functional concern with text, purpose, and context means that, like a Holmesian, an instrumentalist will engage in broad-based historical investigation to help determine a provision's overall purpose and context. This "broad-based" historical inquiry in constitutional interpretation mirrors the instrumentalist approach to statutory interpretation, discussed at § 3.3 nn.63-75. In the constitutional context, this includes resort to the history surrounding adoption of constitutional provisions, including Notes of the Constitutional Convention for the original Constitution, and legislative history of constitutional amendments.

Like Holmesian judges, instrumentalist judges are willing to adopt a view of history which suggests that the framers and ratifiers intended a particular provision to reflect a general concept, if history suggests such a result. Thus, rejecting the formalist emphasis on specific historical intent, discussed


18  Brennan, supra note 3, at 435-36.


at § 9.2.1.3, Justice Brennan remarked, "A position that upholds constitutional claims only if they were within the specific contemplation of the Framers in effect establishes a presumption of resolving textual ambiguities against the claim of constitutional right. It is far from clear what justifies such presumption."21 Indeed, as Justice Brennan noted about specific historical intent, "Typically, all that can be gleaning is that the Framers themselves did not agree about the application or meaning of particular constitutional provisions and hid their differences in cloaks of generality."22

In terms of general historical background, Justice Brennan noted, “As augmented by the Bill of Rights and the Civil War amendments, this text is a sparkling vision of the supremacy of the human dignity of every individual. . . . It is a vision that has guided us as a people throughout our history.”23

§ 11.2.2 Treatment of Subsequent Developments

§ 11.2.2.1 Legislative, Executive & Social Practice

Like Holmesian judges, instrumentalist judges will permit later legislative and executive practice to provide a gloss on meaning. As Justice Brennan stated, “The Framers discerned fundamental principles through struggles against particular malefactions of the Crown; the struggle shapes the particular contours of the articulated principles. But our acceptance of the fundamental principles has not and should not bind us to those precise, at times anachronistic, contours. Successive generations of Americans have continued to respect these fundamental choices and adopt them as their own guide to evaluate quite different historical practices. . . . For the political and legal ideals that form the foundation of much that is best in American institutions – ideals jealously preserved and guarded throughout our history – still form the vital force in creative political thought and activity within the nation today.”24

This will be particularly true for instrumentalist judges if such practice is consistent with the judge's views of non-interpretive considerations. Where there is a conflict, an extreme or radical instrumentalist judge may follow his or her own views, rather than the views derived from consideration of practice. For example, Justice Brennan was unwilling to change his view regarding the unconstitutionality of the death penalty despite clear legislative, executive, and social practice supporting use of the death penalty in some circumstances.25

Because of their willingness to consider all sources of constitutional interpretation, instrumentalist judges are the most willing to use social practice, as well as legislative and executive practice, to aid in determining traditions under our Constitution. It is no surprise that the most vigorous Court

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21 Brennan, supra note 3, at 436

22 Id. at 435.

23 Id. at 439.

24 Id. at 437, 445.

25 Id. at 444.
defense of using such social practices has come in opinions written by instrumentalist Justices, such as Justice Brennan’s dissent in *Stanford v. Kentucky*, and Justice Stevens’ majority opinion in *Atkins v. Virginia.*" 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 even involve legislative enactments or views of social organizations “in other countries,” as part of an evolving consensus among nations.

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,” as defined at § 5.2.3.2 n.67, but also can involve “ahistorical comparativism,” that is, the view of other countries merely for their value in determining sound social policy. Because Holmesian and formalist jurists reject such use of social policy calculations, they reject use of “ahistorical comparativism,” in favor of looking to comparative perspectives only to the extent they reflect “genealogical comparativism.”

These views on history and subsequent practice are consistent with the instrumentalist view that the Constitution is an evolving document that must be interpreted in the context of an evolving society. As Justice Brennan has written, "Those who would restrict the claims of right to the values of 1789 specifically articulated in the Constitution turn a blind eye to social progress and eschew adaption of overarching principles to changes of social circumstance. . . . For the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the

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29  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.).

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adaptability of its great principles to cope with current problems and current needs.\textsuperscript{30}

\textbf{§ 11.2.2.2 Judicial Precedents}

Because instrumentalist jurists embrace the notion of an evolving constitution to cope with current problems and needs, they do not want to be straight-jacketed 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, if they think that the old doctrine was wrongly decided, or is wrong for society today. For example, not only did \textit{Brown v. Board of Education} usher in a new era of equal protection doctrine in 1954, but as Justice Brennan noted in a quote cited at § 7.3.2 n.129, the 25-year history between 1961 and 1986 marked great changes in a number of constitutional law doctrines.

Such changes particularly occurred between 1963 and 1969 when the Warren Court acquired a majority of 5 Justices willing to recognize many new constitutional rights by providing additional constitutional protections in numerous areas of the law. As noted at § 7.3.2 n.128, these Justices were instrumentalists Chief Justice Warren, along with Justices Douglas, Brennan, and Goldberg, who replaced Holmesian Justice Frankfurter in October, 1962, joined in many cases by Justice Black, who as a liberal formalist shared the liberal outlook of the instrumentalists on the Court. Liberal instrumentalist Justice Fortas replaced Justice Goldberg in 1965. In 1967, with the confirmation of Justice Thurgood Marshall, 5 liberal instrumentalists became seated on the Court, in addition to the liberal formalist Justice Black. This perspective continued to have considerable influence during the years of the Burger Court, 1969-86, although it was tempered because only four liberal instrumentalists remained on the Court during those years: Justices Brennan, Marshall, Blackmun, and Douglas or, after 1975, Justice Stevens, who replaced Justice Douglas.

Of course, as noted at § 7.3.2 nn.131-33, where the proper social policies would be advanced by following instrumentalist-era precedents, an instrumentalist judge may be as willing as any other judge to emphasize the importance of precedents, as revealed by Justice Thurgood Marshall's dissent in \textit{Payne v. Tennessee},\textsuperscript{31} where he stated that “this Court owes more to its constitutional precedents in general and to \textit{Booth} and \textit{Gathers} in particular.” The true test of how strongly a judge adheres to precedent, however, is not how much a judge counsels following a precedent with which the judge agrees, but whether the judge is willing to follow a precedent with which the judge disagrees. Even in \textit{Payne} itself, the instrumentalist judges did not make a fetish over the need to follow precedent based on reliance.\textsuperscript{32} Thus, as noted at §§ 4.3.2 & 7.3.2, and reflected in Table 4.3, instrumentalist judges are the least likely of the four decisionmaking styles to follow precedent based on “settled law,” “substantial reliance,” or any “additional reason” that could be named.

\textsuperscript{30} Brennan, \textit{supra} note 3, at 438.


\textsuperscript{32} \textit{Id.} at 850-53 (criticizing the \textit{Payne} reliance formulation).
§ 11.2.2.3  Prudential Considerations

The instrumentalist approach to deciding cases differs from the three other decisionmaking styles most markedly in its willingness to resolve cases where leeways exist by embracing prudential consideration of background principles of justice or social policy embedded in the law. For instrumentalist judges, the act of interpreting the Constitution, a statute, or a common-law rule will often reveal leeways in the law whose resolution by them calls for judicial consideration of background social policy, in addition to prudential considerations directly derivable from text, context, history, practice, and precedent. These leeways can exist because no law exactly covers the particular situation, ambiguities exist in a particular law which clearly does apply, or two or more conflicting rules each arguably apply.

As discussed at § 6.4.1 nn.128-30, it has been argued that some instrumentalist judges have also resorted to the more “radical” prudential consideration of whether the decision would advance a principle of justice or social policy which is not so embedded in existing legal doctrine. Of course, instrumentalist judges typically state that they do not engage in such radical non-interpretive review. For example, Justice Douglas stated in *Griswold v. Connecticut*, "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." Similarly, Justice Brennan has stated, “Justice are not platonic guardians appointed to wield authority according to their personal moral predilections. Precisely because coercive force must attend any judicial decision to countermand the will of a contemporary majority, the Justices must render constitutional interpretations that are received as legitimate.” At her confirmation hearing, Justice Ginsburg observed, “My approach [towards judging] is rooted in the place of the judiciary . . . in our democratic society. The Constitution’s preamble speaks first of ‘we the people’ and then of their elected representatives. The judiciary is third in line. . . . [O]ne of the most sacred duties of a judge is not to read her convictions into the Constitution.”

However, as Professor Michael Perry noted in 1981, "[That] is presently beside the point. What matters is that many, indeed most . . modern constitutional cases of consequence . . cannot be plausibly explained except in terms of noninterpretive review." As noted at § 5.4.3 n.130, this non-interpretive review can involve judges embracing values that the judge determines should be part of the Constitution because they reflect a supposed community consensus, or they reflect values the judge thinks the community eventually will hold, or they reflect the judge's own values. In engaging in non-interpretive review, most instrumentalist judges have appealed to both arguments of principle and arguments of social policy. As Professor John Hart Ely observed in 1978, “The Court's current constitutional jurisprudence . . involves the Court in the merits of the policy or ethical judgment

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33 381 U.S. 479, 482 (1965) (Douglas, J., for the Court).


36 Perry, *supra* note 2, at 265.
sought to be overturned, measuring those merits against some set of 'fundamental' value judgments.\(^{37}\)

Even with respect to interpretive use of social policy considerations, the question arises in the context of constitutional adjudication concerning the legitimacy of using background social policy arguments embedded in the law to render unconstitutional governmental acts of the legislative or executive branches. As phrased by Professor Ely, “It simply makes no sense to employ the value judgments of the majority as the vehicle for protecting minorities from the value judgments of the majority.”\(^{38}\) On the other hand, as Professor Harry Wellington noted, “[Ely’s] criticism, however, overlooks the familiar fact that communities, like individuals, may well violate principles to which they usually adhere. Such inconsistency is most likely in the legislative process, when self-interest is least neutralized by considerations of conscience or moral obligation.”\(^{39}\) Further, the impact of special interest lobbying on the legislative process, and the various checks and balances in the legislative process that make more difficult the passage of legislation, mean that what emerges, or does not emerge, from the legislative process is not a perfect barometer of background social policy. In addition, when faced with an ambiguous provision, it can be argued that the litigants deserve the Court’s best judgment on meaning, not deference to later legislative or executive action.

Because the instrumentalist approach is the most willing to use social policy calculations in its decisionmaking methodology, it is the approach most criticized on grounds of “judicial activism.” This criticism is typically based on accusing instrumentalist judges of five kinds of activism: “judicial legislation” leading to “result-oriented judging” and the “invalidation of the arguably constitutional actions of other branches” based on “departures from accepted interpretive methodology” and, particularly for the Warren Court decisions between 1963-69, “failure to adhere to precedent.”\(^{40}\)

§ 11.3 Variations in the Instrumentalist Approach

§ 11.3.1 Summary of the Basic Instrumentalist Approach

As with the other approaches, before considering variations in the instrumentalist approach it is useful to sum up the basic points of agreement among instrumentalist jurists. The basic sources of constitutional meaning were summarized in a Table appearing at § 5.1. A further elaboration of this Table appeared at Table 6.4.1. Using these Tables as a backdrop, the following Table 11.3 summarizes the basic instrumentalist approach with respect to each source of constitutional meaning.

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Entries listed in boldface in Table 11.3 represent the sources most utilized by instrumentalist jurists, that is, those sources given great weight by instrumentalists. Entries listed in italics represent other sources instrumentalist jurists will use, but these sources are typically given lesser weight. Entries underlined represent sources underplayed or of limited use by instrumentalist jurists, that is, sources given only some weight. There are no sources not used, and thus listed with a strike-through mark.

Table 11.3
Instrumentalist Use of Sources of Constitutional Meaning

<table>
<thead>
<tr>
<th>Contemporaneous Sources</th>
<th>More Specific Interpretive Tasks</th>
<th>General Kinds of Reasoning</th>
</tr>
</thead>
<tbody>
<tr>
<td>Text</td>
<td>Literal or Plain Meaning of Text</td>
<td>Purpose or Spirit of Text</td>
</tr>
<tr>
<td>Context</td>
<td>Verbal Maxims</td>
<td>Policy Maxims</td>
</tr>
<tr>
<td>History</td>
<td>Specific Historical Evidence</td>
<td>Structural Arguments</td>
</tr>
<tr>
<td></td>
<td>Specific Historical Intent</td>
<td>General Historical Evidence</td>
</tr>
<tr>
<td></td>
<td>General Historical Intent</td>
<td>Specific Historical Intent</td>
</tr>
<tr>
<td>Subsequent Considerations</td>
<td>Legislative or Executive Practice</td>
<td>Social Practice</td>
</tr>
<tr>
<td>Practice</td>
<td>Core Holdings of Precedent</td>
<td>Reasoned Elaboration of Law</td>
</tr>
<tr>
<td>Precedent</td>
<td>Judicial Restraint Considerations</td>
<td>Other Prudential Concerns</td>
</tr>
<tr>
<td></td>
<td>(1a) Text (prudential principles of standing, ripeness, mootness)</td>
<td>(2) Practice &amp; Precedent;</td>
</tr>
<tr>
<td></td>
<td>(1b) Context/Structure (political questions and Ashwander factors)</td>
<td>(3) Principles of Justice and/or Social Policy</td>
</tr>
<tr>
<td>Prudential Considerations</td>
<td>(1c) Purpose/History (sensitivity to the needs of government)</td>
<td>Embedded in the Law</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(4) Justice and/or Social Policy Not So Embedded</td>
</tr>
</tbody>
</table>

The listing of “literal or plain meaning of text” appears only in italics in Table 11.3, as it was under the Holmesian approach, because of the functional Holmesian and instrumentalist greater reliance on purpose. Indeed, instrumentalist judges may be willing to let an argument of purpose override clear literal text, based in part on the “transformative purpose of the text,” as noted at § 11.2.1.1 n.8. The remaining contemporaneous sources are listed in boldface because of the instrumentalist willingness to rely fully upon general kinds of reasoning, including general historical intent, as well as specific interpretive tasks. As Justice Brennan observed at § 11.2.1.3, footnote 22, "Typically, all that can be gleaned is that the Framers themselves did not agree about the application or meaning of particular constitutional provisions and hid their differences in cloaks of generality.”

The listings for prudential considerations categories (1c) and (3) appear in boldface because of the instrumentalist predisposition for prudential considerations reflective of purpose and policy to determine constitutional meaning where leeways exist in the law, as instrumentalist jurists often believe they do. For moderate instrumentalists, the listing for category (3) of “background principles of justice or social policy” should be in italics. This issue is discussed at § 11.3.2. The prudential categories (1a) & (1b) are listed in italics because those judicial restraint considerations are not relied upon as much by instrumentalist judges, who tend to prefer to reach the merits of cases to do justice.
The listings for “legislative and executive practice” and “social practice,” along with prudential use of “practice,” appear in italics, reflecting significant use by instrumentalist jurists, though not as much as arguments of purpose and policy. The listings for “core holdings of precedent” and “reasoned elaboration of law,” along with prudential use of “precedent,” appear underlined, because of the instrumentalist predisposition to underplay the importance of precedent, discussed at § 11.2.2.2.

There are no entries combined with a strike-through mark to indicate sources never used by instrumentalist jurists. As a theoretical matter, the non-radical instrumentalist position is to reject use of background principles “not so embedded” in the law, as discussed at § 11.2.2.3. For these jurists, the phrase “not so embedded” should be accompanied by a strike-through mark. However, that phrase is underlined in Table 11.3 because some instrumentalist jurists in practice sometimes seem to resort to background principles or policies not embedded in the law to resolve leeways, such as Justice Brennan’s views regarding the death penalty, discussed at § 11.2.2.1 n.25.

As the only judicial decisionmaking style willing in theory to use background social policies embedded in the law to resolve leeways in the law, the instrumentalist approach may call with some regularity for a different result than all the other decisionmaking styles. The cases discussed at § 11.3.2 regarding extreme versus moderate instrumentalism provide examples of this fact.

§ 11.3.2 Extreme versus Moderate Instrumentalism

Since the instrumentalist era began in 1954, there have been 6 extreme instrumentalists on the Court, Chief Justice Warren, and Justices Douglas, Brennan, Goldberg, Fortas, and Marshall; and 4 moderate instrumentalists, Justices Blackmun, Stevens, Ginsburg, and Breyer. Prior to that time, during the Holmesian era, from 1937 to 1954, there were 2 other Justices on the Court who were extreme instrumentalists, Justices Murphy and Rutledge, and 2 moderate instrumentalists, Chief Justice Stone and Justice Cardozo.

The main difference between extreme and moderate instrumentalis ts is the extent to which the judge is willing to use background principles of justice or social policy embedded in the law, or perhaps not so embedded, to trump interpretation gleaned from the other sources of constitutional interpretation: text, context, history, practice, and precedent. Extreme instrumentalists are more willing to resort to such arguments than are moderate instrumentalists. This can be seen from the following four kinds of cases.

The first kind of case involves an instrumentalist precedent whose reasoning is sufficiently extreme that even later moderate instrumentalist judges are prepared to overrule it. The most prominent examples of this phenomenon involve cases decided from 1963-69, when an extreme liberal instrumentalist perspective dominated the Court, that were rejected by later more moderate instrumentalist Justices. For example, in Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., the Court held in 1968 that a large privately-owned shopping center was the equivalent of the company town in Marsh v. Alabama, and thus state action applied, granting

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individuals the right of free speech on shopping center property. The Court reached this conclusion despite the fact that the shopping center was only the equivalent of the business district in *Marsh*. There was no showing in the case that the shopping center had its own residential area, police and fire protection, mail delivery system, or other aspects of a public town that existed in *Marsh*. Thus, despite the fact that background policies in favor of free speech supported the result in *Logan Valley*, arguments of text, context, history, practice, and even the precedent of *Marsh* supported the view that running a privately-owned business establishment is not state action.

In 1976, the Court overruled *Logan Valley* in *Hudgens v. NLRB*. The Court held in *Hudgens* that speakers have no constitutional right of access to privately-owned shopping centers. Only extreme instrumentalists Justices Brennan and Marshall dissented from the Court’s overruling of *Logan Valley* in *Hudgens*. Moderate instrumentalist Justice Blackmun was in the majority; Justice Stevens took no part in the consideration of the case.

Cases involving congressional power under the enforcement provisions of the Civil War amendments provide another example. In 1966, in *Katzenbach v. Morgan*, the Court upheld a provision in the Voting Rights Act of 1965 that abolished a state literacy test on the ground that Congress could have concluded that abolishing the literacy test would be helpful in ensuring equal protection, even though the Court itself had held in *Lassiter v. Northampton County Board* that a similar state literacy test did not violate equal protection. As the *Katzenbach* dissent of Justice Harlan and Stewart stated, by this decision the Court was allowing Congress, not the courts, to decide what was a violation of the Equal Protection Clause.

In 1997, this approach was firmly rejected by the Court in *City of Boerne v. Flores*. Despite the possible policy arguments that it would good for society if Congress had the power to define what constitutes a violation of equal protection, Justice Kennedy explained in *Flores* that Congress' enforcement power under § 5 of the 14th Amendment is only a power, as the text states, to “enforce” violations of the Amendment by the states by preventing or remedying violations. It is not a power to “define” what conduct was a violation of the Amendment. Justice Kennedy said that the line between congressional measures that remedy or prevent unconstitutional actions and measures that make a substantive change is not easy to discern, but that "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."
Moderate instrumentalist Justice Stevens joined this opinion in full. Indeed, even by 1980, a 6-3 Court in *City of Rome v. United States* had narrowed the interpretation of *Katzenbach*, presumably in order to keep Justices Blackmun and Stevens in the majority. Writing for the Court, Justice Marshall said that when exercising its enforcement authority under § 2 of the 15th Amendment, Congress may prohibit state action which is not a violation of the 15th Amendment only if the state action perpetuates the effects of prior discrimination and creates a risk of purposeful discrimination in the future.

A second kind of case involves a decision where no prior instrumentalist precedent is involved, but extreme instrumentalists, such as Justice Douglas, Brennan and Marshall, are on one side of the decision, and moderate instrumentalists, such as Justices Blackmun and Stevens, are on the other side. For example, in *Board of Regents v. Roth*, the question was whether a teacher hired on a one-year probationary contract had a property interest sufficient to require the state university to hold a hearing before declining to renew the teacher's contract. In that case, extreme instrumentalists Justices Douglas, Brennan and Marshall would have found a constitutionally protected property interest, with Justice Marshall writing, “In my view, every citizen who applies for a government job is entitled to it unless the government can establish some reason for denying the employment.”

While such a position might be viewed as sound social policy from a liberal instrumentalist perspective, no argument from text, context, history, practice, or precedent prior to *Roth* would support such an expansive view of government obligation under the Constitution. In contrast, moderate instrumentalist Justice Blackmun joined the majority opinion which held that no property interest existed in re-employment because being hired for a fixed term of one academic year secured “absolutely no possible claim of entitlement to re-employment.”

Cases involving the constitutionality of the death penalty represent a similar kind of case. For most of the 1970s and 1980s, only extreme instrumentalists, such as Justices Brennan and Marshall, viewed the death penalty as unconstitutional in all circumstances, based upon their view of sound social policy. More moderate instrumentalists, such as Justices Blackmun and Stevens, were not willing to allow their own views of sound social policy to trump arguments of text, context, history, practice, precedent, and prudential considerations embedded in the law, which would uphold the death penalty for certain cases of murder. Toward the end of his tenure on the Court, however, Justice Blackmun did adopt the Brennan and Marshall view.

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48 446 U.S. 156, 175-78 (1980).
49 408 U.S. 564 (1972).
50 *Id.* at 588 (Marshall, J., dissenting).
51 *Id.* at 566 (Stewart, J., for the Court, joined, *inter alia*, by Blackmun, J.).
A third example of this difference comes from the cases involving whether certain protections of the Bill of Rights, or other additional aspects of due process of law, are sufficiently fundamental to be incorporated into the 14th Amendment Due Process Clause and applied against the states. As discussed at § 27.2.3, in a number of these cases in the 1940s and 1950s, extreme instrumentalists, such as Justices Douglas, Murphy, and Rutledge, favored incorporation of a wider range of fundamental rights, while moderate instrumentalists, such as Chief Justice Stone and Justices Cardozo and Byrnes, favored a more cautious approach toward incorporation.

A third kind of case involves an extreme instrumentalist precedent being followed by later moderate instrumentalists, but only as to its core holding. Because use of social policy reasoning appears to moderate instrumentalists to be somewhat extreme, but not so extreme as to be overruled, the case is restricted to its core holding. For example, in *Flast v. Cohen*, a 1968 case, the Court found standing for federal taxpayers to raise an Establishment Clause challenge to government spending that reached parochial schools, despite the fact that such generalized grievances are typically not sufficient to grant standing. Later cases, such as *Bowen v. Kendrick*, have limited *Flast* to its core holding by creating a narrow exception to the usual standing rules, available for litigants relying, as taxpayers, on the Establishment Clause to curb federal spending programs.

Despite following the holding of *Flast*, moderate instrumentalists, as well as non-instrumentalists, have not been willing to use *Flast* to let other parties with generalized grievances obtain standing. However, moderate instrumentalist Justices have followed the core holding of *Flast*, and have not looked for creative, but implausible, ways to distinguish the case. An example is *Valley Forge Christian College v. American United for the Separation of Church and State, Inc.* As discussed at § 17.3.1.2.C nn.350-53, the non-instrumentalist Justices on the Court distinguished *Valley Forge* from *Flast* on the ground that *Valley Forge* involved an exercise of appropriating government funds under the Property Clause, rather than the Taxing and Spending Clause. In both cases, however, government funds were being used to support religion. Justice Brennan’s dissent, joined by Justices Marshall and Blackmun, stated that the majority opinion “utterly fails, except by the sheerest form of *ipse dixit*, to explain why this case is unlike *Flast*.” Justice Stevens also dissented in the case.

A fourth kind of case involves instrumentalist-era precedents whose reasoning is perceived by moderate instrumentalists as not so extreme, so that moderate instrumentalists are willing to extend the precedent past its core holding to cover new fact patterns based upon the general reasoning of the precedent and the fact that the social policy is sufficiently embedded in the law that it deserves full consideration. For example, as discussed at § 18.2.4 nn.93-99, *dicta* in some of the instrumentalist-era cases suggested that a finding that the activity being regulated is economic in nature is not required to find congressional power under the Commerce Clause. It would be enough if the activity, whether economic or not, had a significant affects on interstate commerce. These

54 392 U.S. 83, 100 (1968).


57 *Id.* at 491 (Brennan, J., joined by Marshall & Blackmun, JJ., dissenting).
cases did not alter the Commerce Clause test, however, because in each case economic activity was being regulated. For example, the civil rights law in *Heart of Atlanta Motel v. United States* involved the economic transaction of renting a hotel room; the criminal law in *Perez v. United States* involved the economic crime of extortionate credit.58

The case of *United States v. Morrison* raised the economic activity issue. *Morrison* involved the constitutionality of the Violence Against Women Act of 1994 (VAWA). The moderate instrumentalists on the Court, Justices Stevens, Ginsburg, and Breyer, would have upheld congressional power to regulate, based upon the mountain of data assembled by Congress regarding the affects on interstate commerce of violence against women. Under the general reasoning of the instrumentalist-era precedents that would have been enough.59 In contrast, the non-instrumentalist majority replied that it was not enough to find that the cost of crime and work days lost by victims had a substantial affect 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, per Chief Justice Rehnquist, concluded that Congress may not regulate “noneconomic, violent criminal conduct based solely on that conduct’s aggregate affect on interstate commerce,” and that, based upon the core holdings of prior precedents, “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.”60

These non-instrumentalist Justices were willing only to follow the core holdings of *Heart of Atlanta* and *Perez* and uphold congressional power to regulate where economic activity was being regulated.

§ 11.3.3  **Conservative versus Liberal Instrumentalism**

The instrumentalist Justices on the Supreme Court over the last 50 years have all been liberal. Thus, their resort to prudential considerations has reflected a liberal predisposition. As summarized at § 6.4.4, and listed in Table 6.4.2, regarding federalism issues, this has meant a predisposition in favor of federal power, whether under the Commerce Clause, 10th Amendment, 11th Amendment, congressional power to enforce the Civil War Amendments, or other such issues. With regard to the separation of powers, this has meant a predisposition in favor of congressional power at the expense of the executive. As noted at § 21.2.1.2, liberal judges tend to be not as concerned with economic regulations that restrain the power of business, while being more suspicious of regulations curtailing civil rights. As noted at §§ 5.2.2.2.A & 6.2.2.2, for liberal instrumentalists the Court should be the guardian of the unempowered, as they may not be adequately protected by the political process.61

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60  *Id.* at 613, 617-18 (Rehnquist, C.J., for the Court).

It is certainly possible, of course, for an instrumentalist jurist to have a conservative bent. Since conservatives tend to favor tradition and the status quo, and are often more highly represented by the affluent in society to whom the status quo has favored economically, and whose lobbying influence in the legislative and executive branches is thus more potent, it is more likely for a conservative to adopt either the static constitution model of the formalist approach, which favors the status quo; or the deference-to-government model of the Holmesian approach, which favors those with greater lobbying influence; or even the great respect for precedent of natural law, which favors judicial tradition. Nonetheless, a conservative form of instrumentalist judicial activism is a possibility.

The University of Colorado Law Review published a symposium in 2002 entitled, “Conservative Judicial Activism.” Articles in the symposium explored such topics as “Judicial Activism and Conservative Politics” or “Do Liberals and Conservatives Differ in Judicial Activism.” In addition, as noted at § 11.3.4.1 nn.65-66, Judge Richard Posner of the Seventh Circuit Court of Appeals has described his conservative law-and-economics approach as a version of pragmatic instrumentalism. Since 2001, a number of Democrats have questioned whether some of President Bush’s nominations to the federal bench, who they have filibustered, as discussed at § 7.4.2 nn.236-39, were conservative judicial activists willing to legislate from the bench in favor of conservative values, rather than the values in the text, context, history, practice, and precedent of the Constitution or federal statutes.

§ 11.3.4 Other Variations of Instrumentalism

The possible variations of an instrumentalist approach are as numerous as the different possible theories of what constitutes a good society, since different perspectives on what constitutes justice or sound social policy may lead to different instrumentalist decisions if the other sources of interpretation do not provide an unequivocal answer to the issue before the Court. The six approaches discussed below represent a typology of the main schools of contemporary thought regarding theories of how to determine what would constitute a good society. They are divided into the “non-critical” approaches of pragmatism, utilitarianism, and Kantian-based theory, and the “critical” approaches of critical legal studies, feminist theory, and critical race theory.

§ 11.3.4.1 “Non-Critical” Approaches

A. Pragmatism

A workable definition of pragmatism, adopted by Professors Kuklin and Stempel in Foundations of the Law: An Interdisciplinary Primer, is that the pragmatist believes that “[i]mprovement in the human condition occurs step by step through the implementation, testing, and modification of practical measures, not by grandiose proposals or panaceas.” In the American context, the great 20th


century American pragmatist was John Dewey, who is “[p]erhaps best known for his philosophy of education . . . where citizens can be morally and intellectually prepared and encouraged to openly address the evolving, dynamic developments and inevitable conflicts within modern democratic society.”64 Judge Richard Posner has noted that the pragmatic judge “wants to come up with the best decision having in mind present and future needs, and so does not regard the maintenance of consistency with past decisions as an end in itself but only as a means for bringing about the best result in the present case. [Thus, the main difference between a positivist judge and a pragmatic judge] is that the former is centrally concerned with securing consistency with past enactments, while the latter is concerned with securing consistency with the past only to the extent that such consistency may happen to conduce to producing the best results for the future.”65

There are naturally numerous versions of pragmatism, depending upon how one defines what are the “best results for the future.” On substantive matters, pragmatists can exist from “law and economics” theories on the right;66 to "practical legal studies," whose focus is not on one “right” answer, but on a “supportable” answer that emerges from balancing a number of factors through the common-law judicial decisionmaking process to achieve results which are at the center of American politics,67 to consideration of the "feminine voice" in moral developmental psychology, which leads to results more on the left.68 Plenty of additional versions of pragmatism also exist.69 To support the pragmatic focus on the best results for the future rather than the precedents of the past, leeways in the law can be created under a pragmatist approach by appealing to the "new jurisprudence of interpretation," of which the writings of Professor Stanley Fish and Philosopher Jacques Derrida are leading examples, and which emphasize the indeterminacy of any existing linguistic term.70

B. Utilitarianism

Contrary to the pragmatic focus on practical results rather than “grandiose proposals,” utilitarian theory proposes one grand theory to determine the good. As Professors Kuklin & Stempel noted,

64 Id. at 61-62.


“In seeking the state of affairs in which goodness is maximized, universal utilitarianism typically aims for the greatest good for the greatest number. A state of affairs is better, under this version, when aggregated goodness (often expressed in terms of utility) is increased, even when some individuals suffer losses in order to facilitate greater gains by others.”71

As with pragmatism, there are a number of versions of utilitarian theory. For example, “act utilitarians” theoretically require a calculation of utility for every act in which the individual engages. In contrast, “rule utilitarians” adopt “general rules based on cost-benefit analyses of common situations. Under this latter approach, individual acts must be evaluated only when the particular situation is not routine, . . . or when the circumstances take the case away from the core of the stock situation.”72 In addition to universal utilitarianism, there can also be an “egotistic utilitarianism” where a person strives to increase his or her own good irrespective of its effects on others. Most utilitarians “reject egoism or its apparent implication that the interests of others are to be disregarded. Among other reasons, some have argued that self-interest aligns with benevolence in the long run.”73

Among the complications of utilitarianism are the question of whose satisfactions are to count and whether all satisfactions are to count equally. As Professors Kuklin and Stempel noted:

For instance, the utility of foreigners would seem to have the same intrinsic value as that of neighbors. . . . [U]nder this egalitarian view a person in a prosperous nation should send money to the less fortunate nations until the person’s last dollar brings more satisfaction at home. Everyone world-wide would end up with a low but presumably sufficient standard of living. This has been countered somewhat by the observation that radical egalitarianism has high administrative costs (i.e., the strict taxing and policing systems would be very expensive and invasive of privacy); and would hinder utility by eliminating both the positive incentive effects of wealth accumulation (i.e., people would not bother to work as hard if the earnings go elsewhere) and also the concentrated sources of capital required for industrial development (i.e., the money needed to establish a factory comes from people with wealth to spare.) . . . Finally, there is the problem of interpersonal utility comparisons: when tradeoffs in utility are required, how can one actually determine whether, and by how much, the losses of some persons are offset by the gains of others?74

Under utilitarianism, the ends may justify the means. A utilitarian may treat as unimportant certain moral rights promoted by other theories, such as claims to personal liberty and autonomy. For example, “a judge or prosecutor may property convict a person known by them alone to be innocent of a notorious crime if the benefits derived from increased deterrence and community security and appeasement outweigh the pain of the defendant, her family and supporters. . . . While utilitarians

71 Kuklin & Stempel, supra note 63, at 6 (emphasis omitted).

72 Id. at 7 (emphasis omitted).

73 Id. at 6-7 (emphasis omitted).

74 Id. at 7-8.
have rehabilitated their theories by various strategies and empirical assumptions, including the denial that the probable consequences under these and other problematic hypotheticals would actually increase utility, or a rejection of them as too extreme to be relevant to the daily concerns of moralists, they remain as formidable problems that have driven away many erstwhile supporters.”

The most famous utilitarian to deal with these problems of utilitarianism is the 19th-century Philosopher John Stuart Mill. Professors Kuklin and Stempel noted:

Mill argues in his famed utilitarian defense of the precepts of justice that the means to general utility include the recognition of individual rights because the protection of people’s sentiment of justice is socially expedient. In other words, people will be unhappy if justice does not prevail. . . . In order to promote happiness, individuals must [also] have the right to choose what to believe and how to behave. Under Mill’s still prominent “harm principle,” personal autonomy should be protected so long as it is not exercised in violation of the basic interests of others, for example, of their interests in personal security and property. Autonomy is not to be subordinated to the conventions of the majority. . . . Finally, Mill is a strong advocate of free speech. “[F]reedom of opinion, and freedom of the expression of opinion” is necessary “to the mental well-being of mankind (on which all their other well-being depends).”

In reaching such conclusions, Mill’s actual precepts track closely the principles of justice developed according to the logic of rational thought, discussed at § 16.2, but justified on utilitarian grounds.

C. Kantian Approaches

Immanuel Kant, the 18th-century Prussian philosopher, is the fountainhead of all later Kantian approaches. For Kant, an individual’s character is good when the individual acts for the sake of duty alone and not for other reasons such as generosity, sympathy, or benevolence. As Professors Kuklin and Stempel have noted, “In explicating duty, Kant espoused a universalizability principle, the first form of his famous categorical imperative: one should act pursuant to a maxim that could be willed or chosen as a universal law. . . . Kant argued that in doing one’s duty by acting according to universal rules without special exceptions, the actor essentially embodies or exhibits her essence, her humanness, her authenticity. . . . The second form of Kant’s categorical imperative is that all persons as rational beings with autonomy of the will, are to be treated as ends in themselves, and not as a means only to another’s ends. All humans, as ethical beings, are to be respected.”

A number of variations exists regarding Kantian theory. Reflecting a more liberal perspective, Philosopher John Rawls has taken the position that the “Kantian concerns for equality and personal autonomy can be satisfied . . . by a hypothetical social contract in which all persons decide, as free and rational beings from an initial position of equality, the principles which are to assign basic

75 Id. at 8-9.
76 Id. at 57 (citations omitted).
77 Id. at 9-10.
rights and duties and to determine the division of social benefits.’ . . . Rawls writes that two basic principles of justice would be chosen: first, a principle requiring an equal right to liberty; and second (the ‘difference principle’), a principle allowing social and economic inequalities only when they benefit the least advantaged individual and stem from opportunities that are fairly open to all.”78

Reflecting a more conservative perspective, Philosopher Robert Nozick has taken the position that Kant’s concern for personal autonomy and respect for each individual requires a theory of justice in which “each person has natural property rights in her labor, body, and sentiments, and retains such rights except as one may voluntarily transfer these rights to another by contract, gift, or bequest. Any coercive interference with such rights is immoral, including taxation (‘on a par with forced labor’) for any reason other than very restricted common purposes. In this libertarian scheme, the only justifiably organized government is a minimal state, ‘limited to the narrow functions of protection against force, theft, fraud, enforcement of contracts, and so on.”79

A Kantian approach more centrist in its conclusions has been promoted by Philosopher Ronald Dworkin through his Kantian principle that all persons are entitled to “equal concern and respect.”80 A similar principle was stated by 18th-century philosopher and economist Adam Smith in *The Theory of Moral Sentiments*,81 where he concluded that individuals ought to act according to the logic of an “impartial spectator” who gives equal weight to others’ interests as well as his own. This moral principle, central to a well-formed, modern ethical natural law approach, is discussed at § 16.2.

§ 11.3.4.2 Critical Approaches

In contrast to these “non-critical” approaches to the good, “critical” approaches typically involve a sharper critique of the morality of the existing social order. This critique typically sees societies as reflecting some systemic aspect of domination by the stronger over the weaker members of society. This domination can be reflected through class, gender, or racial domination, among others, leading to three versions of critical approaches: critical legal studies, feminist theory, and critical race theory.

A. Critical Legal Studies (CLS)

In *Foundations of the Law: An Interdisciplinary Primer*, Professors Kuklin and Stempel described the Critical Legal Studies (CLS) movement by noting, “The [existing] system’s shortcomings in the view of CLS scholars include: indeterminacy of legal doctrine; undue mystification of the law to exclude outsiders and enhance the power of lawyers; doctrine and procedure structured to obscure the political aspects of law; [and] protection of the interests of the dominant under the guise of

78 Id. at 62 (citations omitted).

79 Id. at 63 (citations omitted).


81 Adam Smith, The Theory of Moral Sentiments (1759).
neutrality. . . . For example, a CLS article may seek to convince the reader that a supposedly objective legal rule really contains imbedded subjective value choices and that even though the rule appears neutral, it falls more heavily upon society’s disempowered.”82

In addition, Professor Kuklin and Stempel noted, “Because the focus of CLS, as the name implies, is criticism, it is often painted as a purely destructive movement. Others see in CLS criticism a basis for championing reforms directed towards making law less hierarchal, less protective of the current elite, and more capable of promoting a progressive political agenda. For example, CLS writings suggest revising the current structure of representative government, . . . and using law’s status as authority to transform society by moving it away from the goal of wealth maximization and toward the achievement of greater rights for those with lower socioeconomic status.”83 Other summaries of CLS address the perspective of CLS that law is "indeterminate" and thus decisions are always grounded in political choices, which tend "systematically" to embody aspects of class bias.84

In an account specifically directed toward constitutional law, Professor Mark Tushnet observed in Red, White and Blue: A Critical Analysis of Constitutional Law,85 “Whenever someone invokes [one of the non-critical] theoretical positions, we can be sure that he or she is about the explain why the values of a particular elite ought to be imposed on people who are not part of the elite.” Similar to the account here of non-critical positions toward judicial decisionmaking, Professor Tushnet referred to the Jurisprudence of History, the formalist position of focusing on original text and specific historical intent, discussed here at § 9.2.1; the Jurisprudence of Democracy, the Holmesian focus on deference to the government and John Hart Ely’s representation-reinforcing model of judicial review, discussed here at § 10.2.1.2; the Jurisprudence of Philosophy, with its focus on natural law styles of reasoning, discussed here at § 12.2; Antiformalism in Constitutional Theory, with the instrumentalist focus on public values as a critical part of judicial decisionmaking, discussed here at § 11.2.2.3; and Intuitionism and Little Theory, that particular brand of instrumentalism rejecting grandiose theory and adopting the pragmatic focus on “balancing of interests” in case-by-case adjudication, discussed here at § 11.3.4.1.A.86 He also referred to Burkean theory, characterizing it as a form of antiformalism, while the Burkean approach is viewed here as a form of a natural law approach, as noted at § 12.1 and throughout Chapter 12, which is how Edmund Burke would have viewed it.

82 Kuklin & Stempel, supra note 63, at 175.

83 Id. at 175-76.


86 Id. at 21-187.
B. Feminist Theory

As its name implies, feminist theory views law through the lens of gender bias. As Kuklin & Stempel noted, “A major part of the feminist project is to examine and criticize the impact of the law in view of the context and experiences of women. Feminists contend that the legal and political establishments have given short shrift to women’s experiences, which have often been episodes of subjugation, frustration, and denial. The assumed neutral viewpoint of law is one that has generally privileged men and promoted a version of reality that simply is not accurate when applied to women, and often other ‘out groups’ as well.”87

As with the other approaches, there are a number of variations of feminist theory. “Cultural feminists tend to . . . see women’s subordination and difference as an outgrowth of women’s social role, primarily the raising of children and the maintenance of families, including the mediation of intra-familial conflict. . . . To radical feminists, the imperfections and inequality of law flow more from gender hierarchy than gender role and almost certainly not from innate biological or psychological differences. Regardless of their disagreements, radical and cultural feminists argue for greater examination of context, reality, tradition, and hierarchy in the law, rather than swift resort to fixed rules or procedures.”88 Plenty of additional versions of feminist theory also exist.89

C. Critical Race Theory

Critical race theory examines legal issues from the perspective of racial bias. Professors Kuklin and Stempel noted, “The point of the exercise is to illuminate the degree to which the current legal system reflects domination by a white majority.”90 Professor Kimberle Chenshaw notes, “To bring a fundamental challenge to the way things are, whites would have to question . . . both the economic and the racial myths that justify the status quo. . . . [A] challenge to the legitimacy of continued racial inequality would force whites to confront myths about equality of opportunity that justify for them whatever measure of economic success they have attained.”91 Such critical race theory has been done from the perspective not just of African-Americans, but from the perspective of other persons of color as well.92

87 Kuklin & Stempel, supra note 63, at 180.
88 Id. at 181 (emphasis added).
90 Kuklin & Stempel, supra note 63, at 181.
§ 11.4 The Instrumentalist Approach, Combined with Affinity for Another Style

As noted with respect to the other interpretation styles, sometimes a judge may predominantly adopt one interpretation style, but demonstrate an affinity for another style in some cases. As a normative approach, the instrumentalist style agrees with the natural law style that judges must be sensitive in deciding cases to considerations of purpose, practice, and prudential considerations. As summarized at § 12.3.1, the main differences between instrumentalist and natural law jurists in our Nation’s history have involved the natural law rejection of background social policy reasoning in both theory and practice and the natural law greater respect for precedent than the instrumentalist approach.

Because moderate instrumentalist judges will use background social policy arguments less than extreme instrumentalisrs, and all judges, no matter what their interpretation style, will rely on precedents to some extent, there is not a sharp distinction between a moderate instrumentalist judge and a natural law judge in many cases. It thus may be relatively easy for a judge adopting one of these two traditions to evolve into the other interpretive style. Furthermore, since most instrumentalist judges do not acknowledge that they may occasionally resort to background social policies not embedded in the law, as discussed at § 11.2.2.3, speeches or testimony at a confirmation hearing of a moderate instrumentalist judge may sound quite similar to that of a natural law judge.

Justice Blackmun is perhaps the best example of a contemporary judge who began his service on the Court deciding cases more as a natural law judge, but whose decisions reflected an instrumentalist approach later in his career. For example, in 1976, in National League of Cities v. Usery, 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.” This approach is reminiscent of Chief Justice Marshall’s approach in 1824 in Gibbons v. Odgen, where Justice Marshall carved out an area for state sovereignty, but noted that federal power should not be declared unconstitutional unless the activity is “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.”

However, nine years later in 1985, Justice Blackmun abandoned this balancing approach in Garcia v. San Antonio Metropolitan Transit Authority. In Garcia, he joined with liberal instrumentalisrs Justices Brennan, Marshall, and Stevens, and liberal Holmesian Justice White, to overrule National League of Cities in favor of a strong pro-federal power decision. In 1992, Justice Blackmun also


93 426 U.S. 833, 856 (1976) (Blackmun, J., concurring).

94 22 U.S. (9 Wheat.) 1, 195 (1824) (Marshall, C.J., for the Court).

95 469 U.S. 528, 530 (1985) (Blackmun, J., for the Court).

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joined Justices Stevens and White in dissent in *New York v. United States*, rejecting a balanced approach towards state sovereignty as to matters of federal “commandeering” of state legislatures, refusing to join the majority opinion that included Justices O’Connor, Kennedy, and Souter.

Justice Blackmun’s decisions in state action cases reveal the same trend. During the 1970s, Justice Blackmun joined a number of non-instrumentalist majority opinions which refused to find state action despite the state’s granting a liquor license to a private restaurant, state regulation of a private utility, or state statutory support for a “self-help” remedy in the context of a private creditor/debtor dispute. In each of these cases instrumentalist Justices Douglas (and later Stevens), Brennan, and Marshall dissented. During the 1980s and 1990s, however, Justice Blackmun became a predictable moderate instrumentalist vote on state action issues, joining Justice Stevens, along with liberal Holmesian Justice White, in the majority finding state action in a number of close cases. Justice Blackmun also joined Justices Stevens and White in the majority finding no state action in cases where only extreme instrumentalist Justices Brennan and Marshall were in dissent.

With regard to statements made at confirmation hearings, a number of recent Justices have made statements at their confirmation hearings that seemed to reflect a natural law model of interpretation. Once on the Court, however, their decisions have leaned more in the instrumentalist direction. For example, at her confirmation hearing, Justice Ginsburg emphasized that “one of the most sacred duties of a judge is not to read her convictions into the Constitution.” In his opening remarks, Justice Breyer suggested aspects of the natural law balance between text and purpose, stating, “That vast array of Constitution, statutes, rules, regulations, practice, procedures – that huge vast web – has a single basic purpose [to help individuals] live together productively, harmoniously, and in freedom. Keeping that ultimate purpose in mind helps guide a judge. . . . I will try to interpret the law carefully in accordance with its basic purposes. . . . I will do my utmost to see that [my] decisions reflect both the letter and spirit of a law that is meant to help [individuals].”

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96 505 U.S. 144, 188 (1992) (White, J., joined by Blackmun & Stevens, JJ., concurring in part and dissenting in part).


101 Excerpts from Senate Hearings on Supreme Court Nominee, N.Y. Times, July 13, 1994, at A8.
In his confirmation hearing, Justice Breyer also reflected the natural law respect for history, practice, precedent, and prudential considerations. Concerning “liberty” in the Due Process Clause, Justice Breyer noted that in addition to text, “One goes back to history and the values the framers enunciated. One looks to history and tradition, and one looks to the precedents that have emerged over time. One looks as well to what life is like at the present as well as in the past. And one tries to use a bit of understanding as to what a holding one way or the other will mean for the future.”

Once on the Court, however, Justice Ginsburg and Breyer have been associated most often with Justice Stevens, forming a relatively reliable moderately liberal block. A good summary of Justice Ginsburg’s liberal instrumentalist views appears in an article introducing her prior to her giving a speech. The moderate, liberal instrumentalist style of Justice Breyer, with some leanings in the direction of natural law, and for some affinity also for a liberal Holmesian approach, as noted below, was foreshadowed in Justice Breyer’s comments at his confirmation hearing. At that time, he stated, “[The Supreme Court] works within a grand tradition that has made meaningful in practice the guarantees of fairness and freedom that the Constitution provides. Justice Blackmun certainly served that tradition well. Indeed, so have . . . all of those who have served in the recent past: Justice White, Justice Brennan, and Justice Marshall.”

Justice Breyer’s instrumentalist views also appear in his 2005 book, Active Liberty: Interpreting Our Democratic Constitution, where he supports interpretation based on language, purpose, history, tradition, precedent, and prudential consequences. With its focus on judicial interpretation helping to promote participatory democracy, this approach is a version of an instrumentalist “deliberate democracy” theory, discussed at § 15.4.3 nn.92-96. Some commentators have suggested that Justice Souter testified at his confirmation hearing in non-instrumentalist terms, but has decided cases once on the bench as a liberal instrumentalist. As discussed at § 12.4.3, Justice Souter is probably best viewed as a centrist natural law judge, with an occasional affinity for instrumentalism, but not predominantly an instrumentalist judge.

As suggested above, it is possible for an instrumentalist judge to have an affinity for the Holmesian style of interpretation. Both involve functional approaches toward law. Given the liberal instrumentalist predisposition to favor the legislative branch in separation of powers cases, a liberal instrumentalist with Holmesian leanings may be as willing to defer to government decisions in the

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102 Excerpts from Hearing on Breyer Nomination to High Court, N.Y. Times, July 14, 1994, at D22.


105 Excerpts from Senate Hearings on Supreme Court Nominee, N.Y. Times, July 13, 1994, at A8.

context of some legislative policy judgment or administrative agency judgment made pursuant to legislatively delegated powers, as would a liberal Holmesian judge. For example, Justice Breyer dissented in United States v. Playboy Entertainment Group, Inc.\textsuperscript{107} discussed at § 30.1.4.2 nn.132-33. In this case, the majority opinion, joined by Justice Stevens and Ginsburg, ruled invalid a government regulation banning cable operators from showing sexually-oriented programming unless the programming is fully blocked or shown only when children are not likely to be in the audience. The majority concluded that the regulation was invalid because the government had not shown that the alternative of allowing customers to have their transmissions blocked would be an ineffective alternative. The dissent, written by Justice Breyer, agreed with the government’s statement of facts that the blocking alternative would not be effective because of the difficulty in notifying parents of their rights and because of problems with the blocking technology.

In a number of other cases, Justice Breyer has similarly deferred to government policy in cases where Justices Stevens and Ginsburg were not willing to so defer. For example, Justice Breyer joined the majority opinion in Florida Bar v. Went for It, Inc.\textsuperscript{108} a case involving attorney advertising. In this case, Justice O’Connor applied the standard intermediate scrutiny commercial speech test of Central Hudson Gas & Electric Corp. v. Public Service Commission, discussed at § 30.3.2 nn.228-30, in a very deferential way to uphold a government regulation of attorney advertising. Justices Kennedy, joined by Justices Stevens, Souter, and Ginsburg dissented in the case. In Sims v. Apfel,\textsuperscript{109} a majority of Justices Stevens, O’Connor, Souter, Thomas and Ginsburg held that a social security claimant does not waive judicial review of an issue even though the claimant fails to exhaust that issue by presenting it to the Social Security Appeals Council for review. Justice Breyer, authoring a 4-Justice dissent, would have held for a waiver, supporting the government’s position in the case.

It is also possible for an instrumentalist judge to have formalist leanings in some cases. For example, legal philosopher H.L.A. Hart’s theory of statutory interpretation adopted the instrumentalism of the Legal Process School, discussed at § 3.3 nn.63-64, if the statute’s text was ambiguous. If the text was unambiguous, Hart downplayed arguments of purpose in favor of plain meaning formalism.\textsuperscript{110} Similarly, for constitutional interpretation, it would be possible for a judge to be an instrumentalist most of the time, but a formalist for provisions of the Constitution that were viewed as having a plain meaning. As discussed at § 9.4, Justice Black is perhaps best viewed as predominately a formalist, with instrumentalist leanings. A judge with slightly greater judicial activist tendencies could be an instrumentalist with formalist leanings. Indeed, given Justice

\textsuperscript{107} 529 U.S. 803, 816 (2000); id. at 843-45 (Breyer, J., joined by Rehnquist, C.J., and O’Connor & Scalia, JJ., dissenting).

\textsuperscript{108} 515 U.S. 618, 623-35 (1995); id. at 635 (Kennedy, J., joined by Stevens, Souter & Ginsburg, JJ., dissenting).

\textsuperscript{109} 530 U.S. 103 (2000); id. at 114-19 (Breyer, J., joined by Rehnquist, C.J., and Scalia & Kennedy, JJ., dissenting).

Harlan’s criticism of Justice Black in *Griswold*, discussed at § 9.4 n.92, Harlan might have viewed Black in exactly that way.
CHAPTER 12: NATURAL LAW CONSTITUTIONAL INTERPRETATION

§ 12.1 Introduction to Natural Law Decisionmaking

As discussed at § 3.4, the natural law approach agrees with the formalist approach that law ultimately should be able to be expressed as a system of logically related, universally valid rules. Thus, law is not just a means to the end of some social value, regardless of what that does to the symmetry of rules. On the other hand, natural law theorists disagree with the positivist conclusion of the formalists and Holmesian judges that law and morals are separable, believing instead that judges should be sensitive to how the law advances standards of natural justice. Under this approach, which predominated during the 18th century and early-to-middle 19th century, as discussed at § 8.4.1 nn.62-111, a judge should pay attention to such principles as reasoned elaboration of the law in light of the law's history and purposes (its "mischief to be remedied"), fidelity to a considered and consistent legislative, executive or social practice, and, most importantly, fidelity to precedent.

This natural law approach toward purpose, history, practice, and precedent was summed up by James Madison discussing constitutional interpretation. It has been noted, "[A]mong the obvious and just guides to [interpreting] the Constitution, Madison listed: '1. The evils and defects for which the Constitution was called for & introduced. 2. The comments prevailing at the time it was adopted. 3. The 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.'"1

A more complete elaboration of this style of interpretation appears in Justice Joseph Story’s Commentaries on the Constitution of the United States.2 Building on Madison's insights, who had nominated him to the Supreme Court, Justice Story discussed the natural law approach toward separation of powers and federalism, embracing sharing of powers, checks and balances, and the need for a strong federal government. He also indicated an abiding faith in the Anglo-American common law system and its preference for clearly defined legal tests, coherence and consistency in legal categories, and deciding cases on narrower grounds where possible. His faith in the common law also meant he was suspicious of the 19th-century legislative codification movement. It has been noted, "Among the American lawyers and judges of [the early 19th century], Justice Story stands out as possibly the most learned and influential defender of the natural law tradition. To Story it was imperative that American lawyers understand natural law in interpreting and applying the principles of the Constitution and the common law. Being 'a philosophy of morals', natural law was to Story the substratum of the legal system, resting 'at the foundation of all other laws.'"3

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2 See Joseph Story, Commentaries on the Constitution of the United States (1833).

As discussed at § 8.4.1, in general there were two competing natural law approaches in the 18th century to which the framers and ratifiers would have turned for guidance. One approach was the classic/Christian natural law tradition that developed from Aristotle, through Aquinas, and affected such writers as Blackstone and the mature Edmund Burke. The second natural law tradition of the 18th century was the Enlightenment natural rights tradition of the English, Scottish, and French Enlightenments. As discussed at §§ 8.4.1 & 12.3.3, while there are a number of differences between these two traditions, both the classic/Christian and Enlightenment natural law traditions share many aspects of the common-law methodology of judicial decisionmaking. Thus, any differences between natural law and natural rights generally, or between any particular version of natural law or natural rights, is not critical in terms of general interpretive methodology.  

Professor Ernest Young discussed many of the similarities between Burkean and Enlightenment natural law decisionmaking in an article entitled, Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation. He noted that the 18th- and 19th-century natural law judicial decisionmaking tradition utilized a wide range of arguments regarding constitutional interpretation, including consideration of constitutional text and purpose, constitutional structure, the history of the framing and ratifying period, judicial precedents, and legislative and executive practice under the Constitution. As discussed at §§ 12.2.2.1-12.2.2.2, under a natural law approach arguments of practice and precedent are held to constitute a gloss on meaning that alters what the Constitution means, consistent with a “living” model of constitutional interpretation.

The basic elements of the natural law approach are discussed at § 12.2. This natural law approach was the predominant approach to interpretation at our Nation’s founding, and was adhered to by such notable early Justices as Chief Justice Marshall and Justice Story. In the 20th century, as discussed at §§ 12.3-12.4, a few Justices on the Court have similarly approached constitutional interpretation from this natural law perspective: Justices Powell, O’Connor, Kennedy, and Souter. Among these Justices, there are variations concerning the extent of the Justice’s commitment to the natural law emphasis on precedent, discussed at § 12.3.2. There are also variations in terms of which 18th-century natural law theory the judge mostly believes the framers and ratifiers adopted, classic/Christian natural law or Enlightenment natural law, discussed at § 12.3.3.

Finally, as exists with respect to each style of interpretation, a judge who predominately follows one style of interpretation may have an affinity for another style. As discussed at § 12.4, Justice Kennedy occasionally demonstrates an affinity for a formalist interpretation style. Justice O’Connor

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4 See generally Symposium: Natural Law v. Natural Rights: What Are They? How Do They Differ, 20 Harv. J.L. & Pub. Ply. 627-731 (1997) (Randy Barnett stated that “natural-law ethics instructs us on how to exercise the liberty that is defined and protected by natural rights”; Michael P. Zuckert used “natural law” to refer to the classic/Christian tradition and “natural rights” to refer to the Enlightenment tradition; Douglas Kmiec noted under that either of these views a difference exists between a “natural law originalism” and Justice Scalia’s textualist/formalist “originalism”).

occasionally demonstrated an affinity for the Holmesian style, as, to a limited extent, did Justice Powell. Justice Souter occasionally demonstrates an affinity for instrumentalism.

§ 12.2  Defining the Natural Law Style of Constitutional Interpretation

§ 12.2.1  Treatment of Contemporaneous Sources of Interpretation

§ 12.2.1.1  Treatment of Text

The 18th-century natural law style of interpretation predated Immanuel Kant’s focus on subjective will, discussed at § 6.2.1.1 nn.13-17. Thus, as has been noted, for Chief Justice John Marshall and the founding generation, the "intent" of the Constitution is not the subjective "intent" of the minds of the framers, but rather the "intent" gleaned from applying traditional modes and canons of construction to the document's text. These modes and canons of construction are what define the natural law method of interpretation.6

This natural law decisionmaking style emphasizes the importance of understanding a provision's purpose. As Professor Michael Moore wrote in A Natural Law Theory of Interpretation,7 "Once a judge determines the ordinary meaning of the words that make up a text and modifies that ordinary meaning with any statutory definitions or case law developments, there is still at least one more task. A judge must check the provisional interpretation from these ingredients with an idea how well such an interpretation serves the purpose of the rule in question. The necessity for asking this question of purpose Lon Fuller made familiar to us in his famous 1958 debate with H.L.A. Hart."

The rules of interpretation ordinarily followed in the 18th century and early 19th century reflected this approach. As Professor William Crosskey wrote about interpretation in the 18th century, "[T]he over-all purpose of a document was stated carefully in general terms; details were put in, only where, for some particular reason, details seem required; and the rest was left to the rules of interpretation customarily followed by the courts."8 This focus on a provision's purpose was most famously stated in "The Rule of Heydon's Case" in 1584. In Heydon's Case,9 Lord Coke stated that a judge should inquire into the "mischief and defect" that the drafter was seeking to remedy and "the

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6 See Leslie F. Goldstein, In Defense of Text 7-33 (1991); Young, supra note 5, at 688-706; H. Jefferson Powell, The Original Understanding of Original Intent, 98 Harv. L. Rev. 885, 887-902 (1985) (reviewing various judicial methods concerning intent, and arguing that the framers and ratifiers did not expect the Constitution to be interpreted according to their personal intentions).


8 William Crosskey, Politics and the Constitution 363 (1953). The full passage from which this excerpt is taken appears at § 6.1.2.2 n.32. See also Louis J. Sirico, Jr., Original Intent in the First Congress, 71 Mo. L. Rev. 687 (2006) (First Congress focused on framers and ratifiers’ general purposes in adopting constitutional text, not specific plain meaning).

9 76 Eng. Rptr. 637, 638 (1584).
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."

The Supreme Court addressed this approach toward interpretation in a number of early 19th-century cases. For example, in *McCulloch v. Maryland*, Chief Justice Marshall stated, "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. . . . 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."

Similarly, Justice Story stated in *Martin v. Hunter's Lessee*, "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." Justice Story’s support for purposive interpretation is also noted at § 6.2.1.2 nn.33-35.

Following a natural law approach, the Court also relied in *Gibbons v. Ogden* on the purposes behind the Commerce Clause. The Court stated, "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."

This approach can be contrasted with the formalist, Holmesian, and instrumentalist styles of interpretation. As many commentators have noted, a formalist approach typically focuses on textual plain meaning devoid of purposive analysis, unless the plain meaning of text is determined to be ambiguous or absurd. In contrast, the natural law style of interpretation is always willing to utilize both the plain meaning (or letter) of a constitutional provision and the provision's purpose (or spirit)

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11  14 U.S. (1 Wheat.) 304, 326 (1816).
12  22 U.S. (9 Wheat.) 1, 192 (1824).
to help determine constitutional meaning.\textsuperscript{14} For the functional Holmesian or instrumentalist approaches, the purpose of text is given greater weight than the text's literal meaning. As Justice Holmes phrased it in \textit{United States v. Whitridge},\textsuperscript{15} “[T]he general purpose is a more important aid to the meaning than any rule which grammar or formal logic may lay down.” In contrast, under the natural law approach, while the "reason and spirit" of the law can be crucial "where words are dubious," appropriate weight must be given to the plain meaning of words used in a text. As noted at § 6.2.1.2 n.32, the "reason and spirit [of a law]; or the cause which moved the legislator to enact it" – it is, says Blackstone, "the most universal and effectual way of discovering the true meaning of a law, when the words are dubious."\textsuperscript{16} However, if the words are not “dubious,” the words themselves, and not the law's reason or spirit, is the most “effectual way” to determine meaning. Of course, as noted at §§ 6.2.1.2 nn.36-38, if the literal meaning of the text is clear, then even under a Holmesian approach arguments of purpose will not be used to override that literal meaning, even though arguments of purpose are given greater weight by Holmesian judges than by natural law judges in the initial determination of the text’s meaning, as noted at § 10.2.1.1 nn.6-9. For an instrumentalist approach, the purpose of the text may override the text’s literal meaning since “[i]nterpretation must account for the transformative purpose of the text,” as noted at § 11.2.1.1 n.8.

Chief Justice John Marshall's statutory interpretation opinions are instructive regarding the natural law approach to text and purpose. Chief Justice Marshall stated in \textit{United States v. Wiltberger},\textsuperscript{17} "The case must be a strong one indeed, which would justify a court in departing from the plain meaning of words . . . in search of an intention which the words themselves did not suggest." At the same time, Chief Justice Marshall noted in \textit{Schooner Paulina's Cargo v. United States}\textsuperscript{18} that "literal construction" of a statute is but a part of determining the statute's "real meaning," and that meaning is also derived from legislative purpose and interpreting words in other parts of the statute.

\section*{§ 12.2.1.2 \hspace{1em} Treatment of Context}

The next question to ask concerns the role of context in constitutional interpretation, and the interplay among text, purpose, and context. As Justice Story noted in 1833 in \textit{Commentaries on the Constitution of the United States},\textsuperscript{19} "In construing the constitution of the United States, we are, in the first instance, to consider, what are its nature and objects, its scope and design, as apparent from the structure of the instrument, viewed as a whole, and also viewed in its component parts."

\textsuperscript{14} See Goldstein, supra note 6, at 8-12; Moore, supra note 7, at 383-84; Powell, supra note 6, at 894-902; Hans W. Baade, "Original Intent” in Historical Perspective: Some Critical Gloses, 69 Tex. L. Rev. 1001, 1034-35 (1991).

\textsuperscript{15} 197 U.S. 135, 143 (1905), discussed § 10.2.1.1.

\textsuperscript{16} William Crosskey, Politics and the Constitution 366 (1953).

\textsuperscript{17} 18 U.S. (5 Wheat.) 76, 995-96 (1820).

\textsuperscript{18} 11 U.S. (7 Cranch) 52, 64-68 (1812).

\textsuperscript{19} Story, supra note 2, at § 405.
With regard to the elements of structure – issues of separation of powers, federalism, and the proper role for the courts – the 18th-century natural law approach embraced a sharing of powers, checks and balances approach toward separation of powers; a balanced approach toward federal versus state governmental power, which nonetheless acknowledged the need for a strong federal government; and a view that the role of the courts was to hold governmental actions unconstitutional if, on balance, the government violated constitutional limitations.

As Justices O’Connor and Kennedy have noted, their approach does not adopt the static view of the Constitution propounded by formalist judges. Thus, regarding federalism issues, “The Federal Government undertakes activities today that would have been unimaginable to the Framers in two senses: first, because the Framers would not have conceived that any government would conduct such activities; and second, because the Framers would not have believed that the Federal Government, rather than the States, would assume such responsibilities. Yet the powers conferred on the Federal Government by the Constitution were phrased in language broad enough to allow for the expansion of the Federal Government’s role.”

Reflecting a balanced approach between federal and state governmental power, Justice Kennedy discussed in his concurrence in *U.S. Term Limits, Inc. v. Thornton* that the framers and ratifiers adopted a dual theory of sovereignty, “establishing two orders of government, each with its own direct relationship, its own privity, and its own set of mutual rights and obligations to the people who sustain it and are governed by it.” Justice Kennedy added that this theory was embraced by the Court in 1819 in *McCulloch v. Maryland*. Commentators from the conservative Holmesian perspective have criticized Justice Kennedy on the grounds that this theory of federalism is not as deferential to state governments as Chief Justice Rehnquist’s approach. Consistent with her occasional affinity for conservative Holmesian interpretations, discussed at § 12.4.2, Justice O’Connor joined Chief Justice Rehnquist in dissent in *Thornton*, along with conservative, and thus states’-rights oriented, formalists, Justices Scalia and Thomas. Federalism issues are considered in Chapter 18.

The natural law approach to separation of powers was stated by Justice Story in 1833. He said, “[Separation of powers] is not meant to affirm, that [the three branches] 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. . . . ; and, as 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.” Separation of powers and checks and balances issues are discussed in Chapters 19 & 20.

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23 Story, *supra* note 2, § 525.
Regarding judicial review, Chief Justice Marshall noted in the famous case of *Marbury v. Madison*, discussed at § 17.1.2.1, that under the American theory of separation of powers, it is the emphatically the province of the judiciary to say “what the law is,” and the Constitution is just as much “law” as statutes or the common law. If two laws conflict, the courts must decide how each operates, and the Constitution is superior to law repugnant to it. Chief Justice Marshall noted that all those who have framed written constitutions contemplate them as forming the paramount law, and thus the courts have a duty to hold governmental actions unconstitutional if, on balance, the courts conclude that the governmental action violates constitutional mandates. 24 This approach reflects an analytic approach to judicial review, similar to the formalist view on the role of the court, discussed at § 9.2.1.2. It rejects the functional views of the Holmesian deference-to-government model of judicial review, discussed at § 10.2.1.2, or the functional instrumentalist role of the court to provide special protection for the unempowered in society, discussed at § 11.2.1.2.

§ 12.2.1.3  Treatment of History

With regard to history, a natural law approach is willing to examine historical sources to help determine a provision's purpose because a natural law approach is sensitive to a provision's purpose. However, as noted at § 6.2.3.1, the prevailing mode of interpretation in the United States and England in the late 18th and early 19th century took the view that it was improper to consider the legislative history of a provision to help determine a provision's meaning. Thus, notes of the Constitutional Convention, or statements made on the floor of the House and Senate during consideration of the first 10 amendments, were not proper to consider, while contemporaneous statements about the meaning of the Constitution that were not part of the formal legislative history, but were part of the public dialogue prior to ratification, like *The Federalist Papers*, were proper to consider. This limitation gradually died out during the 19th century in America. 25

Because this limitation died out in America, Notes of the Constitutional Convention, or House or Senate statements about constitutional amendments, became proper to use as history to determine the framers and ratifiers' intent during the second half of the 19th century. 26 Early natural law opinions are thus more "textualist" than later natural law opinions, which involve more historical "originalism." 27 Given this evolution concerning the appropriate use of constitutional or legislative history to determine the framers and ratifier's intent, the disagreements among commentators over court use of such material in the 18th century and the post-revolutionary war period, discussed at § 6.2.3.1, are of historical interest, but no real jurisprudential interest. All commentators agree that during the 19th century the history surrounding adoption of the Constitution and later constitutional amendments became appropriate to use as an aid in determining the framers and ratifiers' intent.

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24  *Marbury v. Madison*, 1 Cranch 137, 177-78 (1803).

25  *See* § 6.2.1.3; *Baade*, *supra* note 14, at 1043-62.

26  *See* *Baade*, *supra* note 14, at 1043-62.

27  *See, e.g.*, Daniel A. Farber, William N. Eskridge, Jr. & Phillip Frickey, Themes for the Constitution’s Third Century 77-78 (1st ed. 1993) (discussing the early "textualist" nature of Chief Justice Marshall's Supreme Court opinions).

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So understood, the Plain Meaning Rule, noted § 9.2.1.2 n.21, coupled with a willingness to use related provisions (texts in pari materia), as well as a willingness to use both verbal and policy canons of construction, is virtually identical with the “textualist” natural law approach to interpretation discussed here. Both involve full consideration of context, both permit analysis of drafters’ purposes to determine intent as long as the purposes are derived from considering the document itself, and both reject use of intrinsic material, such as legislative history or Notes of the Constitutional Convention, to determine a text's plain meaning. Perhaps the only main difference would be that the “textualist” natural law approach would phrase the weight given to a text's plain meaning as a "plain meaning presumption" rather than a more rigid "plain meaning rule." Professor Reed Dickerson noted, "At best, there should be no plain meaning 'rule', only a plain meaning 'presumption.' It may also be true that much of the judicial talk about 'plain meaning' is only a device for assigning the burden of persuasion as between parties contending over the meaning of a [text]."  

For example, some of Chief Justice Marshall's statutory interpretation opinions suggest adoption of a “plain meaning rule.” As stated in United States v. Fisher, 29 "[W]here great inconvenience will result from a particular construction, that construction is to be avoided, unless the meaning of the legislature be plain; in which case it must be obeyed." However, other of Marshall's opinions suggest adoption only of a "plain meaning presumption." As stated in United States v. Wiltberger, 30 "The case must be a strong one indeed, which would justify a court in departing from the plain meaning of words . . . in search of an intention which the words themselves did not suggest." In practice, of course, such a theoretical disagreement may not be very important, since if the "inconvenience" is "great" or "strong" enough, most judges will be tempted to conclude that the statute is not "plain" enough for that meaning to be enforced under either a plain meaning rule or a plain meaning presumption approach.

In any event, the “originalist” natural law approach that emerged during the 19th century rejected any limitation on intrinsic material, such as exists under a formalist approach, as discussed at § 9.2.1.3. This “originalist” natural law approach is willing to consider all sources of history, including Notes of the Constitutional Convention for the original Constitution, or legislative history behind later constitutional amendments, to help determine the meaning of the Constitution. As discussed at § 6.2.3.1, this is the approach toward use of legislative history adopted by all the non-formalist Justices on the Court today in cases involving both statutory and constitutional interpretation.

With regard to whether a natural law judge would focus on the specific examples held by the framers and ratifiers about a provision, or their general concepts, the answer depends in part on the provision. To the extent the provision is "relatively direct, specific, and focused," history may suggest that the framers and ratifiers intended the provision to reflect only detailed, specific choices. If so, judges should remain focused on those choices because by "implementing the intent of the Framers, the Court is supposedly not imposing its own vision of policy, but only requiring current

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28 Reed Dickerson, The Interpretation and Application of Statutes 233 (1975).
29 6 U.S. (2 Cranch) 358, 386 (1805) (Marshall, C.J., for the Court).
majorities to bow to the original deal, to which we have all implicitly consented."31 Of course, even if "some of the Framers addressed specific issues in clear terms, there remains the problem of aggregating individual views into the collective views of a diverse group of individuals. Different Framers may not have agreed with each other on their interpretation of a provision."32 This problem of aggregating individual framers’ intent to determine a fixed meaning is discussed at § 6.2.1.1 nn.2-5. On the other hand, where history suggests instead that the framers and ratifiers embedded in the Constitution broad natural law concepts, like those dealing with the First Amendment, Equal Protection Clause, and Due Process Clause, history may suggest that the framers and ratifiers intended "to provide no hard-and-fast answers . . ., and to let the answers develop over time in common-law fashion," against a general background of principles of justice derived from political and moral philosophy embedded in the law.33

In short, the natural law style of interpretation will consider both the specific intent of the framers and ratifiers about a constitutional provision and any general legal concept used by the framers and ratifiers in constitutional text to help determine constitutional meaning. In contrast, the formalist approach focuses much more on the framers and ratifiers’ specific intent about the provision's meaning, not its general concept.34 As phrased by Professor Leslie Goldstein, "[Chief Justice] Marshall carefully distinguished between the conscious, specific, policy goal that may have motivated a particular constitutional clause, on the one hand, and the broader, more generalized principle, or rule of law, that the clause established, on the other hand. For Marshall, constitutional law consisted of the latter rather than the former. For [formalists] the choice is the reverse."35 This issue of the differences between a "specific intent" approach and a "general concept" approach is discussed at § 5.2.3.3.

A similar point has been noted by Professor Rodney Smith. He stated, "[Formalists, such as Raoul Berger] examine the text, history and structure of the Bill of Rights to ascertain whether those sources resolve specific questions. Not surprisingly, it is exceedingly rare to find that those sources yield specific interpretive answers to specific questions. The framers of the Constitution, the Bill of Rights and the Civil Rights Amendments largely were natural lawyers, who espoused broad principles and often eschewed the call to resolve specific issues in a specific manner within the Constitution."36 Professor Young has noted about Edmund Burke’s theory of interpretation that “[r]ather than attempt to anticipate future problems and needs, the founders of institutions would do

31 Farber, Eskridge & Frickey, supra note 27, at 77-79.
32 Id. at 78.
33 Id. at 78-81.
34 See Baade, supra note 14, at 1034-35; Goldstein, supra note 6, at 8-12; Powell, supra note 6, at 894-902.
35 Goldstein, supra note 6, at 9.
better to lay out broad standards, then let future generations apply them in particular situations as they come up.”

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, "[M]y interpretive position is not one that original intent is controlling, but that original meaning is controlling . . . . [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.” Had some conservative commentators paid closer attention to these words at the time, they would have understood that Justice Souter would interpret the Constitution in a natural law fashion, rather than a formalist, specific historical intent fashion, and would not have been so surprised that his decisionmaking has differed markedly from formalist Justices such as Scalia and Thomas, or Holmesian Justices, like Chief Justice Rehnquist.

The Holmesian model of judicial decisionmaking agrees with the natural law approach that the judge should interpret general constitutional or statutory provisions in light of general concepts embodied in those provisions if history suggests that was the framers and ratifiers' intent, as discussed at § 10.2.1.3. However, the Holmesian and natural law approach to judicial decisionmaking differ in that the natural law approach rejects the strong preference for judicial deference to the legislature typified by the Holmesian approach and reflected in the writings of James Bradley Thayer, discussed at § 10.2.1.2. Further, because the Holmesian approach rejects any notion of natural rights as "naive," discussed at § 3.4 n.92, Holmesian judges are less likely than natural law judges to conclude that the framers and ratifiers intended some concept in the Constitution to reflect an Enlightenment natural law principle. Thus, instead of concluding that the framers and ratifiers expected some concept to evolve over time in response to Enlightenment-style reasoning, Holmesian jurists are more likely to conclude that the framers and ratifiers had a specific meaning in mind which they intended to remain fixed, as discussed at § 10.2.1.3 nn.27-30. Professor Michael Perry has remarked, “Bork and many other enthusiasts of originalism (e.g., former Attorney General Edwin Meese) sometimes seem not to understand that the extent to which the originalist approach to

37 Young, supra note 5, at 665.

38 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.

39 See generally Christopher E. Smith & Kimberly A. Beuger, Clouds in the Crystal Ball: Presidential Expectations and the Unpredictable Behavior of Supreme Court Appointees, 27 Akron L. Rev. 115, 134-35 (1993) (“Thus Souter has disappointed political conservatives, including President Bush, because his judicial conservatism differs from that of Scalia, Thomas, and Rehnquist.”).

40 See generally Young, supra note 5, at 674-81 (discussing Burke's rejection of such a strong model of judicial restraint); Michael Perry, The Constitution in the Courts: Law or Politics? 86-90 (1994) (discussing Thayer's "minimalist" approach toward constitutional interpretation, and its embrace by Justices Holmes and Frankfurter).
constitutional interpretation constrains a judge depends on (what the judge believes to be) the original meaning of the provision: The more specific the original meaning, the greater the constraint; the more general the meaning, the lesser the constraint and the greater the latitude." \(^{41}\) In practice, a predisposition toward specific intent or meaning would track the formalist approach toward specific intent, discussed at § 9.2.1.3.

For example, as noted at § 4.4.1, most modern judges in the natural law judicial decisionmaking tradition view the Establishment Clause as reflecting an Enlightenment-based natural law concept of separation of church and state. As Justice Kennedy stated in *Lee v. Weisman*, \(^{42}\) "[T]he lesson of history that was and is the inspiration for the Establishment Clause [is] the lesson that in the hands of government what might begin as a tolerant expression of religious views may end in a policy to indoctrinate and coerce." Justice Souter, concurring, remarked, "[T]he Framers were vividly familiar with efforts in the Colonies and, later, the States to impose general, nondenominational assessments and other incidents of ostensibly ecumenical establishments," and the Framers intended the Establishment Clause to condemn "all [such] establishments, however nonpreferentialist." \(^{43}\) That concept would counsel a judge to find unconstitutional practices such as officially organized prayer in public schools, despite the fact that such prayer was a specific example thought constitutional by the framers and ratifiers as determined by "historical practices and understandings." \(^{44}\)

### § 12.2.2 Treatment of Subsequent Developments

#### § 12.2.2.1 Legislative, Executive, and Social Practice

The traditional 18th-century mode of interpretation treated a reasoned elaboration of precedents, or repeated legislative or executive practice, as a gloss on meaning. As Professor Jefferson Powell has observed, "[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.'" \(^{45}\) The Burkean approach to interpretation is similar. As Professor Ernest Young has noted, "Burke placed little reliance on the original structure and the theoretical underpinnings of institutions; rather, institutions become effective in meeting the needs of society through a continuing process of adaptation that may or may not be consistent with the original intentions of the founders." \(^{46}\) In 1833, Justice Story similarly supported the practice of drawing inferences from

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\(^{42}\) 505 U.S. 577, 591-92 (1992) (Kennedy, J., for the Court).

\(^{43}\) *Id.* at 615 (Souter, J., joined by Stevens & O'Connor, JJ., concurring).

\(^{44}\) *Id.* at 631-32 (Scalia, J., joined by Rehnquist, C.J., and White & Thomas, JJ., dissenting).


\(^{46}\) Young, *supra* note 5, at 664.
congressional, executive, and state acquiescence in "more than forty years" of "operation" under the Constitution, and from the "practical exposition of the government itself."47

McCulloch v. Maryland provides a good example of this principle at work. As discussed at § 5.3.2.1, based upon legislative and executive practice Madison changed his position between 1791 and 1816 on the constitutionality of Congress incorporating a national bank. The Supreme Court noted this practice, and subsequent judicial practice, stating in McCulloch,48 "The principle now contested was introduced at a very early period of our history, has been recognized by many successive legislatures, and has been acted upon by the judicial department, in cases of peculiar delicacy, as a law of undoubted obligation."

As discussed at § 6.3.1, the Court also paid deference to legislative practice in Martin v. Hunter's Lessee and Gibbons v. Ogden. In Hunter's Lessee,49 the Court stated, "Hence [the Constitution's] 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 mold and model the exercise of its powers, as its own wisdom and the public interests should require." In Gibbons,50 the Court stated, "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."

Because they adopt a normative approach to law, similar to instrumentalist jurists, most natural law jurists will be willing to consider normative considerations from whatever source, including social practice. Thus, in Atkins v. Virginia, discussed at § 6.3.3 nn.124-25, the 6-3 Court majority that considered social practice regarding the death penalty for mentally retarded criminals was composed of the natural law Justices O'Connor, Kennedy, and Souter, as well as the instrumentalist Justices Stevens, Ginsburg, and Breyer. Natural law Justices should be willing to consider even social practice from other countries, not for its social policy value, discussed at § 11.2.2.1, but 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.51 Since many of the framers and ratifiers believed in natural law, as discussed at §§ 8.4.1, 12.3.3 & 24.1, many of the individual rights in the Constitution were likely intended to have such a universal natural law base.

47 Story, supra note 2, § 391, 408.
50 22 U.S. (9 Wheat.) 1, 186-90 (1824).
51 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.)
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 § 17.1.4 nn.68-70. For example, this explains why it was European views against banning homosexual sodomy, rather than views of other nations around the world, that were used by Justice Kennedy in his opinion in *Lawrence v. Texas*, discussed at § 27.3.4.2 nn.259-64.

§ 12.2.2.2 Judicial Precedents

As an analytic approach to interpretation, the natural law approach shares the formalist belief in the importance of following “settled law.” The natural law approach also shares the Holmesian focus on precedents which have engendered “substantial reliance.” For example, in *Adarand Constructors, Inc. v. Pena*, Justice O’Connor defined “settled law” as doctrine part of the "fabric of the law." In overruling *Metro Broadcasting, Inc. v. FCC* in *Adarand*, Justice O’Connor stated:

> It is worth pointing out the difference between the application of stare decisis in this case and in *Planned Parenthood of Southeastern Pa. v. Casey*. *Casey* explained how consideration of stare decisis informs the decision whether to overrule a long-established precedent that has become integrated into the fabric of the law. Overruling precedent of that kind naturally may have consequences for "the ideal of the rule of law." In addition, such precedent is likely to have engendered substantial reliance, as was true in *Casey* itself. . . But in this case . . . we do not face a precedent of that kind, because *Metro Broadcasting* itself departed from our prior cases – and did so quite recently. By refusing to follow *Metro Broadcasting*, then, we do not depart from the fabric of the law; we restore it.53

In their concurrence in *United States v. Lopez*, Justices Kennedy and O'Connor spoke forcefully about the wisdom of following precedents with respect to the Commerce Clause. They noted, "[T]he 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. . . . That fundamental restraint on our power forecloses us from reverting to an understanding of commerce that would serve only an 18th-century economy . . . . 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."

Despite this similarity, the natural law approach differs from both a formalist or Holmesian approach in an important way. Under the natural law approach, a sequence of judicial precedents interpreting a constitutional provision can provide a "gloss" on meaning that can modify the framers and ratifiers' initial specific views. As Professor Powell has noted when discussing the writings of James Madison, under the traditional natural law model, "'usus', the exposition of the Constitution provided by actual governmental practice and judicial precedents could 'settle the meaning and intention of the authors.' Here, too, [Madison] was building on a traditional foundation: the common law had regarded usage as valid evidence of the meaning of ancient instruments, and had regarded judicial

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53 *Id.* at 233-34 (citations omitted).

54 514 U.S. at 1637.
determinations of the meaning even more highly." As Madison himself said in The Federalist Papers No. 37, “All new laws, though penned with the greatest technical skill and passed on the fullest and most mature deliberation, are considered more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications.”

Professor Young made a similar point that Edmund Burke would counsel following a clear, well-established later judicial tradition elaborating the general concept used by the framers and ratifiers in explicit constitutional text, even if it could be shown that the judicial precedents were in contrast to the framers and ratifiers’ original specific views. In contrast, at least one formalist commentator has disagreed with this understanding of a Burkean approach, and has counseled Burkean judges to follow text rather than precedent, both on “original meaning” grounds and on the ground that such an approach best reflects American judicial traditions.

Regarding how precedent gets used, Professor Young noted that Burke would agree with Madison that a “series of particular discussions and adjudications” carries interpretive weight beyond the impact of mere stare decisis. Professor Young stated, "When used as a means of divining the present meaning of a constitutional provision as it has evolved over time, precedent itself functions as a tool of interpretation; rather than offering a reason to adhere to an incorrect interpretation under the doctrine of stare decisis, the force of precedent enters into the initial determination of what the correct interpretation is." In his writing, Professor Dworkin has called this use of precedent the “gravitational force” of precedent, in addition to a precedent’s “enactment force.” In Dworkin’s terminology, the “enactment force” of a precedent focuses on the narrow question of whether to follow an incorrect interpretation under the doctrine of stare decisis based upon practical reasons. Some of these practical reasons are “convenience, reliance on accumulated experience, and the usefulness for planning of being able to predict what a court will decide.” These reasons support the formalist or Holmesian willingness to follow precedents that are settled law or on which substantial reliance exists, because of a concern that the approach follows a “workable prescription for judicial government,” as noted at § 4.3.1 nn.75-77, and elaborated at §§ 9.2.2.2 & 10.2.2.2.

The “gravitational force” of a precedent, however, arises from “the notion of justice that like cases should be treated alike.” This “gravitational force” of a precedent enters into the initial

55  Powell, supra note 6, at 939.

56  See Young, supra note 5, at 664-74.


58  Young, supra note 5, at 691-92.


60  Dworkin, supra note 59, at 1230, citing Greenawalt, supra note 59, at 1008.
interpretation of what the correct interpretation is, as its focus is on “what a chain of precedents requires when properly understood.” This view of reasoned elaboration of the law, where the general reasoning of prior cases exerts an influence on what the doctrine means today, independent of the “enactment force” of the precedent’s core holding, is, according to Dworkin, a “distinctive fact about common law adjudication.” More generally, it is a distinctive fact about constitutional law adjudication when in a common-law mode, as for interpretation of broad concepts placed into the Constitution, where there is a “good deal of the common law type of reasoning in constitutional cases” based on the view that the framers and ratifiers, based on their natural law beliefs, intended “the answers to develop over time in common-law fashion.” As noted at §§ 4.3.1 & 11.2.2.2, while the instrumentalist style of interpretation, as a normative approach to the judicial task, theoretically also embraces this kind of reasoned elaboration of the law, the instrumentalist predisposition to “re-explore” precedent to ensure that the precedent “makes sense” means that instrumentalist judges will give reasoned elaboration of the law very little weight, unless, of course, they substantively agree with the general reasoning in the prior decisions.

Because they were immersed in the Anglo-American system of judicial decisionmaking, the framers and ratifiers’ views concerning text, context, history, practice, and precedent were grounded in the grand traditions of the Anglo-American common law system. This approach, which rejects non-interpretive resort to prudential considerations not embedded in the law, as discussed at § 12.2.2.3, favors principles such as reasoned elaboration of the law, fidelity to precedent, deciding cases on narrower grounds where possible, and deciding most cases only after full briefing and argument. The increased attention since 1986 during the modern natural law era to the principle regarding deciding cases on narrower, more fact-specific grounds, has been called “judicial minimalism” by Professor Cass Sunstein. He has noted that such “minimalism” is most useful in giving flexibility to politically accountable officials in difficult cases at the frontiers of constitutional law where judges would do best to avoid firm rules that they might come to regret.

61 Id. at 1231.

62 Id. at 1230.


64 Farber, Eskridge & Frickey, supra note 27, at 79.

65 See generally Harry W. Jones, Our Uncommon Common Law, 42 Tenn. L. Rev. 443, 450-63 (1975); Charles Fried, The Artificial Reason of the Law, or What Lawyers Know, 60 Tex. L. Rev. 35, 38-49 (1981); Church of the Lukumi Babalu Aye, Inc. v. Hialeah, Fla., 508 U.S. 520, 571-76 (Souter, J., concurring) (discussing deciding cases on narrower grounds, the importance of full briefing and argument, and reasoned and consistent elaboration of the law).

In part, the principle of "reasoned elaboration" includes clearly defined tests that work in practice; coherence and consistency in legal categories; and avoidance of functional balancing tests that are situation-specific and not easily reconcilable with other aspects of legal doctrine, unless contemporaneous sources and subsequent events mandate use of such tests. These notions are implicit in the Payne and Patterson factors, restated in Planned Parenthood v. Casey,67 and discussed at § 7.3.3, for determining when a judge who treats a sequence of precedents as a gloss on meaning, as does a natural law judge, should find the extra impetus to overrule: (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 Constitution; or (5) the precedent raises concerns about a commitment to the "rule of law." As discussed at § 4.3.2 nn.88-89, the Supreme Court has also discussed these same factors in the context of statutory interpretation.68 Reasoned elaboration of the law would also include, in some version, commitment to developing the law according to "neutral principles," as discussed at § 3.4 nn.93-106.69

Although sometimes cited by judges from other decisionmaking styles, these factors are the special province of natural law judges. Most of these factors were discussed in the joint opinion of Justices O'Connor, Kennedy, and Souter in Casey.70 In contrast, the formalist and Holmesian Justices voted in Casey to overrule Roe based upon their conclusions that Roe was wrongly decided, that Roe did not represent settled law, and that no substantial reliance argument existed that required Roe to be affirmed. These judges did not engage in any further analysis of identifying any additional special reason that would justify overruling Roe. Because the instrumentalist Justices in Casey agreed with the holding of Roe, the issue of whether to overrule Roe was not a consideration for them.

§ 12.2.2.3 Prudential Considerations

As discussed at § 6.4.2, two approaches could be taken under a natural law approach toward the appropriateness of non-interpretive resort to prudential considerations not embedded in the law. One view is to embrace non-interpretive consideration of principles of justice not embedded in the law. Under this approach, whether or not the framers and ratifiers of the Constitution intended each clause to embody natural law principles, judges should take that view today. Thus, judges should

67 505 U.S. 833, 855-69 (1992) (joint opinion of Justices O'Connor, Kennedy, and Souter). The factors from Payne, Patterson, and Casey are all discussed at § 4.3.2 nn.86-89.

68 See Neal v. United States, 516 U.S. 284, 295-96 (1996) (Kennedy, J., for the Court); Patterson v. McLean Credit Union, 491 U.S. 164, 173-74 (1989) (Kennedy, J., for the Court), discussed § 4.3.2 nn. 88-89.


always read the Constitution's words against the backdrop of natural law theory. This approach would require judges to pay great respect to the ordinary meaning and purpose of the words used in the Constitution. However, under this approach, judges would always be permitted to resort to natural law philosophy in the final instance "so as to check meaning and purpose by an all-things-considered value judgment that acts as a safety-valve against wildly absurd or unjust results."71

In its most extreme form, such an approach to judicial decisionmaking would place judges in the role of Platonic Guardians, deciding constitutional cases in order to promote the judge's natural law vision of the "just state." This extreme form was criticized by Judge Learned Hand in his famous Oliver Wendell Holmes, Jr. Lecture at Harvard in 1958. As Judge Hand stated, "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."72 Most judges and commentators whosubscribe to some version of natural law theory reject this approach. However, some commentators seem to embrace it.73

A second approach, more consistent with the “social contract” natural law approach to judicial decisionmaking dominant during the framing and ratifying of our Constitution, holds that judges should resort to natural law principles in interpreting the Constitution only to the extent that particular clauses of the Constitution were drafted with natural law principles in mind.74 Under this approach, where clear constitutional provisions do not reflect a sound natural law position, as in the case of slavery in the United States before the 13th Amendment, judges should follow the meaning of the Constitution until the natural law position is properly added to the document.75 Of course, as


74 Michael S. Moore, Do We Have An Unwritten Constitution, 63 S. Cal. L. Rev. 107, 133-37 & n.71 (1989). See also Goldstein, supra note 6, at 2-3, 12-33 (discussing Chief Justice John Marshall's natural law theory of interpretation, and distinguishing it from versions of natural law that embrace some form of non-interpretive review). In her discussion, Professor Goldstein discussed an approach she called "Dworkinism," which she defined as “each generation of American judges is to develop new moral-legal principles (based upon the judges’ personal philosophy).” Id. at 3. As discussed, this approach would embrace some form of non-interpretative review, but it is not clear that it represents a faithful account of Dworkin’s approach to constitutional interpretation. His approach is grounded in interpretation of background principles of justice embedded in the law, or as called by Dworkin, “institutional rights.” Dworkin, Hard Cases, 88 Harv. L. Rev. 1057, 1082 (1975). Such an approach reflects a non-interpretive approach toward prudential considerations.

75 See, e.g., Donald M. Roper, In Quest of Judicial Objectivity: The Marshall Court and the Legitimation of Slavery, 21 Stan. L. Rev. 532 (1969). See also Sanford Levinson, Constitutional
discussed at §§ 8.4.1 & 12.3.3, there can be great disagreement about what version of natural law, if any, any particular framer or ratifier believed. Nevertheless, all of these natural law traditions operated within a similar methodology of judicial interpretation, with slight variations. One of these variations would permit judges to resort to constitutional principles outside those stated in the Constitution to the extent that a case can be made that the framers and ratifiers themselves intended judges to resort to natural law principles outside the written text of the Constitution to supplement it. This variation and other variations are discussed at §§ 12.3-12.4. All of these variations, however, agree that the major provisions of the Bill of Rights and the Civil War Amendments were drafted with the belief that the principles they embodied reflected natural law, as discussed at § 24.1.

No Supreme Court Justice in our history has explicitly adopted the "Platonic Guardian" model of judicial decisionmaking, including no Justice who has adopted a natural law judicial decisionmaking style. The closest a sitting Justice may have come to such an approach is Justice Chase's opinion in the classic 1798 case of Calder v. Bull, a view that was rejected by a majority of the Court. Professor Jefferson Powell has noted about the case, “Chase went out of his way to stress that constitutional argument was not limited to interpretation of the constitutional text: ‘I cannot subscribe to the omnipotence of a state legislature, or that it is absolute and without control; although its authority should not be expressly restrained by the Constitution, or fundamental law.”

Even Chase’s opinion, however, is perhaps best understood as an example of the natural law variation noted directly above at § 12.2.2.3 n.76, with Justice Chase resorting only to natural law principles outside the written text of the Constitution that he believed the framers and ratifiers intended judges to adopt. Professor Powell noted, “Chase expressly based this conclusion on the liberal principle that governmental authority is derived from the consent to the social contract, and that consent to certain governmental actions could never be inferred.” More generally, the natural law tradition of our society has followed the Marshall Court's approach to slavery: if the Constitution has clearly adopted an unsound position from the perspective of natural law, it is up

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77 3 U.S. 386, 387-89 (1798) (Chase, J., opinion); id. at 395-401 (opinions of Patterson, Iredell & Cushing, JJ.). The case was argued in the absence of Chief Justice Ellsworth.


79 Id. For state court decisions of the same era that take an approach similar to that of Justice Chase, see Suzanna Sherry, Natural Law in the States, 61 U. Cin. L. Rev. 171, 183-96 (1992).
to legislative action, constitutional amendment, or the people's reserved right of revolution, to correct the problem. It may be remembered that Locke’s view was that government “is established by society, and may therefore be disestablished by it. But who is to judge when the government has betrayed its trust to the extent necessary to justify an act of revolution? Locke answers, 'the people.'"80 Under this view, judges should only enforce the natural law principles placed into the Constitution by the framers and ratifiers, or natural law principles that are part of the background principles of justice embedded in the law, with the people's reserved right of revolution perhaps textually recognized by the reservation of other rights “to the people” in the Ninth Amendment, as discussed at § 24.3 nn.20-21.

Natural law judges who reject non-interpretive review will resort to the other kinds of prudential argumentation: (1) the contemporaneous sources of constitutional text, context, and history, (2) the subsequent event sources of practice and precedent, and (3) the mainstream normative concern with whether the decision would advance a particular background principle of justice that the judge believes is embedded in the law. As discussed at § 3.4 nn.93-106, natural law judges reject use of background social policies, believing that balancing policy arguments is appropriate for the legislative and executive branches of government, not the judicial branch. In applying these principles, natural law judges will consider the consequences of the decision in terms of whether the background principle would be advanced. As Professor Dworkin has noted, natural law reliance on principles, but not policies, is perfectly consistent with considering the consequences of a judicial decision, and that decision’s impact on the advancement of those natural law principles.81

As discussed at § 5.4.2, some examples of “mainstream normative” prudential consideration of background moral principles embedded in the law include Planned Parenthood v. Casey’s language regarding “the heart of liberty”; Weber v. Aetna Casualty & Surety Co.’s language regarding “the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing”; BMW of North America, Inc. v. Gore’s language regarding grossly excessive punitive damage awards reflecting “basic unfairness of depriving citizens of life, liberty, or property, through the application not of law and legal processes, but of arbitrary coercion”; Moore v. City of East Cleveland’s language regarding the “tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children”; Griswold v. Connecticut’s example of “a right of marital privacy”; and, as an early example, Chief Justice John Marshall’s Contracts Clause opinion in 1810 in Fletcher v. Peck, which was based “either by general principles which are common to our free institutions, or by the particular provisions of the Constitution.”

Other background moral principles of the Anglo-American common-law tradition include “no person should be permitted to profit from his own wrong” and “persons should behave reasonably under the circumstances,” as noted at § 4.2.3 n.61. As noted at § 7.2.3 n.67, there is the background moral principle that “arbitrary coercion is wrong.” As noted at § 12.3.3 n.136, there is the background moral principle that “where there is a right, there should be a remedy,” and, as noted

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80 Huntington Cairns, Legal Philosophy from Plato to Hegel 336 (1949), citing John Locke, Second Treatise on Government 240 (1690)

81 Dworkin, supra note 59, at 1204-23.
punishment should be proportionate to the crime. As discussed at § 16.2, the ultimate test of background moral principles in terms of consistency with reason is whether they can be derived from a foundational moral principle of giving each individual “equal concern and respect,” alternatively phrased as “love of neighbor as thyself.”

§ 12.3 Variations in the Natural Law Approach

§ 12.3.1 Summary of the Basic Natural Law Approach

As with the other interpretation styles, before considering variations in the natural law approach it is useful to sum up the basic points of agreement among natural law jurists. The basic sources of constitutional meaning were summarized in a Table appearing at § 5.1. A further elaboration of this Table appeared at Table 6.4.1, which summarized the basic approach of each of the four judicial decisionmaking styles with respect to these basic sources of constitutional meaning. Using these Tables as a backdrop, the following Table 12.3 summarizes the basic natural law approach with respect to each source of constitutional meaning.

Entries listed in boldface in Table 12.3 represent the sources most utilized by natural law jurists, that is, those sources given great weight by natural law judges. Entries listed in italics represent other sources natural law jurists will use, but these sources are typically given lesser weight. Entries underlined in Table 12.3 represent sources underplayed or of limited use by natural law jurists, that is, sources given only some weight. Entries combined with a strike-through mark indicate sources not used by natural law jurists.

Table 12.3
Natural Law Use of Sources of Constitutional Meaning

<table>
<thead>
<tr>
<th>Contemporaneous Sources</th>
<th>More Specific Interpretive Tasks</th>
<th>General Kinds of Reasoning</th>
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<td>Literal or Plain Meaning of Text</td>
<td>Purpose or Spirit of Text</td>
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<td>Verbal Maxims</td>
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<td></td>
<td>Related Provisions</td>
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<td>History</td>
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<td></td>
<td>Specific Historical Intent</td>
<td>Specific Historical Intent</td>
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<tr>
<td></td>
<td>General Historical Intent</td>
<td>General Historical Intent</td>
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<table>
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<tr>
<th>Subsequent Considerations</th>
<th>More Specific Interpretive Tasks</th>
<th>General Kinds of Reasoning</th>
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<td>Practice</td>
<td>Legislative or Executive Practice</td>
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<tr>
<td>Precedent</td>
<td>Core Holdings of Precedent</td>
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</tr>
<tr>
<td>Prudential Considerations</td>
<td>Judicial Restraint Considerations</td>
<td>Other Prudential Concerns</td>
</tr>
<tr>
<td>(1a) Text (e.g., prudential principles of standing, ripeness, mootness)</td>
<td>(2) Practice &amp; Precedent;</td>
<td>(3) Principles of Justice and/or Social Policy Embedded in the Law;</td>
</tr>
<tr>
<td>(1b) Context/Structure (e.g., political questions and Ashwander factors)</td>
<td>(4) Justice and/or Social Policy Not So Embedded;</td>
<td></td>
</tr>
<tr>
<td>(1c) Purpose/History (e.g., sensitivity to the needs of government)</td>
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</tbody>
</table>
In this Table, both listings of “literal or plain meaning of text” and “purpose” are in boldface because the natural law willingness to consider fully both the “literal” meaning of the text and its “purpose.” All listings for “specific historical intent” and “general historical intent” under both categories “specific historical evidence” and “general historical evidence” are in boldface because of the natural law willingness to consider all equally in cases to which they apply. The listings for “core holdings of precedent” appears in boldface because of the strong natural law respect for precedent and an unwillingness to overrule precedent unless some “special additional reason” is present. The listing of “reasoned elaboration of law” also appears in boldface reflecting the natural law respect for “reasoned elaboration of law,” as discussed at § 12.2.2.2. As discussed at § 12.3.2, however, for a moderate natural law jurist, “reasoned elaboration of law” is not given quite the same weight as the “core holdings of precedent,” and thus should appear in italics.

The listings for “legislative and executive practice” and “social practice” appear in italics, rather than underlined, because of the natural law willingness to consider each of these aspects of practice to determine constitutional meaning, though they are not given the same weight as contemporaneous sources or judicial precedents. The listing for background “social policy” appears with a strike-through mark indicating the natural law rejection of courts resorting to background social policy arguments. The listing of prudential considerations “not so embedded” in the law appears with a strike-through mark indicating the “social contract” version of natural law which has been predominant in our Nation’s history. For a natural law jurist following the Platonic Guardian model of interpretation, the listing for “not so embedded” should appear in italics.

In general, the natural law approach, with its focus on text, purpose, and background principles of justice embedded in the law, is an intermediate approach between the positivist focus on text and purpose (formalism and Holmesian, respectively), and a normative focus on both background principles of justice and social policy (instrumentalism). Thus, there are few cases where the natural law approach is alone in dissent. There are many cases, however, where the natural law approach will reach a result similar to one of the other decisionmaking styles, but will do so based upon its own kind of reasoning. This is particularly true given the great natural law respect for precedent not shared by the other decisionmaking styles. Thus, natural law judges are prone to writing concurring opinions, agreeing with the majority’s result, but for slightly different reasons.

Given the balance on the Court as of the 2004 Term between three Holmesian or formalist Justices (Chief Justice Rehnquist and Justices Scalia and Thomas) and three moderate instrumentalists (Justice Stevens, Ginsburg, and Breyer), such a natural law concurrence may well represent the controlling votes in the case. Under the Court’s approach to precedent, as stated in Marks v. United States, when faced with a fragmented Court, and no majority opinion, lower courts should follow as the “controlling rationale” of the case the opinion of those Justices “who concurred in the judgment on the narrowest grounds.” Since 1986, this has often been a natural law opinion. The joint opinion of Justices O’Connor, Kennedy, and Souter in Planned Parenthood v. Caseaisy is a classic example of this phenomenon. Justice Powell’s approach applying strict scrutiny to a race-

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based affirmative action program in *Regents of the University of California v. Bakke*, and then concluding that achieving a diverse student body is a compelling governmental interest, is another such example. In *Grutter v. Bollinger*, the Court concluded that it was unnecessary to decide whether Justice Powell’s opinion in *Bakke* represented the controlling vote for purpose of the *Marks* analysis, since the majority decided on its own to adopt Powell’s *Bakke* analysis anyway.

Further, even when natural law Justices join a majority opinion, they may write a concurring opinion that will suggest to a sophisticated reader of Supreme Court opinions a limitation on the majority’s reasoning that could be a controlling factor in later cases. Justices Kennedy and Souter’s concurrence in *Lujan v. Defenders of Wildlife* in a case involving standing, discussed at § 17.3.1.3.A n.395; Justices O’Connor and Kennedy’s concurrence in *Lopez v. United States* in a case involving Congress’ power under the Commerce Clause, discussed at §§ 12.3.2 nn.89-95 & 18.2.5 n.106; and Justice Kennedy’s concurrence in *Kelo v. New London, Connecticut* in a case involving the Takings Clause, discussed at § 22.2 n.52, are three examples of this kind of concurrence.

§ 12.3.2 Extreme versus Moderate Natural Law

Just as there are extreme and moderate formalists, Holmesians, and instrumentalists, there are extreme and moderate natural law jurists. The main point of difference between an extreme and moderate natural law jurist is the extent to which the jurist emphasizes the natural law great respect for precedent, that respect being the special province of natural law jurists, as discussed at § 12.2.2.2.

It is possible in any case that there will be a tension between what the sources of constitutional law other than precedent suggest the answer should be to a constitutional issue, and what the Supreme Court’s precedents hold. Given the great respect natural law judges pay to precedent, this tension between sources and precedent is the most acute for a natural law judge. This is particularly likely to occur for a precedent whose majority was made up, as discussed at §§ 13.1 & 14.2, of formalist-era Justices (1873-1937), Holmesian-era Justices (1937-54), or instrumentalist-era Justices (1954-86). In such a case, the precedent may not reflect how a natural law judge would interpret the Constitution (the natural law era being 1789-1873), making it more likely that a tension may exist.

The clearest recent examples of this tension between judicial precedents and other sources of constitutional law arose in *United States v. Lopez* and *United States v. Morrison*. As Justices

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Kennedy and O’Connor indicated in their concurrence in *Lopez,* using constitutional law sources other than precedents suggests that Congress overstepped its bounds when it passed the Gun-Free School Zones Act of 1990, relying on the Commerce Clause. Here, “neither the actors nor their conduct has a commercial character, and neither the purposes nor the design of the statute has an evident commercial nexus.” This was further supported by arguments about federalism embedded in the structure of our Constitution, particularly the theory that “two governments accord more liberty than one requires . . . two distinct and discernable lines of political accountability: one between the citizens and the Federal Government; the second between the citizens and the States.” It was also supported by the fact that “education is a traditional concern of the States.”

On the other hand, as Justices Kennedy and O’Connor pointed out, “*Stare decisis* operates with great force in counseling us not to call into question the essential principles now in place respecting the congressional power to regulate transactions of a commercial nature.” Thus, as their concurrence indicated, “deference given to Congress has since been confirmed [and decisions should not be] called into question” when extending the Commerce Clause to uphold civil rights laws with an economic nexus, such as *Katzenbach v. McClung,* which involved banning racial discrimination at public restaurants, or criminal laws with an economic nexus, such as *Perez v. United States,* which involved extortionate credit transactions. Thus, Kennedy and O’Connor “joined the Court’s opinion with . . . observations on what I conceive to be its necessary though limited holding.”

In his dissent in *Lopez,* Justice Souter gave even greater respect to precedent than did Justices O’Connor and Kennedy. Justice Souter observed that for the last 50 years the Court had deferred to rationally based congressional judgments regarding whether Congress was regulating an activity affecting interstate commerce. Applying that deferential standard here would lead to a conclusion that Congress’ exercise of power should be upheld, despite the qualms one might have from text, context, and history arguments alone.

89 514 U.S. at 580 (Kennedy, J., joined by O’Connor, J., concurring).

90 *See id.* at 576, 580.

91 *Id.* at 574.

92 *Id.* at 573-74.


95 *Lopez,* 514 U.S. at 568.

96 *Id.* at 603-04, 608 (Souter, J., dissenting).

97 *Id.* at 604-07, 614-15 (concern about abandoning recent results in Commerce Clause cases).
On balance, one can say that a judge might have an extreme natural law view of precedent or a moderate natural law view. Under the extreme view, the judge treats relatively equally as a “gloss on meaning” the precedent’s “core holding” and any “general reasoning” in the precedent that supported the holding. The judge is predisposed to follow that general reasoning as part of “reasoned elaboration of the law.” A moderate view treats the precedent as a “gloss on meaning,” but primarily to the extent of the precedent’s core holding. It is primarily the core holding, therefore, that has, in Dworkin terminology discussed at § 12.2.2.2, the “gravitational force” of precedent.

In *Lopez*, Justice Souter adopted the extreme natural law view of precedent, following the general reasoning of the instrumentalist-era precedents which gave virtual plenary power to Congress to regulate under the Commerce Clause any activity, whether economic or not, that affects interstate commerce, although all the Commerce Clause cases of the instrumentalist era involved economic activity, as noted at § 18.2.4 nn.93-99. This view is broader than most natural law judges would likely find absent those precedents. For example, while Chief Justice Marshall’s opinion in *Gibbons v. Ogden* gave the federal government wide power to regulate under the Commerce Clause, it is clear that Marshall assumed that there were some activities “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.”98 Because over 40 States already had criminal laws outlawing possession of firearms around schools, including Texas where the case arose,99 *Lopez* was a classic case where no federal “interference” was “necessary.”

Despite this conclusion from *Gibbons v. Ogden*, from an extreme natural law perspective it is appropriate to follow the general reasoning in a later pattern of precedents as part of reasoned elaboration of the law, even if those precedents lead to a different result today than would have been reached 200 years ago. Furthermore, it is appropriate to follow the general reasoning of such precedents even if one disagrees with those precedents’ analysis of text, context, history, and practice, unless one of the five special reasons, noted at §§ 7.3.3 & 12.2.2.2 n.67, suggests that the precedent should be overruled. During his confirmation hearing, Justice Souter indicated that while on the New Hampshire Supreme Court he had voted to uphold precedents with which he disagreed and that the rule that the Court should ordinarily adhere to its precedents “is a bedrock necessity if we are going to have in our judicial systems anything that can be called the rule of law.”100

In contrast to this view, Justices O’Connor and Kennedy held in *Lopez* a moderate natural law view of precedent. Under this view, they were willing to follow only the core holdings of the instrumentalist-era cases, not their general reasoning. Thus, they noted that *Katzenbach v. McClung*, which upheld congressional power to pass civil rights law regarding economic transactions, or

98 22 U.S. (9 Wheat.) 1, 195 (1824).

99 See *Lopez*, 514 U.S. at 551, 581.

Perez, which upheld congressional power over economic criminal activities, were still good law. For cases involving regulation of truly economic activity, Congress still has virtually plenary power to regulate. However, for cases that do not involve regulation of economic activity, Justices O’Connor and Kennedy were unwilling to extend the general reasoning in McClung or Perez to cover the Lopez situation, which involved the non-economic issue of possession of a gun near a school.

The same split between Justice Souter and Justices O’Connor and Kennedy occurred in United States v. Morrison.101 Again, Justice Souter followed the instrumentalist-era precedents’ general reasoning, which permitted Congress to regulate any activity under the Commerce Clause that has a significant affect on interstate commerce. Based upon congressional findings regarding the economic impact of violence against women, Justice Souter supported congressional power to pass the Violence Against Women Act of 1994.102 Once again, Justices O’Connor and Kennedy took a moderate approach to precedent, following the core holdings of the instrumentalist-era cases, which upheld the power of Congress to ban economic criminal activity, as in Perez, but joined the Court’s majority opinion which concluded that regulation of noneconomic, criminal conduct, an issue not directly before the Court in the instrumentalist-era cases, could not be justified under Congress’ Commerce Clause power.103

Even if there had been a case on point, Justices O’Connor and Kennedy probably would have called for that case to be overruled. One ground on which natural law judges will vote to overrule precedent is based on the “special circumstance” that such a case would be “substantially wrong,” a conclusion they have applied most forcefully in cases of structural issues of separation of powers, federalism, checks and balances, and judicial review, as discussed at § 7.3.3.4. For Justices O’Connor and Kennedy, the “Constitution requires a distinction between what is truly national and truly local.”104 These cases are all discussed at §§ 18.2.4-18.2.5.

A similar difference among Justices O’Connor, Kennedy, and Souter has also appeared in cases involving the criminal justice system. Typically, where these three Justices have disagreed in criminal cases, it is because Justice Souter has chosen, as in Lopez and Morrison, to follow the general reasoning of instrumentalist-era precedents, which are more favorable to criminal defendants’ rights. In contrast, Justices O’Connor and Kennedy, while not overruling the core holdings of those cases, have distinguished the prior cases, as in Lopez and Morrison, to and reach a result more consistent with their understanding of constitutional text, context, history, and practice, which is often more favorable to the government. A sampling of these cases are discussed at § 23.2.1.1 nn.95-98 & 23.2.1.2.D nn.147-55.


102 Id. at 634-37 (Souter, J., joined by Stevens, Ginsburg & Breyer, JJ.,dissenting).

103 Id. at 610-11 (Kennedy, J., joined by O’Connor, J., concurring).

104 Id. at 617-18.
§ 12.3.3  Conservative versus Liberal Natural Law

As with the other decisionmaking styles, there can be a difference between a conservative or liberal version of natural law. Assuming the jurist adopts the “social contract” vision of natural law that rejects non-interpretive resort to background principles of justice not embedded in the law, the difference between conservative versus liberal natural law is manifested most in a different view of which natural law tradition most affected the framing and ratifying of the Constitution. Naturally, a judge will view the text, context, and history of the Constitution differently depending upon which natural law tradition the judge believes the framers and ratifiers predominantly held.

As discussed at § 8.4.1, in general there were two competing natural law approaches in the 18th century to which the framers and ratifiers would have turned for guidance. One approach was the classic/Christian natural law tradition that developed from Aristotle, through Aquinas, and affected such writers as Blackstone and the mature Edmund Burke. As described by McClellan, this "older and once dominant traditional natural law, encompassing the classical and Christian tradition, subscribed to the view that a Divine Being, ruler of the universe through an eternal and universal law, is the supreme lawgiver, and that natural law is an emanation of God's reason and will."105 Conservative natural law jurists tend to be drawn to this 18th-century natural law tradition, and thus are more likely to conclude that this approach substantially influenced the framers and ratifiers of the Constitution. Nevertheless, there are some “progressive” religious natural law thinkers who use religious traditions and passages in religious works regarding support and care for the poor and love of all individuals equally to support a progressive view of the principles in that religious tradition.

The second natural law tradition of the 18th century was the Enlightenment tradition of the English, Scottish, and French Enlightenments. Under this approach, rights derive from man and man’s reason. In the Anglo-American context, rights emerge from the common-law process of judicial, legislative, and executive interaction. This is often called the “natural rights” or “common law” approach. According to McClellan, the Enlightenment tradition is "characterized by its rationalism, secularism, and radicalism . . . . Highly individualistic, [this tradition] rejected the divine origin of natural law, exalted the autonomy of human reason, and exhorted the mind of man to look for a law of nature in the secularized state of nature."106 Liberal and centrist natural law jurists tend to be drawn to this 18th-century natural law tradition, and thus are more likely to conclude that this approach substantially influenced the framers and ratifiers of the Constitution. Nevertheless, there are some “libertarian” natural law thinkers who use Locke’s idea that government was formed to protect “life, liberty, and property” as support for a conservative libertarian agenda.

As noted at § 8.4.1 nn.106-11, the classic/Christian and Enlightenment natural law traditions share many aspects of the common-law methodology of judicial decisionmaking. As discussed by Professor Young, the 18th-century and 19th-century natural law judicial decisionmaking tradition utilized a wide range of arguments regarding constitutional interpretation, including consideration

105  McClellan, supra note 3, at 70.

106  Id. at 71. See Suzanna Sherry, The Sleep of Reason, 84 Geo. L.J. 453, 470 (1996) (noting that an “emphasis on reasoned deliberation . . . pervades the thought of the founding generation.”).
of constitutional text and purpose, constitutional structure, the history of the framing and ratifying period, subsequent judicial precedents, and subsequent legislative and executive practice under the Constitution which was held to constitute a gloss on meaning. As Professor Young stated, "The first point is that none of [these] generally accepted modes of constitutional argument are ruled out."  

Professor Young noted that both of these traditions rejected the "formalist" version of original intent represented by Justice Scalia or Raoul Berger, and the judicial restraint "Holmesian" deference of Chief Justice Rehnquist or Judge Robert Bork. So, too, both traditions reject instrumentalist functional focus, limited concern with analytic requirements, and use of social policy considerations. Despite the similarities between the two natural law traditions, and their uniform rejection of formalist, Holmesian, and instrumentalist styles of interpretation, there are differences between the classic/Christian natural law approach to which Burke is related, and the Enlightenment natural rights approach. These differences affect how conservative natural law jurists, who more likely embrace the classic/Christian form of natural law, differ from liberal natural law jurists, who more likely embrace the Enlightenment natural law approach.

As noted at § 8.4.1 nn.85-105, the principal difference between the two traditions concerns which natural law principles are viewed as incorporated into the Constitution. Stated briefly, the Enlightenment project emphasized four central goals of liberalism: "civil peace, material prosperity through economic growth, scientific progress, and rational liberty." In contrast, the natural law principles that flowed from Burke, Blackstone, and others in the 18th-century classic/Christian natural law tradition were more elitist, aristocratic, and conservative. Professor Stephen Presser noted, "The conservatives, as would Burke in 1791, conceived of the state as an organic entity, with hierarchical control, and a single set of correct answers to political problems to be elaborated and pronounced from the top down. Sovereignty in England, in other words, rested not in the people but in the 'holy trinity' of crown, lords, and commons.

This difference is reflected in a second difference between these two natural law traditions. Under the Enlightenment tradition, "The Lockean and Madisonian political and constitutional philosophy of the protection of inalienable human rights must be central to the originalist interpretation of the American constitutional enterprise." Regarding the classic/Christian tradition, Professor Presser noted, "In the Declaration of Independence, of course, natural law was cast in the form of natural

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108 Id. at 625-42, 698-706.
rights to life, liberty, and the pursuit of happiness which governments were formed to perfect, pursuant to Locke's Second Treatise of Government. In the hands of the first federal judges, however, natural law was more about circumscribing the actions of government to protect traditional rights of property and person than it was about the creation of expansive new individual rights. This difference is reflected most prominently in the variations between early Federalist judges, such as Justice Chase, who decided cases more from the classic/Christian natural law tradition, versus Chief Justice Marshall, who decided cases more from the Enlightenment natural law tradition.

As discussed at § 8.4.1 nn.62-84, a third difference concerns whether the framers and ratifiers' views were based more on Enlightenment reasoning and commitment to "rational liberty" and "progressive use" of tradition, or based more on classic/Christian use of custom, tradition, practice, and precedent to limit change in the law, as in Blackstone or Burke. Reflecting the potential difficulty in pigeon-holding any particular jurist in one tradition or the other, Justice Story's natural law philosophy has been described as "two-sided: one half modern in the style of Hobbes, Locke, and even Rousseau; the other half classical and Christian, in the tradition of Cicero, Aquinas, Hooker, and Burke. [Story] seems unaware of the basic conflict between natural law and natural rights."

A fourth difference between the two traditions concerns whether only natural law principles placed into the Constitution by the framers and ratifiers can guide constitutional interpretation, or whether natural law principles outside the Constitution can nevertheless form a backdrop to constitutional interpretation. Because of the Enlightenment concept of the social contract and government deriving its legitimacy from the consent of governed, the Enlightenment tradition is to restrict judges to using natural law principles only to the extent those principles were adopted by the framers and ratifiers. The best evidence for such adoption would be explicit language, like that used in the First Amendment, Due Process Clause, and Equal Protection Clause. However, it is at least possible, consistent with the social contract approach, to argue that the framers and ratifiers themselves intended judges to resort to natural law principles outside the written text of the Constitution, and that this understanding was part of the society's social contract, as noted at § 12.2.2.3 n.76. This social contract approach is embedded, of course, in the Enlightenment view that each generation has a natural right of revolution against unjust regimes. That right is discussed at § 24.3 n.20.

Perhaps because England has no written constitution, or because the classic/Christian tradition assumes that natural law is an emanation of God’s will and reason and is not dependent on a social contract, the classic/Christian tradition, at least as represented by Burke, appears more receptive to the argument that judges may occasionally supplement the natural law principles adopted by the framers and ratifiers with natural law principles derived from other sources, including religious ones.


113 See id. See also Goldstein, supra note 6, at 78-84 (also discussing Justice Chase’s versus Chief Justice Marshall's interpretation theories).

114 James McClellan, Joseph Story's Natural Law Philosophy, 5 Benchmarks 85, 86 (1993).

For example, such an insight, that judges have a pre-existing duty to God, appears to lie behind former Alabama Supreme Court Chief Justice Roy Moore’s justification for his refusal in 2003 to order a Ten Commandments monument to be removed from the Alabama Supreme Court building.

However, as Professor Young noted, Burke’s use of tradition to shape judicial decisionmaking is restricted to “something internal to a tradition,” though perhaps at an “aspirational, highly general” level.116 This position suggests that the Burkean approach, at least as Young envisioned it, agreed with the Enlightenment approach that judges should remain faithful to the moral concepts of the framers and ratifiers elaborated in the traditional common-law methodology. Professor Lee Strong has made the same point that the classic/Christian tradition commits the judge to an “original intent” interpretive methodology,117 although Professor Strong confused the Enlightenment natural right of revolution, § 24.3 n.20, with a “non-originalist” interpretive methodology.

Another variation of the classic/Christian tradition is based on Augustine’s views of man as “fallen from grace,” and thus limited in ability to advance properly principles of “reason” and “love.” Professor Graham Walker has argued that the framing and ratifying generation shared this perspective on law. Professor Walker noted that an individual holding these views would counsel judicial restraint in decisionmaking since “if all interpreters partake of a morally vitiated human nature themselves, then responsible judges will be modest, wary, and self-critical as they interpret the Constitution—especially since their interpretive decisions affect many other people.”

Under any of these versions of what the framers and ratifiers intended, a natural law approach does not commit the judge to the view that the concepts embedded in the Constitution have a static content that, when applied to concrete specific problems, have an unchanging meaning. That would not have been the understanding that any drafter would have had under an Enlightenment, Burkean, or Augustinian view. As Professor David Richards has stated from an Enlightenment perspective, "No great political theory, including Locke's, is the last word on its own best interpretation, and critical advances in political theory may enable us better to understand and interpret the permanent truths implicit in the theory and to distinguish these from its lapsing untruths."119 From a Burkean perspective, Professor Ernest Young noted that “the limits of human rationality require a constitution that can adapt in response to unforeseen difficulties, changed circumstances, and outright mistakes that any human endeavor will inevitably entail.”120 From an Augustinian perspective, Professor Walker noted that constitutional concepts are “timeless principles of human nature and political order,” but, with respect to the framers and ratifiers, “[I]ke any of us, their immediate preferences

116 Young, supra note 5, at 689.


119 Richards, supra note 115, at 13.

120 Young, supra note 5, at 668-69.
were sometimes at odds with, and certainly did not exhaust, their aspirations.”

In short, a person who wishes, consistent with a natural law tradition to apply consistently a general concept in which the individual believes, may have to adjust one or more specific views which currently are not consistent with that general concept. Through this process, a dynamic is created whereby over time more of an individual's specific views will be a reflection of reasoned elaboration of general moral concepts applied to current social realities, rather than specific views merely being the product of the individual's past experiences, unthinking adherence to tradition, idiosyncratic preferences, or prejudice. Under this view, while general concepts embedded in the Constitution do not change, and thus the “living” or “evolving” Constitution is not based even in part on a mere reflection of contemporary social policies, as it is in part for an instrumentalist, our understanding of what those general concepts mean when applied to specific fact situations can change over time. This is similar to the view that the principles in foundational religious documents, like the Bible, do not change, but that our understanding of the content of those principles can change, such as the difference between traditional and progressive religious understandings regarding slavery, anti-Semitism, and whether the earth moves around the sun, discussed at § 16.1.

Further, from a natural law interpretation perspective, the framers and ratifiers would wish later generations to give that concept the more enlightened and progressive reasoning, since they were not putting into the Constitution their own fixed, subjective, specific views about some matter, but rather were placing into the Constitution broad natural law principles whose content they believed was independent of their specific views, and which would better be discovered over time through the application of reason. After all, the framers were not “positivists,” like formalist or Holmesians, who would believe, consistent with “positivism,” discussed at § 2.3-2.4, that their task consisted entirely of placing their fixed preferences into the Constitution. Instead, as responsible believers in natural law, the framers would have been somewhat more humble than those who support a fixed, static Constitution give them credit concerning whether their current reasoning at the time of ratification fully reflected a complete understanding of the natural law principles in which they believed. Of course, an Enlightenment perspective is more likely than a Burkean or Augustinian perspective to embrace fully such an evolved understanding of the general intent lying behind such a natural law concept, since the Burkean perspective is tied more closely to evolution based on traditions, not pure reason, and the Augustinian perspective is also wary of the competencies of human reason, as noted at § 12.3.3 n.118.

Such an evolved understanding of “liberty” and “equality” is discussed at §§ 16.1-16.2. As discussed there, this evolved understanding from both the classic/Christian and Enlightenment traditions ends up at the same point, with a foundational principle of “equal concern and respect” for all individuals, alternatively phrased as “love of neighbor as thyself.” Thus, while the 18th-century classic/Christian and Enlightenment traditions did have some substantive disagreements over the content of natural law, those disagreements gradually tend to disappear over time as each tradition moves into its more evolved understanding of the demands of reason and truth.

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121 Walker, supra note 118, at 154-56.

Justice Souter addressed the point regarding an evolving understanding of principles during his confirmation hearing in 1989. He noted, "Principles don't change but our perceptions of the world around us and the need for those principles do." Justice Kennedy reflected a similar point in 2003 in *Lawrence v. Texas*, which held unconstitutional laws criminalizing consensual sodomy. He noted for the Court, "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 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."

Professor Jefferson Powell has noted that this "progressive" mode of reasoning dependent on judicial "tradition," was shared by James Madison on the Republican side of early American politics, and by Alexander Hamilton and Chief Justice John Marshall on the Federalist side. Although some on the Republican side, including Jefferson, adopted arguments related to a plain meaning approach that viewed "constitutional propositions [as] deductions from static principles" from which "no argument from subsequent precedent, practice, or experience could change," as discussed at § 7.1, that approach to interpretation was rejected by early and continuous Supreme Court practice. Instead, the common-law methodology of Madison, Hamilton, and Marshall won, based on a Constitution "adapted to the various crises in human affairs," as noted at § 4.1 nn.8-12.

From a natural law perspective, rather than a formalist perspective, the critical purpose of a Constitution is not to be “anti-evolutionary,” as Justice Scalia has stated, cited at § 9.2.2.1 n.37, but rather to be “anti-majoritarian.” The point of natural law provisions in 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 Professor Chemerinsky has 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

123  *See Garrow, supra* note 38, at 52 (reporting on Souter’s comment at his confirmation hearing); 539 U.S. 558, 572, 578-79 (2003) (Kennedy opinion for the Court in *Lawrence v. Texas*).

124  *See Powell, supra* note 78, at 92-100, 117.
As discussed at § 15.4.1 nn.80-81, from the perspective of natural law, 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.” Thus, a pluralistic democratic society is viewed not as an end-in-itself, but rather as the best means by which to ensure that society protects and advances the set of universal principles of justice. 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 at § 26.2.1.1.D; gender discrimination cases, discussed at § 26.3.1.2; and cases involving sexual orientation, discussed at §§ 26.4.6 & 27.3.4.2, 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, noted at § 20.1.1.3 n.27, and not equaled with respect to the Equal Rights Amendment.126

Admittedly, from the “positivist” perspective of formalism and Holmesianism, such a view of judicial review raises clear “counter-majoritarian” difficulties, as discussed in the famous book by Professor Alexander Bickel, The Least Dangerous Branch, in 1962.127 Even from an instrumentalist perspective, which is more committed to developing processes to advance participatory democracy, rather than adopting universal natural law principles of justice, as discussed at §§ 15.4.1 nn.72-76 & 15.4.3 nn.92-96, the “counter-majoritarian” nature of judicial review can still be a "central obsession of modern constitutional scholarship," unless judicial review is linked to aiding participatory governance.128 For countries increasingly reflecting over the past 20 years modern elections.125


126 On the race, gender, and sexual orientation cases generally during the 20th century, see William N. Eskridge, Jr., Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century, 100 Mich. L. Rev. 2062 (2002).

127 Alexander Bickel, The Least Dangerous Branch 16 (2d ed. 1986).

natural law models of governance, such as the Western European countries and the United States, discussed at § 15.4.1 nn.77-81 (United States) & 16.1 text following n.5 (Europe), judicial review based on such universal natural law concepts is not so problematic, discussed at § 17.1.4 nn.65-70.

In sum, the natural law methodology consists of engaging in reasoned elaboration of the moral and political concepts placed into the Constitution by the framers and ratifiers, while balancing that elaboration against the demands of constitutional text, context, history, legislative and executive practice, and precedents – that balancing critical, for example, in modern substantive due process doctrine, discussed at § 27.3.4. While each judge is theoretically operating from the same historical data, considerations of general interpretive bias, discussed at § 4.4.1, suggest that more conservative judges are more likely to conclude the framers and ratifiers were driven by classic/Christian/Burkean concepts, while more liberal judges are more likely to conclude the framers and ratifiers were driven by Enlightenment concepts. While the discussion at §§ 16.1-16.2 points out that the evolved version of both traditions agree upon moral principles, and thus any disagreement between the two should disappear over time, until that evolved version of each is accepted, differences between traditional classic/Christian natural law and traditional Enlightenment natural law will continue to affect doctrinal outcomes, based upon which tradition the judge believes the framers and ratifiers adopted.

For example, one difference between the classic/Christian and Enlightenment natural law traditions was addressed by the Supreme Court in Alden v. Maine.129 This case involved the question of what sovereign immunity rights states were intended to have upon entering into the constitutional system of governance. As discussed in Justice Souter’s opinion, there were two 18th-century theories of sovereignty, what Souter called the “natural law” approach (reflecting the classic/Christian natural law tradition), and the “common law” approach (reflecting the Enlightenment social contract/common law tradition).130 The classic/Christian natural law tradition adopted a strong theory of sovereign immunity, based upon the King, or Pope, as sovereign, and thus not subject to suit without consent. For Luther, any notion of Papal sovereignty over temporal matters was transferred to the state. As has been noted, "By most accounts, the idea of the sovereign state, an entity exercising 'supreme legitimate authority within a [defined] territory,' grew out of the Protestant Reformation.”131

In contrast, the fully developed Enlightenment theory of the social contract rested sovereignty on common law grounds, which could be limited by later enacted statutes. However, some early Enlightenment thinking, like that of Hobbes or Locke, clearly adopted strong state sovereign immunity notions. Thus, as Justice Souter noted, while Hobbes and Locke rejected religious grounding for natural law, and placed rights in the secular concept of the consent of the governed, they nonetheless retained in their writing the strong theory of state sovereign immunity typical of the classic/Christian natural law tradition. Only in the 18th century, with the more fully developed Enlightenment political philosophy of Montesquieu and others regarding separation of powers and


130 Id. at 763-64 (Souter, J., joined by Stevens, Ginsburg & Breyer, JJ., dissenting).

checks and balances, did the full common law approach to sovereignty emerge.\textsuperscript{132} Thus, Hobbes or Locke do not reflect the well-developed Enlightenment position on sovereign immunity.

Looking over the historical evidence, both at the time of ratification, and legislative, executive and judicial practice soon thereafter, Justice Souter concluded that the framers and ratifiers of the Constitution had more in mind the common law approach, based upon a strong social contract/Enlightenment/common law commitment to natural law. As Justice Souter noted:

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. Natural law thinking on the part of a doubtful few will not, however, support the Court's position.\textsuperscript{133}

Justice Souter also noted that the American Colonies did not enjoy sovereign immunity, that being a privilege understood in English law to be reserved for the Crown alone. He stated:

Several colonial charters, including those of Massachusetts, Connecticut, Rhode Island, and Georgia, expressly specified that the corporate body established thereunder could sue and be sued. Other charters were given to individuals, who were necessarily subject to suit. If a colonial lawyer had looked into Blackstone for the theory of sovereign immunity, as indeed many did, he would have found nothing clearly suggesting that the Colonies as such enjoyed any immunity from suit. "[T]he law ascribes to the king the attribute of sovereignty, or pre-eminence," said Blackstone, and for him, the sources for this notion were Bracton and Acts of Parliament that declared the Crown imperial. It was simply the King against whom "no suit or action can be brought ... even in civil matters, because no court can have jurisdiction over him." If a person should have "a just demand upon the king, he must petition him in his court of chancery, where his chancellor will administer right as a matter of grace . . . ."\textsuperscript{134}

Supporting Justice Souter’s view, there is plenty of evidence that many framers and ratifiers, apart from Hamilton, Madison, and Marshall, believed the Constitution did not grant states any sovereign immunity from individual lawsuits in federal courts.\textsuperscript{135} Further, this approach to sovereign immunity

\begin{footnotes}
\footnotetext{132}{527 U.S. at 767 n.6, 768-72.}

\footnotetext{133}{\textit{Id.} at 764.}

\footnotetext{134}{\textit{Id.} at 764-66 (citations omitted).}

\end{footnotes}
reflects an analytically consistent approach that meshes well with a range of background natural law principles, such as “where there is a right, there must be a remedy.” ¹³⁶

On the other hand, there is some evidence, cited by Justice Kennedy in his opinion, supporting the view that the framers and ratifiers of both the original Constitution, and the later 11th Amendment, had more in mind the classic/Christian natural law approach regarding state sovereign immunity.¹³⁷ Indeed, as Justice Souter acknowledged, this is consistent with Hobbes and Locke’s early Enlightenment natural law approach, and is not completely inconsistent with statements made by Hamilton, Madison, and Marshall during the ratification debates that states would retain some sovereign immunity,¹³⁸ although each of their statements tended to support the limited common law/Enlightenment kind of immunity, not the strong classic/Christian kind, as discussed at § 17.2.4.3 nn.242-46. Respect for the principle that “where there is a right, there must be a remedy” also appears in Justice Kennedy’s approach. Justice Kennedy noted in Alden that individuals can bring private actions for injunctive relief against state officials charged with implementing state programs as authorized under Ex parte Young, as discussed at § 17.2.4.2, and that in “ratifying the Convention, the States consented to suits brought by other States or by the Federal Government [and] Congress may authorize private suits against nonconsenting States pursuant to its § 5 enforcement power.” ¹³⁹

It is important to note that the focus of this analysis is not on which natural law approach, if any, the Justices believe is most valid. The relevant question is what was the natural law approach favored by the framers and ratifiers of the Constitution and the 11th Amendment. As Justice Kennedy noted in Alden, “[T]he contours of sovereign immunity are determined by the founders’ understanding, not by the principles or limitations derived from natural law.” ¹⁴⁰

This split between Justices Kennedy and Souter has been played out in a sequence of cases involving the 11th Amendment and related issues of state sovereign immunity.¹⁴¹ In each of these cases, Justice Kennedy, who is more conservative, has adopted a result consistent with the classic/Christian view on sovereignty, while Justice Souter, who is more of a centrist, has adopted the social contract/Enlightenment view. Justice O’Connor, who is more conservative than Souter, has joined


¹³⁷ *Id.* at 713-27 (Kennedy, J., for the Court).

¹³⁸ *Id.* at 767 n.6, 772-74 (Souter, J., joined by Stevens, Ginsburg & Breyer, JJ., dissenting).

¹³⁹ *Id.* at 755-57 (Kennedy, J., for the Court), citing *Ex Parte Young*, 209 U.S. 123 (1908)).

¹⁴⁰ *Id.* at 734 (Kennedy, J., for the Court).

with Justice Kennedy to form a 5-Justice majority for his views in each of these cases. Since Justice Kennedy’s approach toward state sovereign immunity is consistent not only with classic/Christian doctrine, but with the early Enlightenment doctrines of Hobbes and Locke, and is not completely inconsistent with statements made during the ratification debates by Hamilton, Madison, and Marshall, it is perhaps not surprising that Justice O’Connor would join with Justice Kennedy in these cases, particularly given her predisposition in favor of states’ rights, discussed at § 12.4.2.

This is true even though the mature Enlightenment position would agree with Justice Souter. When Justices Kennedy or O’Connor adopt a position consistent with the classic/Christian tradition, it is almost inevitably because some aspect of the Enlightenment tradition also supports that result. Where the classic/Christian and Enlightenment traditions are on opposite sides of a case, as with abortion rights in Casey, Justices O’Connor, Kennedy, and Souter usually opt for the Enlightenment view. Further, as discussed § 16.2.3, given the fact that the evolved understanding of both the classic/Christian and Enlightenment traditions lead to the same ultimate conclusion, eventually there should not be any split among natural law Justices in terms of the demands of natural law. As noted at § 16.4, the evolved natural law understanding of immunity would support Justice Souter’s views. As noted at § 17.2.4.3, the best historical understanding of the framers and ratifiers’ views on sovereign immunity also supports Justice Souter’s views.

Further discussion of the 11th Amendment, including the views of formalist, Holmesian and instrumentalist judges, appears at § 17.2.4.2. As a general matter, formalists and Holmesian judges are predisposed to adopt a strong theory of state sovereign immunity because they adopt positivist theories of law where the law’s force derives from the will of the sovereign, which can consent to being sued or not. Thus, as Justice Souter noted in Alden,142 “Justice Holmes said so expressly: ‘A sovereign is exempt from suit, not because of any formal conception or obsolete [natural law] theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends.’” On the other hand, the liberal instrumentalist preference for protecting individual rights against the state has meant that the instrumentalist position is to give a limited reading to the 11th Amendment and related theories of sovereign immunity.143

Views about the Establishment Clause also reflect variations in a natural law approach to the Constitution. The Enlightenment/common law view is reflected in Jefferson’s famous reference to a “wall of separation between church and State,”144 and in the views of James Madison and others at the beginning of our constitutional history that any official endorsement of religion can impair

142 527 U.S. at 796 (Souter, J., joined by Stevens, Ginsburg & Breyer, JJ., dissenting).


This approach underlaid Justice O’Connor and Souter’s adoption in *Lee v. Weisman* of the endorsement test to determine violations of the Establishment Clause. Another application of this approach to the Establishment Clause occurred in the case of *Santa Fe Independent School District v. Doe*. The traditional classic/Christian natural law view is predictably much more accommodating to expressions of religious faith, perhaps concluding that “government could promote a generalized or nondenominational Christianity, so long as it did so in a manner that tolerated non-Christian religions.” As discussed at § 32.1.4, an evolved understanding of both the Enlightenment and classic/Christian traditions would adopt a separation of church and state doctrine along the lines of the endorsement test propounded by Justices O’Connor and Souter.

A Justice viewing the framers and ratifiers as holding a balanced view between the traditional classic/Christian view of accommodation and the traditional Enlightenment/common law view of no endorsement of religion would likely adopt an intermediate approach between these two outcomes – like the no “coercion” or “proselytizing” test propounded by Justice Kennedy in *Lee v. Weisman*. In *Weisman*, Justice Kennedy concluded that a nondenominational prayer at a high school graduation would involve coercion, rejecting the formalist argument that students do not have to attend graduation and thus no coercion is involved. Justice Kennedy stated, “The argument lacks all persuasion. Law reaches past formalism. And to say a teenage student has a real choice not to attend her high school graduation is formalistic in the extreme.” This approach is also reflected in the writings of Professor Michael McConnell, who is now a Tenth Circuit Court of Appeals Judge.

With respect to the other decisionmaking styles, the standard instrumentalist position on the Establishment Clause is even more insistent on a rigid separation of church and state than represented by the endorsement test. This was noted at § 4.4.1, and is discussed at § 32.1.2.4. In general, formalist and Holmesian judges share the accommodationist approach to the Establishment Clause based upon their view that this approach is consistent with the specific intent of the framers.

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146  505 U.S. at 612-26 (Souter, J., joined by Stevens, J., & O’Connor, J., concurring).


and ratifiers, and the Holmesian preference for deference to government.\textsuperscript{151} Thus, despite not adopting a classic/Christian mode of reasoning, application of this approach would be consistent with the results reached by the dissent in \textit{Santa Fe Independent School District v. Doe}.\textsuperscript{152} And, for Justice Thomas, he may share some sympathy for the classic/Christian mode of reasoning anyway, as noted at § 9.4.

Views about contract and property rights, critical for Contracts Clause and Takings Clause analysis, are also influenced by which natural law tradition the Justice believes the framers and ratifiers held. Similar to the issue of state sovereign immunity, the early Enlightenment approach of John Locke, the classic/Christian tradition of writers like William Blackstone, and the views of some of the early Justices on the Supreme Court, including John Marshall and Joseph Story, have a similar position – strongly supportive of individual contract and property rights.\textsuperscript{153} The later Enlightenment/common law approach placed less emphasis on individual property rights, and more emphasis on the ability of the state to regulate property and contract matters.

For example, it has been noted that while “John Locke stressed the critical importance of private property rights, . . . [p]rotection of private rights . . . has never been an absolute in the U.S. legal system.”\textsuperscript{154} The majority view in the 19\textsuperscript{th} century was that “consequential damages – those from activities that did not involve physical invasions or appropriations of property for a public use, but that nonetheless had physical consequences, such as subsidence occasioned by a road-building project – were not compensable takings.”\textsuperscript{155} Even during the 17\textsuperscript{th} and 18\textsuperscript{th} centuries, famous European philosophers, like Pufendorf, Burlamanqui, and Vattel, held the view that government should “regulate and adjust economic power so as to ‘make life pleasant and agreeable’ for all the ‘fellow creatures’ in the society.”\textsuperscript{156}

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\item \textsuperscript{152} 530 U.S. 290, 318 (2000) (Rehnquist, C.J., joined by Scalia & Thomas, JJ., dissenting).
\item \textsuperscript{155} William Michael Treanor, \textit{The Original Understanding of the Takings Clause and the Political Process}, 95 Colum. L. Rev. 782, 792 (1995). \textit{See generally} id. at 794-97, citing \textit{inter alia}, Transportation Co. v. Chicago, 99 U.S. 635 (1879) (“[A]cts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking . . . .”).
\end{enumerate}
\end{footnotesize}
The classic early case where the Court split on this issue was the famous 1837 case of Charles River Bridge v. Warren Bridge. There, the majority adopted the Enlightenment/common law approach to permit a state legislature to change a monopoly grant to use of a bridge. The majority noted, “[T]he object and end of all government is to promote the happiness and prosperity of the community by which it is established, and it can never be assumed that the government intended to diminish its power of accomplishing the end for which it was created. . . . A State ought never to be presumed to surrender this power [public grants], because, like the taxing power, the whole community have an interest in preserving it undiminished.”

The dissent, per Justice Story, adopted more the early Enlightenment and classic/Christian approach to try to protect an individual from a newly imposed burden of competition. Justice Story stated, “It is a contract, whose obligation cannot be constitutionally impaired. . . . For my own part, I can conceive of no surer plan to arrest all public improvements, founded upon private capital and enterprise, than to make the outlay of capital uncertain and questionable, both as to security and as to productiveness.”

One can see the same kind of tension among Justices O’Connor, Kennedy and Souter in cases involving the Takings Clause today. As with the state sovereign immunity cases, typically Justices O’Connor and Kennedy opt for the early Enlightenment and classic/Christian approach of strong protection for property rights, while Justice Souter opts for the later Enlightenment/common law approach.

For example, in Eastern Enterprises v. Apfel, Justice O’Connor, in a plurality opinion, held that a taking had occurred when a statute imposed upon a coal company a large, retroactive liability for lifetime health care of former employees and their families. Justice Kennedy concurred in the result, but he found the retroactivity of the statute violated due process without regard to a Takings Clause analysis. In contrast, Justice Souter joined dissenting opinions, which noted that the defendant, while still in the coal business, had participated in negotiations with other operators and miners where there was an understanding that the operators would provide the miners with lifetime health benefits. Thus, new burdens were foreseeable and could be constitutionally imposed.

A similar split, in a case involving whether interest earned on client’s money placed into IOLTA accounts was the client’s property, occurred in Phillips v. Washington Legal Foundation, discussed at § 22.2 nn.43-44.

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158 Id. at 604, 608 (Story, J., dissenting).

159 524 U.S. 498, 528-29 (1998) (O’Connor, J., joined by Rehnquist, C.J., and Scalia & Thomas, JJ., announcing the judgment of the Court); id. at 539, 547-50 (Kennedy, J., concurring in the judgment & dissenting in part); id. at 550-51 (Stevens, J., joined by Souter, Ginsburg & Breyer, JJ., dissenting); id. at 553-54 (Breyer, J., joined by Stevens, Souter & Ginsburg, JJ., dissenting).

§ 12.4  The Natural Law Approach, Combined with Affinity for Another Style

Predictably, the natural law judges, Justices O’Connor, Kennedy and Souter, voted together in a majority of cases. Where they split, the Court’s decision was often 5-4, given three conservative positivists, Chief Justice Rehnquist and Justices Scalia and Thomas, on one side of the Court, and three moderate, liberal instrumentalists, Justices Stevens, Ginsburg, and Breyer, on the other side of the Court. For example, Justices O’Connor, Kennedy, and Souter split 2-1 in 146 of the Court’s 150 5-4 cases decided during the 1993-2000 Terms of the Court. In addition to the extreme/moderate and conservative/liberal variations of natural law, another reason that might lead natural law judges to disagree is that one or more of the judges has an affinity for one of the other interpretation styles.

§ 12.4.1  Natural Law Combined with Formalist Interpretation

A natural law judge might have sympathy for the formalist emphasis on certainty and predictability in the law, given that the natural law and formalist theories share an affinity for analytic, as opposed to functional, approaches to the law. Of the current natural law Justices on the Supreme Court, Justice Kennedy has demonstrated the greatest affinity for this aspect of formalist interpretation.

For example, in free speech cases Justice Kennedy has joined Justices Scalia and Thomas dissenting in Madsen v. Woman’s Health Center, Inc., Hill v. Colorado, and Federal Election Commission v. Colorado Republican Federal Campaign Committee. Justice Kennedy’s affinity for formalism also appeared in his joining dissents in a Sixth Amendment case, Gray v. Maryland, and in two


163 530 U.S. 703, 741-42 (2000) (Scalia, J., joined by Thomas, J., dissenting) (regulation of speakers around abortion clinics is content-based, and thus should trigger strict scrutiny); id. at 2516 (Kennedy, J., dissenting) (“In my view, Justice Scalia’s First Amendment analysis is correct.”).

164 533 U.S. 431 (2001) (Thomas, J., joined by Scalia, J., and Kennedy, J., and with whom Rehnquist, C.J. joins as to Part II, dissenting) (Part I concluded that campaign finance statute’s limits on coordinated expenditures between a candidate and a state political party should be tested by strict scrutiny, and the law at issue in this case fails strict scrutiny; Part II concluded that even under the Court’s traditional Buckley analysis the regulations at issue in this case are unconstitutional).

165 523 U.S. 185 (1998) (majority held that only replacing a defendant’s name with a symbol of deletion in a co-defendant’s confession violates the defendant’s right to cross-examine witnesses when the co-defendant refuses to testify; more formalist dissent would have drawn a bright-line
cases involving the rights of Native Americans, *Idaho v. United States*,\(^{166}\) and *Minnesota v. Mille Lacs Band of Chippewa Indians*.\(^{167}\)

An additional example of Justice Kennedy joining a formalist dissent occurred in *Brentwood Academy v. Tennessee Secondary School Athletic Association*.\(^{168}\) There, a majority held that a private state high school athletic association, whose membership included only 16% private and parochial high schools and most of whose officials were employed by the public high schools, was a state actor for purposes of its regulatory rules because of the significant “entwinement” between the State and the association. A more formalist dissent concluded that certainty and predictability in the law requires that the Court restrict finding state action to where the organization “performs a public function; [is] created, coerced, or encouraged by the government; or acted in a symbiotic relationship with the government”; the “entwinement” test is too “unclear.”\(^{169}\)

Similarly, Justice Kennedy will occasionally read a statute in a more formalist fashion than Justices O’Connor and Souter. This has occurred in cases like *Zadvydas v. Davis*,\(^{170}\) *Davis v. Monroe County Board of Education*,\(^{171}\) and *West v. Gibson*.\(^{172}\)

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distinction between statements that incriminate a defendant directly, and those that only incriminate inferentially, as in this case where the defendant's name is redacted).

\(^{166}\) 533 U.S. 262 (2001) (majority held that the federal government holds, in trust for the Coeur d’Alene Tribe, title to lands underlying portions of Lake Coeur d’Alene and the St. Joe River in Idaho; more formalist dissent held that since official congressional ratification of this trust relationship was not formally completed until after Idaho became a State, Idaho took title to this land on the date Idaho became a State and the trust is invalid).

\(^{167}\) 526 U.S. 172 (1999) (majority held that Chippewa Indians retain certain hunting, fishing, and gathering rights on land they ceded to the United States in 1837, and that President Tyler’s attempt in 1850 to remove the Chippewas from the land lacked statutory or constitutional authority; more formalist dissent held that certainty requires that when a President acts with express or implied congressional authorization, there be a strong presumption of validity, and that President Tyler’s action in terminating these rights under the treaty should be upheld).


\(^{169}\) *Id.* at 305 (Thomas, J., joined by Rehnquist, C.J., and Scalia & Kennedy, JJ., dissenting).

\(^{170}\) 533 U.S. 678 (2001) (statute providing that government “may” detain removable alien beyond 90-day statutory removal period does not authorize indefinite detention, but instead authorizes detention only for a time reasonably necessary to secure removal; more formalist dissent would read the statute literally to give the Attorney General discretion to determine how long the removable alien may be detained).

\(^{171}\) 526 U.S. 629 (1999) (damage action permissible against recipient of funds under Title IX in cases of student-on-student harassment if the recipient is deliberately indifferent to the sexual harassment; more formalist dissent holds that since the literal text of the law only prohibits

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§ 12.4.2  Natural Law Combined with Holmesian Interpretation

A natural judge might have some sympathy for the Holmesian deference-to-government model of decisionmaking, as did Justice O’Connor. This was particularly true during Justice O’Connor’s early years on the Court between 1981-1984, which were more Holmesian. In these years, her voting patterns were most similar to the voting patterns of Holmesian judges Justices Rehnquist and White. By 1989-1990, Justice O’Connor had moved to joining most often Justices Kennedy and Souter.173

Even after 1984, Justice O’Connor occasionally departed from a standard natural law analysis to join a deference-to-government Holmesian decision. This occurred, for example, when Justice O’Connor joined a Holmesian dissent in the 1989 “flag-burning” case of Texas v. Johnson. The dissent would have created a special exception to free speech law permitting governments to ban flag burning.174 It also occurred in Florida Bar v. Went for It, Inc.,175 a 1995 case involving attorney advertising, where Justice O’Connor wrote the majority opinion applying the standard commercial speech test of Central Hudson Gas & Electric Corp. v. Public Service Commission in a very deferential way to uphold a government regulation of attorney advertising. Justice Kennedy and Souter, along with Justices Stevens and Ginsburg, dissented in the case.

Justice O’Connor’s occasional preference for Holmesian deference to government was also evident in her joining the dissents in the 1998-99 cases of Crawford-El v. Britton;176 Hohn v. United

...misconduct by recipients, the discrimination must be within the control of the recipient).

172 527 U.S. 212 (1999) (EEOC has the legal authority to require federal agencies to pay damages for employment discrimination under Title VII; more formalist dissent holds that the statutes relating to EEOC enforcement did not clearly contain an immunity waiver by the United States).


176 523 U.S. 574 (1998) (majority followed the standard rule that qualified immunity for government officials exists as long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have been aware; more Holmesian dissent
would have amended the rule to provide greater protection for government officials by permitting immunity if the government official can offer a legitimate reason for the action being challenged and the plaintiff cannot establish that the offered reason is a pretext).

177 524 U.S. 236 (1998) (majority held that the Supreme Court has jurisdiction to review decisions denying applications for certificates of appealability in habeas corpus cases; more Holmesian dissent concluded that Congress intended to prevent further review in habeas cases unless a Court of Appeals judge or a Circuit Justice finds a reasonable basis for an appeal).

178 526 U.S. 314 (1999) (majority held that a guilty plea does not waive the privilege of self-incrimination during the sentencing phase of a case; more Holmesian dissent concluded that the privilege against self-incrimination should not shield a defendant from the natural consequences of the defendant’s uncooperativeness at the sentencing phase).

179 531 U.S. 533 (2001) (majority held unconstitutional as a violation of free speech a welfare reform provision that barred attorneys funded by the federal Legal Services Corporation from accepting cases that challenged welfare laws; more Holmesian dissent would have permitted government limits on individuals receiving government funds).

180 533 U.S. 289 (2001) (majority held that habeas corpus writs are still permissible under certain provisions of the Antiterrorism and Effective Death Penalty Act of 1996 and Immigrant Responsibility Act of 1996; more Holmesian dissent would have held that the relevant statutory provisions barred habeas corpus review, thus deferring to the government by making the government action unreviewable in court).


Justice O’Connor also occasionally read a statute in a more Holmesian deference-to-government fashion than Justices Kennedy and Souter. This occurred in cases like *NASA v. Federal Labor Relations Authority*, 527 U.S. 229 (1999) (Office of the Inspector General representatives employed by NASA are representatives of NASA, so barring a union representative from participating in an investigation is an unfair labor practice; more Holmesian dissent would have deferred to NASA’s position that the OIG inspector was sufficiently independent that the inspector was not a representative of NASA).  

In some cases involving women or children, Justice O’Connor sometimes adopted a less deferential position, more protective of individual rights. For example, Justice O’Connor authored the 5-4 majority opinion in *Davis v. Monroe County Board of Education*, 526 U.S. 86 (1999) concluding that Title IX provides schools can be sued for sexual harassment of students by other students, in addition to acts of sexual harassment by its own employees, if the school is deliberately indifferent to known acts of harassment. The opinion was joined by Justices Stevens, Souter, Ginsburg, and Breyer. On the other hand, it has been noted, “[Justice O’Connor’s] positions generally reflect the view that children are more in need of supervision and restriction than rights. . . . [H]er opinions often confirm the widely held perception that she is conservative in the area of federal-state relationships – generally favoring deference to the state on issues involving the interests of children.”

When he was on the Court from 1971-87, Justice Powell adopted an approach similar to Justice O’Connor, of being predominantly a natural law judge, with some Holmesian leanings. On cases

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183  125 S. Ct. 2195, 2220 (2005) (O’Connor, J., joined by Rehnquist, C.J., and Thomas, J., as to all but Part III, dissenting).

184  527 U.S. 229 (1999) (Office of the Inspector General representatives employed by NASA are representatives of NASA, so barring a union representative from participating in an investigation is an unfair labor practice; more Holmesian dissent would have deferred to NASA’s position that the OIG inspector was sufficiently independent that the inspector was not a representative of NASA).

185  526 U.S. 86 (1999) (Federal Labor Relations Authority has the power to order federal agencies to bargain mid-term under a collective bargaining agreement; more Holmesian dissent would have deferred to each agency to decide whether to bargain mid-term or not).


188  Perry, supra note 186, at 82. For additional descriptions of Justice O’Connor’s judicial philosophy, with particular reference to women’s and children’s issues, see Eloise Rosenblatt,*The Judicial Philosophy of Justice Sandra Day O’Connor*, 29 Lincoln L. Rev. 131 (2001-02); Judith Olans Brown,*Wendy E. Parmet & Mary E. O’Connell, The Rugged Feminism of Sandra Day O’Connor*, 32 Ind. L. Rev. 1219 (1999).
involving federalism issues, Justice Powell was also a strong supporter of states’ rights.\textsuperscript{189} During the 1970s, Justice Powell was often the swing vote between the four more instrumentalist Justices on the Court (Justices Brennan, Marshall, Blackmun, and Stevens) and the four more formalist or Holmesian Justices on the Court (formalist Chief Justice Burger and Holmesian Justices Stewart, White, and Rehnquist). As has been noted, in a number of these “swing vote” cases, such as “Regents of the University of California v. Bakke, 438 U.S. 265 (1978), Trimble v. Gordon, 430 U.S. 762 (1977), and Branzburg v. Hayes, 408 U.S. 665 (1972),” Justice Powell’s different approach in these cases meant that although “he controlled the disposition,” he was “the only justice adopting his particular view of affirmative action, the rights of nonmarital children, and press rights, respectively.”\textsuperscript{190} His opinion in each of these cases has become the majority approach today.

During the early-to-mid 1980s, when both Justices Powell and O’Connor where on the Court, they voted together a large percentage of the time. For example, during the 1983 Term of the Court they voted together 84.9% of the time; during the 1984 Term, 85.7% of the time; during the 1985 Term, 87.1% of the time; and, during the 1986 Term, 83.3% of the time. During this period, however, Justice O’Connor had a slightly greater affinity for the Holmesian approach than Justice Powell, as she actually voted most often with Justice Rehnquist during the 1981-84 Terms of the Court, although she voted most often with Justice Powell during the 1985 Term of the Court.\textsuperscript{191}

Two examples of this difference between Justice Powell and O’Connor can be seen in the cases of \textit{Plyler v. Doe} and \textit{City of Akron v. Akron Center for Reproductive Health}. In \textit{Plyler v. Doe}, the Court held that Texas could not deny undocumented children the free public education that it provides to children who are citizens of the United States or legally admitted aliens. Justice Powell’s concurrence in the case focused on the background natural law principle that individuals should not be punished for things over which they have no control, which Justice Powell had used in \textit{Trimble v. Gordon} and other cases to justify applying intermediate scrutiny in cases involving illegitimate children. Similarly, Justice Powell reasoned in \textit{Plyler} that the children of illegal aliens are not responsible for being in this country. Their parents are responsible. In contrast, Justice O’Connor joined Chief Justice Burger, and Justices White and Rehnquist, in dissent. Adopting a posture emphasizing more the Court’s limited role in judicial review, and respect for the principle of deference to the other branches of the government, the dissent stated, “[T]he Constitution does not constitute us as ‘Platonic Guardians’ nor does it vest in this Court the authority to strike down

\begin{footnotesize}
\begin{enumerate}
\item[\textsuperscript{190}] Geoffrey R. Stone, Louis M. Seidman, Cass R. Sunstein & Mark V. Tushnet, Constitutional Law lxxxviii (1996) (italics added to the case names).
\end{enumerate}
\end{footnotesize}
laws because they do not meet our standards of desirable social policy, ‘wisdom,’ or ‘common sense.’ 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 *Akron* case involved, among other issues, whether a state could require that a second-trimester abortion be conducted in a hospital, rather than an abortion clinic. Justice Powell’s majority opinion concluded that there “can be no doubt that [the statute’s] second-trimester hospitalization requirement places a significant obstacle in the path of women seeking an abortion. A primary burden created by the requirement is additional cost to the women. . . . [A] second-trimester requirement may force women to travel to find available facilities, resulting in both financial expense and additional health risk.” In contrast, the dissenting opinion of Justice O’Connor, joined by Justices White and Rehnquist, adopted an approach more deferential to the government. Justice O’Connor stated, “As the City of Akron points out, there is no evidence in this case to show that the two Akron hospitals that performed second-trimester abortions denied an abortion to any women . . . . In addition, there was no evidence presented that other hospitals in nearby areas did not provide second-trimester abortions. Further, almost any state regulation, including the licensing requirement that the Court would allow inevitably and necessarily entails increased costs for any abortion. . . . A health regulation, such as the hospitalization requirement, simply does not rise to the level of ‘official interference’ with the abortion decision. . . . [and] does not impose an undue burden.”

In terms of later doctrinal development, both Justice Powell’s focus in *Akron* on whether the regulation was a “significant obstacle” to obtaining an abortion, and Justice O’Connor’s focus on whether the regulation was an “undue burden” on abortion rights, foreshadowed the adoption by the natural law Justices O’Connor, Kennedy, and Souter of the “undue burden” standard in *Planned Parenthood v. Casey*. In *Casey*, the term “undue burden” was defined as a short-hand reference for when “a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a non-viable fetus.” Justice Powell also included language in his *Akron* opinion on the importance of *stare decisis*, language foreshadowing the discussion of *stare decisis* in the joint opinion in *Casey*. Justice Powell stated in *Akron*:

> [A]rguments continue to be made . . . that we erred in interpreting the Constitution [in *Roe v. Wade*]. Nonetheless, the doctrine of *stare decisis*, while perhaps never entirely persuasive on a constitutional question, is a doctrine that demands respect in a society governed by the rule of law. We respect it today, and reaffirm *Roe v. Wade*. . . . There are especially compelling reasons for adhering to *stare decisis* in applying the principles of *Roe v. Wade*. That case was considered with special care. It was first argued during the 1971 Term, and reargued – with

193 *Id.* at 242 (Burger, C.J., joined by White, Rehnquist & O’Connor, JJ., dissenting) (citations omitted).


195 *Id.* at 466-67 (O’Connor, J., joined by White & Rehnquist, JJ., dissenting).

extensive briefing – the following Term. The decision was joined by THE CHIEF JUSTICE and six other Justices. Since *Roe* was decided in January, 1973, the Court repeatedly and consistently has accepted and applied the basic principle that a woman has a fundamental right to make the highly personal choice whether or not to terminate her pregnancy.197

§ 12.4.3 Natural Law Combined with Instrumentalist Interpretation

A natural law judge might also have sympathy for instrumentalist reasoning, as both reject a positivist approach to the law, and share the view that the judicial task has a normative component instead. In a number of cases, Justice Souter has joined with Justices Stevens, Ginsburg, and Breyer to form a 4-Judge block of votes. In most of these cases, Justice Souter’s willingness to join these liberal instrumentalist Justices, which was not shared by Justices O’Connor or Kennedy, can be attributed to Justice Souter’s strong natural law belief in following even the general reasoning of the instrumentalist-era precedents between 1954 and 1986, and not merely their core holdings. This willingness was not shared by Justices O’Connor and Kennedy, as noted at § 12.3.2. Nevertheless, in some of these cases, Justice Souter’s vote cannot be fully explained by that analysis, and one can perhaps see some direct instrumentalist reasoning in some of Justice Souter’s opinions.198

For example, in *Bush v. Vera*,199 discussed at § 26.2.1.5, Justice Souter exaggerated the difficulty of developing standards to govern when a violation has taken place in racial redistricting cases in order to support racial redistricting in favor of minority groups. Justice Souter noted that the Court “has never succeeded in identifying how much is too much, having adopted a ‘predominant purpose’ test that amounts to a practical repudiation of any hope of devising a workable standard.” However, under the general reasoning of the instrumentalist-era precedent of *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,200 discussed at § 26.2.1.2, proof that “discriminatory purpose was a motivating factor” is viewed as a certain enough for discriminatory intent analysis.

As noted at § 26.2.1.5, Justice Souter’s support for racial redistricting was also apparent in *Abrams v. Johnson*.201 In *Abrams*, the majority upheld a district court’s redistricting plan that contained only one African-American majority district in the Atlanta area because creation of a second such district would have required subordinating Georgia’s traditional districting policies to consider race predominantly. Justice Breyer, dissenting with Justices Stevens, Souter, and Ginsburg, held that the court should not have departed from the Georgia legislature’s intent to create two such districts

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197 426 U.S. at 419-20 & n.1.


around Atlanta. In *Easley v. Cromartie*, the four dissenters in *Abrams* were joined by Justice O’Connor in deferring to the state by concluding that use of race was not a “predominant factor” in the redrawing of the much litigated 12th Congressional District in North Carolina. The dissent would have deferred to the factual judgment of the district court that racial considerations did predominate. In *Lawyer v. Department of Justice*, the four dissenters in *Abrams* were joined by Holmesian Chief Justice Rehnquist in deferring to a three-judge federal district court’s reapportionment of a Florida Senate district. The dissent argued that the district court should first have offered the Florida legislature a more reasonable opportunity to craft its own solution.

Another example of Justice Souter’s occasional affinity for an instrumentalist approach may be in the race-based affirmative action cases. For example, in *Adarand Constructors, Inc. v. Pena*, the majority opinion held that traditional strict scrutiny should be applied to federal, as well as state, race-based affirmative action programs. Justice Souter rejected that approach, thus supporting race-based affirmative action in federal contracting. Of course, Justice Souter’s dissent may also reflect his strong commitment to precedent, and his belief that the Court should follow the precedent of *Fullilove v. Klutznick*, which had upheld a federal race-based affirmative action program regarding government contracting, absent “any factual premises on which *Fullilove* rested having disappeared since that case was decided.”

In addition, Justice Souter will occasionally read a statute in a more instrumentalist fashion than Justices Kennedy or O’Connor. Given the Supreme Court’s recent membership, this usually has meant that in these cases Justice Souter was in dissent with Justices Stevens, Ginsburg, and Breyer. This has occurred in cases like *FDA v. Brown & Williamson Tobacco Corp.*, *Department of Commerce v. United States House of Representatives*, and *Grupo Mexicana de Desarrollo v. Alliance Bond Fund, Inc.* It also occurred in the cases of *Allentown Mack Sales & Service, Inc.*

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205 529 U.S. 120 (2000) (FDA lacks authority to regulate tobacco products based upon lack of explicit authorization and the FDA’s long-standing view that it lacked jurisdiction; more instrumentalist dissent would have granted FDA the power to regulate tobacco based upon Congress’ overall desire to protect health and new knowledge about the effects of smoking).

206 525 U.S. 316 (1999) (use of statistical sampling in census taking not authorized by the explicit language of the Census Act; more instrumentalist dissent concludes that because sampling might yield a more accurate estimate of population, sampling should be allowed to be used).

207 527 U.S. 308 (1999) (district court does not have power to issue a preliminary injunction preventing defendant from transferring assets in which a non-lien or equitable interest is claimed because such a power was historically unavailable from a court of equity; more instrumentalist dissent holds that as a policy matter such a power would not be that troubling because the plaintiff
In addition, sometimes both Justices Kennedy and O’Connor have interpreted a statute in a formalist or Holmesian fashion, leaving Justice Souter to give a principled natural law interpretation, almost always in such cases joining instrumentalist Justices in dissent. This has occurred in cases like Alexander v. Sandoval, Buckhannon Board v. West Virginia Department of Health & Human Resources, Miller v. French, and Reno v. Bossier Parish School Board, and Carter v. United

208 522 U.S. 359 (1998) (NLRB conclusion that an employer lacked a “good faith reasonable doubt” about a union’s majority support, not supported by record as a whole; more instrumentalist dissent would have deferred to the NLRB’s conclusion, thus supporting a pro-employee result that would have concluded such polling by the employer was an unfair labor practice).

209 524 U.S. 274 (1998) (school district not liable for sexual harassment of a student by a teacher unless the school district official who had authority to institute corrective measures has notice of the teacher’s misconduct and was deliberately indifferent to that information; more instrumentalist dissent would have permitted an action, based on the policy of placing protection of high school students above the school district’s financial concerns).

210 532 U.S. 275 (2001) (majority deferred to the government by following the literal holdings of prior cases, not their more general reasoning, to conclude that Congress did not intend a private right of action to enforce disparate-impact regulations under Title VI of the Civil Rights Act of 1964; dissent noted that a faithful reading of the “prevailing principles of statutory construction” in existence at the time Congress passed the “comprehensive civil rights Act,” as well as dicta in many cases interpreting this statute, would support finding a private right of action in this case).

211 532 U.S. 598 (2001) (plaintiff is not a prevailing party for purposes of obtaining attorneys’ fees when that party has “failed to secure a judgment on the merits or a court-ordered consent decree, but has nonetheless achieved the desired result because the lawsuit brought about a voluntary change in the defendant’s conduct”; dissent followed the instrumentalist-era precedents in the Courts of Appeals which had held the plaintiff was a “prevailing party” if the plaintiff was a “catalyst” for the change).

212 530 U.S. 327 (2000) (Prison Litigation Reform Act read literally in favor of the government to eliminate a court’s traditional equitable authority to suspend an automatic stay of relief after 30 days; dissent would have remanded the case to determine whether the statute provided sufficient time to make the required findings before determining the statute removed a court’s equitable authority).

213 528 U.S. 320 (2000) (majority deferred to government by holding that § 5 of the Voting Rights Act does not prohibit preclearance of a redistricting plan enacted with a discriminatory but nonretrogressive purpose; dissent held that any purpose to give less weight to minority participation in the electoral process is a purpose to discriminate and thus abridges § 5 of the Voting Rights Act).
States.\textsuperscript{214}

\section*{§ 12.4.4 \hspace{1em} Constitutional versus Statutory versus Common-Law Interpretation}

As noted at § 4.4.1, while in theory a judge could adopt one style of interpretation for common-law decisionmaking, and a different style for statutory interpretation, and yet a different style for constitutional law, almost all judges and commentators adopt the same interpretive approach toward each kind of case. This is predominantly because the interpretation styles are based on the individual’s view on the nature of law and the nature of the judicial task, as discussed in Chapter 2, and those views are the same for common-law, statutory, or constitutional cases, as noted in Chapter 3. Of course if one adopted a decisionmaking style based upon other considerations, such as an independent theory of democratic self-government, or some generic “rule-of-law” concern, the interpretive methodologies in common-law, statutory, and constitutional law cases could converge, or they could diverge.\textsuperscript{215}

Despite the fact of convergence regarding decisionmaking styles, almost all judges and commentators, including those in the natural law tradition, have noticed three differences between constitutional and statutory interpretation. First, constitutions tended to be drafted in more general terms, and not contain as many detailed provisions as statutes. Thus, interpretation of constitutions tend to involve more resort to purpose, context, and history kind of considerations, what Chief Justice Marshall called in \textit{McCulloch v. Maryland} “deduc[ing] from the nature of the objects themselves,” cited at § 12.2.1.1 n.10. More statutes can be predominantly determined by the plain meaning of statutory text.

Second, constitutions tend to be drafted to apply for decades with little amendment, while statutes tend to be drafted based on the assumption that statutory amendment is easier, and more likely in case a mid-course correction is needed. Thus, as Chief Justice Marshall said in his famous quote in \textit{McCulloch},\textsuperscript{216} “We must never forget it is a constitution we are expounding” which was "intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs."

Third, because of the easier ability to amend a statute than a constitution, most judges will apply the doctrine of \textit{stare decisis} a little more forcefully in cases of statutory interpretation, reasoning that correction of an erroneous statutory interpretation decision can be done more easily by the legislature, while the Court may need to take a greater lead in correcting an erroneous constitutional decision. This principle was noted at § 4.3.2 n.89, in the context of discussing Justice Kennedy’s

\textsuperscript{214} 530 U.S. 255 (2000) (majority deferred to government by adopting a literal approach which held that carrying away something from a bank with an intent to steal was not an included offense for the crime of taking by force or violence any thing of value from a bank, because the lesser offense did not literally include every element of the greater offense; the dissent noted that the majority departed from the old common-law rule that robbery was an aggravated form of larceny).


\textsuperscript{216} 17 U.S. (4 Wheat.) 316, 415, 421 (1819).
majority opinion in *Patterson v. McLean Credit Union* in 1992. All three of these differences were reflected in the passage from Dean Edward Levi, cited at § 4.1 n.6, and following comments.
CHAPTER 13: FORMAL CAUSES AND THE FIVE ERAS OF AMERICAN LAW

The four styles of interpretation detailed in Chapters 9-12 determine in individual cases which results will be “hammered out” at any particular time. The next four Chapters in this book discuss the causes which help explain why a majority of Justices on the Supreme Court at different times in our Nation’s history have adopted one of the four judicial decisionmaking styles. In discussing these efficient causes of why the dominant interpretation style in different eras has changed, Chapter 13 focuses on the formal fact of changes in American legal history from an initial natural law era, through formalist, Holmesian, and instrumentalist eras, to a modern natural law era today. Chapter 14 focuses on the material cause of these changes, that is, the changing background of social and political events in society which forms the material base from which constitutional law emerged in its various eras. Chapter 15 focuses on aspects of cognitive and moral developmental psychology which are part of the efficient cause related to explaining changes in the majority approach from one judicial era to the next. Finally, Chapter 16 relates the cognitive and moral developmental stages and the judicial eras to issues of contemporary societal development, the final cause or end of legal change being to reflect and advance such societal developments.


In the more than 200 years since ratification, the Constitution's interpretation and application have been determined by Supreme Court Justices whose members have reflected different combinations of the four interpretation styles discussed in Chapters 9-12. In general, there are five eras of Supreme Court decisionmaking: (1) the original natural law era of 1789-1873, which corresponds roughly to the Marshall and Taney Courts, with Justice Story as a bridge between the two; (2) the formalist era of 1873-1937, which corresponds to the Court’s treatment of the 1873 Slaughter-House Cases as precedent during the last third of the 19th century and the Lochner v. New York/Hammer v. Dagenhart era of the first third of the 20th century; (3) the Holmesian, New Deal Court era of 1937-54, which involved the rejection of Lochner and Dagenhart against the backdrop of President Roosevelt's “Court-Packing Plan” in 1937; (4) the modern instrumentalist era of 1954-86, which was inaugurated by Brown v. Board of Education and lasted through the Warren and Burger Courts; and (5) the emerging modern natural law era of the Court since 1986.

These eras of Supreme Court decisionmaking are matched by similar eras in the development of American law generally. For example, in 1977, Professor Grant Gilmore published his classic statement of the development of American law, The Ages of American Law. In this book, Professor Gilmore, building on earlier writings by Professor Karl Llewellyn, divided American legal history into three distinct ages: a pre-Civil War Golden Age, a post-Civil war to World War I formalist or conceptualist age, and a modern period which harkens back to the Golden Age of the pre-Civil War period. As discussed at § 3.3, a number of commentators have called this modern period and its

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approach to law instrumentalism. Gilmore’s understanding of the ages of American law was based on this simple dichotomy of two basic decisionmaking styles: formalism and instrumentalism. This approach reflected prevailing jurisprudential writing at the time that emphasized similarities and differences between formalism and instrumentalism as judicial decisionmaking styles.

As summarized in Chapter 3, and detailed in Chapters 9-12, a more complete typology of judicial decisionmaking styles involves adding the Holmesian and natural law decisionmaking styles to Gilmore’s discussion of formalism and instrumentalism. This addition helps to clarify the ages of American law. The formalist style associated with Langdell and Englishmen John Austin, discussed at § 3.1, is unquestionably the post-Civil War style, and instrumentalism, discussed at § 3.3, was the dominant style for much of the last half of the 20th century. As Professor Kermit Hall noted in The Magic Mirror: Law in American History, an overview of American legal history, "From the Civil War to about 1900 the trend favored the formalistic and conservative judicial approach. . . . The Great Depression was a catalyst for liberal legalism [which] fused the social reformist impulse of Progressivism, the relativism and instrumentalism of legal realism and sociological jurisprudence, and the regulatory responsibility of the state associated with the New Deal."

However, in the formative era of American law, the pre-Civil War period, the dominant mode of legal analysis is better characterized not as Gilmore’s or Llewellyn's earlier instrumentalist Golden Age, but rather as reflecting natural law presuppositions. In this period, judges adopted a normative perspective, a view shared by instrumentalist and natural law judges, as discussed at §§ 3.3-3.4. Thus, judges were sensitive to the consequences that adopting a particular rule would have. As noted by Harvard University Law School Professor and Historian Morton Horwitz in The Transformation of American Law, 1780-1860, “During the last fifteen years of the eighteenth century, one can identify a gradual shift in the underlying assumptions about common law rules. For the first time, lawyers and judges can be found with some regularity to reason about the social consequences of particular legal rules.” In addition, during this period judges recognized that they did, and needed, to make law, particularly common law, which reflected a particular social value system. As Horwitz stated, “What dramatically distinguished nineteenth century law from its eighteenth century counterpart was the extent to which common law judges came to play a central role in directing the course of social change. Especially during the period before the Civil War, the common law performed at least as great a role as legislation in underwriting and channeling

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As judges began to conceive of common law adjudication as a process of making and not merely discovering legal rules, they were led to frame general doctrines based on a self-conscious consideration of social and economic policies."6

However, unlike the functional perspective of instrumentalism, discussed at § 3.3, during this formative era of American law both lawyers in their argumentation, and judges in their opinions, grounded the underlying legitimacy of their enterprise in a notion of natural law. Law, for them, could be organized and systematized around rational principles, the natural law analytic premise, as discussed at § 3.4, not the instrumentalist functional premise. As Dean Roscoe Pound noted in 1938 in *The Formative Era of American Law*,7 "A mode of thought [natural law] which produced and developed the classical international law, which modernized the civil law so that it could go round the world, which had much influence on the development of equity and the law merchant – the liberalizing agencies in the Anglo-American common law – which was the theoretical basis of much of the best work of Lord Mansfield, of the Declaration of Independence and bill of rights, and of the legislation, judicial decision, and doctrinal writings of the formative era of American law, is not to be rated as nothing in legal history." Indeed, Professor Gilmore himself noted in *The Ages of American Law*,8 "The post-Revolutionary generation of American lawyers approached the problem of providing a new law for a new land as convinced eighteenth-century rationalists."

The characterization of the Pre-Civil War era as one of natural law is not inconsistent with Professor Gilmore’s or Llewellyn's account of judicial decisionmaking. Professors Gilmore, Llewellyn, Horwitz, and others are right that judges during this period shared the instrumentalist premise that judges could, and needed, to make law to advance particular ends, and that this fact distinguished the pre-Civil War judicial decisionmaking style from the post-Civil War style of formalism. To the extent Gilmore, Llewellyn, and Horwitz were focused on a single dichotomy, formalism versus instrumentalism, the pre-Civil War style certainly did not adopt the formalist style. However, once attention is drawn to the two different kinds of normative judicial styles, natural law versus instrumentalism, the natural law character of the pre-Civil War judicial decisionmaking style emerges. The ends that judges advanced during this period were defined not in purely functional terms, but rather in terms of advancing rationally and systematically the dominant natural law vision in America at the time – an Enlightenment vision of the social contract, Adam Smith's theory of competition and economic growth, and John Locke's theory of property rights.

Even writers, like Horwitz, who have used the term instrumentalism to distinguish the pre-Civil War period from the post-Civil War formalist period, have agreed that judges routinely resorted to economic natural law arguments to alter the common law during the pre-Civil War period. As Horwitz stated, "This increasing preoccupation with using law as an instrument of policy is everywhere apparent in the early years of the nineteenth century. Two decades earlier it would have been impossible to find an American judge ready to analyze a private law question by agreeing 'with Professor Smith, in his 'Wealth of Nations', . . . that distributing the burthen of losses, among the

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6 Id. at 1-2.


8 Gilmore, supra note 1, at 10.
greater number, to prevent the ruin of a few, or of an individual, is most conformable to the principles of insurance, and most conducive to the general prosperity of commerce."9 Similarly, though using the term "instrumental," Professor Kermit Hall stated in his book on American legal history, "The ethical yardstick employed by colonial courts was replaced by a new measure that asked judges to consider how legal rules encouraged economic growth, individual risk taking, and the accumulation of capital . . . . Judges engaged in instrumental activity by using their common law authority to fashion doctrines that expedited and enhanced private business activity and entrepreneurship generally."10 Professor Ronald Dworkin perhaps best stated this point in his conclusion that Professor Horwitz' discussion of changes in a "string of early nineteenth-century cases about the rights of riparian owners" is best understood as a "story of principle," the natural law focus, rather than as a "story of policy," the instrumentalist focus.11 This difference between arguments of principle versus arguments of policy is discussed at §§ 2.4 & 3.4.

As legal historians have observed, this focus on changing the common law to promote economic growth differed from the focus of courts in the colonial period on stability in the law to promote the moral and religious notions of the community and to protect existing economic arrangements.12 Specifically, New York University School of Law Professor and Historian William Nelson noted that the colonial period was a period of ethical unity and community based norms where consensus "was promoted by the fact that nearly all members of society shared common ethical values and imposed those values on the occasional individual who refused to abide by them voluntarily."13 This change in focus is best conceived as a change from an ethical natural law to an economic natural law focus. As Dean Roscoe Pound stated in 1938, "In the nineteenth century, the stabilizing and conserving natural law takes on three forms, ethical, political and economic. The ethical form, in which moral precepts dictated by reason are the ideal, is the oldest, coming from the seventeenth century, where it connects with the theological natural law of the Middle Ages. It is replaced in early nineteenth-century America by the political form in which an ideal of 'the nature of American institutions' or the 'nature of free institutions' or the 'nature of free government' is the starting point. Later, as the stabilizing side of natural law comes to be the one stressed chiefly, an economic ideal of a society ordered by the principles of the classical political economy prevails."14

This change resulted in a number of alterations in traditional common law doctrine. As Professor Horwitz noted, as summarized by Professor Stephen Presser, the property doctrine of "natural flow,"

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9 Horwitz, supra note 5, at 3 (citations omitted).
10 Hall, supra note 4, at 109, 221.
12 See generally Horwitz, supra note 5, at 1-9; Hall, supra note 4, at 12-17, 28-48; William E. Nelson, Americanization of the Common Law: The Impact of Legal Change on Massachusetts Society, 1760-1830, at 36-68 (1975).
13 Nelson, supra note 12, at 3.
14 Pound, supra note 7, at 22-23.
which barred riparian owners from interrupting the flow of water to others, was changed to a doctrine of “reasonable use,” which encouraged productive use of water resources. The tort doctrine of “strict liability” in nuisance law was changed to a concept of “negligence,” which freed up entrepreneurial activity by removing the threat of strict liability. In contract doctrine, there was a change from rules focused more on “fair” prices to refusing to set aside contracts for inadequacy of consideration and the “widespread acceptance of the rule of caveat emptor.” Jury discretion “became strictly limited to matters of fact; all questions of law were reserved for the court,” a circumstance not true in 18th-century colonial courts. This change was used to ensure that juries would not frustrate the economic policies of the courts with juries’ customary, ethical views. Merchants and courts worked together to promote “emerging entrepreneurial, transportation, and manufacturing interests of the nineteenth century.”

This evolution from ethical natural law, through political natural law, to economic natural law, as it relates to constitutional law, is discussed at § 14.2.1. The change regarding limiting jury discretion is discussed at § 21.2.4.4. Of course, not every judge, or every lawyer, fully embraced this economic natural law enterprise. Some pre-Civil War judges and lawyers were equally focused on the colonial-era, ethical natural law concern with promoting stability in the law, while still supporting doctrines promoting economic growth.

The Holmesian style of judicial decisionmaking helps clarify the transition between the post-Civil War formalist period and the modern instrumentalist approach. The breakdown of the formalist approach occurred initially because of increasing acceptance after 1900 of Holmes’ functional, realist insight that law serves particular social ends, not the formalist’s insistence on mechanical rule application and logic and symmetry. As Professor Hall noted, "From the Civil War to about 1900 the trend favored the formalistic and conservative judicial approach, but from then through World War I sociological jurisprudence and liberalism gained credibility." Under sociological jurisprudence, there is “a rejection of a 'jurisprudence of concepts,' the view of law as a closed logical order. The shortcomings of formal, logical analysis were noticed as the twentieth century produced new problems for which existing law did not provide solutions.” The Realist Movement, and its relationship to a functional approach to law, is noted at § 2.4 n.40 and § 13.2 nn.52-54.

This acceptance of Holmes’ functional, realist insights began first with respect to the common law and theories of statutory interpretation in the 1910s and 1920s. During this period courts began to

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18 Hall, *supra* note 4, at 211.

consider the purpose behind common law doctrines and to decide cases more in light of those purposes, rather than using blind adherence to literal doctrinal requirements. As Professor Hall noted, there was greater stress on “the functions of law rather than the abstract conceptualization of it.”20 With regard to statutory interpretation, there was a "gradual" change led by Justice Holmes during the 1910s and 1920s with increasing resort to statutory purposes and legislative history as a supplement to "pure logic."21 The formalist style of interpretation hung on longer on the Supreme Court, however, due to the life-tenure and longevity of some Supreme Court Justices, whose formative years of legal study had taken place during formalism’s heyday at the end of the 19th century under the influence of the theories of Harvard University Law School Dean Christopher Columbus Langdell,22 and who were appointed to the Court during the 1910s and 1920s, as discussed at § 14.2.2. Finally, formalism was rejected by a majority of the Supreme Court in 1937, which resulted in the Court rejecting the Lochner-era formalism of Justices Van Devanter, McReynolds, Sutherland, and Butler, and replacing it with Justice Holmes’ posture of deference to government. After 1937, this posture of deference upheld New Deal-style regulations, as discussed at § 14.2.3.

This breakdown did not immediately lead to instrumentalism, however. Following Holmes, the dominant judicial decisionmaking style immediately post-1937 emphasized that judges should not take into account their own view of background social justice or public policy considerations, but rather should decide cases to reflect the social ends as defined by the dominant groups in society, in our democracy the outcome of the legislative, executive, and administrative processes.23 Increasingly, however, as judges post-World War II became more activist in using the leeways in the law to advance particular public policies that were not being addressed by the other branches of government, the dominant judicial decisionmaking style in all areas – common law, statutory interpretation, and constitutional law – moved to an instrumentalist approach.

Law Professor and Historian G. Edward White called this movement “The Rise and Fall of Justice Holmes.”24 Concerning specific aspects of the law, Professor Kermit Hall noted that with respect to the common law areas of property, contracts, and torts, this change was reflected in modern liberal legalism’s focus on "new property" rights, increased use in contract law of doctrines like reliance and unconscionability, and shifted emphasis in tort law from fault and blameworthiness toward a focus on providing compensation to injured parties. With respect to statutory interpretation, this was reflected in modern developments concerning interpretation of legislation and administrative rules and regulations in light of the Legal Process school’s focus on purposes,

20 See Hall, supra note 4, at 269.


22 See generally Thomas C. Grey, Langdell’s Orthodoxy, 45 Pitt. L. Rev. 1, 6-15 (1983). The promotion by Dean Langdell of a formalist approach toward law is discussed at § 3.1 nn.4-10.

23 See Hall, supra note 4, at 282-85.

discussed at § 3.3 nn.63-75, particularly in the public interest areas of civil rights, consumer rights, and environmentalism. With respect to constitutional law, this was reflected in developments as varied as increased Court protection in cases involving civil liberties, free speech, race and gender issues, and rights of the accused.\footnote{Hall, supra note 4, at 291-303 (common law), 303-08 (statutes and administrative law), 309-32 (constitutional law).} As discussed at § 11.3.2, the heydey of instrumentalism on the Supreme Court was between 1963-69. This aspect of modern Supreme Court doctrine is discussed at § 14.2.4.

Beginning in the 1970s, the dynamic that motivated instrumentalism began to lose its force and came under increasing attack. This attack occurred both at the federal level with respect to constitutional and statutory interpretation,\footnote{See generally John Denton Carter, The Warren Court and the Constitution: A Critical View of Judicial Activism (1973); Louis Lusky, By What Right? (1975); John Hart Ely, Democracy and Distrust (1977) (constitutional critiques); Cass R. Sunstein, Interpreting Statutes in the Regulatory State, 103 Harv. L. Rev. 405 (1989) (statutory interpretation critique).} and at the state level with respect to constitutional, statutory, and common-law decisionmaking.\footnote{See, e.g., Richard Neely, How Courts Govern America (1981) (critique from the perspective of a state court judge).} These attacks against instrumentalism came both from those who would prefer judges to be less activist, writing from either the formalist tradition\footnote{See, e.g., Raoul Berger, New Theories of "Interpretation": The Activist Flight from the Constitution, 47 Ohio St. L.J. 1 (1986); Raoul Berger, "Original Intention" in Historical Perspective, 54 Geo. Wash. L. Rev. 296 (1986); Raoul Berger, The Founders' Views – According to Jefferson Powell, 67 Tex. L. Rev. 1033 (1989); Antonin Scalia, A Matter of Interpretation (1997).} or the Holmesian tradition,\footnote{See, e.g., Robert Bork, The Tempting of America: The Political Seduction of the Law (1986); Edwin Meese, III, The Supreme Court of the United States: Bulwark of a Limited Constitution, 27 S. Tex. L. Rev. 455 (1986); John Hart Ely, Democracy and Distrust (1980).} as well as from commentators who urged adoption of a natural law tradition or a revised version of instrumentalism.

With respect to a natural law tradition, some commentators focused more on looking back to the natural law philosophy of the framing and ratifying generation and to interpreting the Constitution consistent with that natural law philosophy. Some viewed that philosophy as based more on the classic/Christian natural law tradition,\footnote{See, e.g., Milner Ball, Don't Die Don Quixote: A Response and Alternative to Tushnet, Bobbitt, and the Revised Texas Version of Constitutional Law, 59 Texas L. Rev. 787 (1981); Harold Berman, The Interaction of Law and Religion, 31 Mercer L. Rev. 405 (1980); Charles E. Rice, Some Reasons for a Restoration of Natural Law Jurisprudence, 24 Wake L. Rev. 539 (1989).} while others viewed that philosophy more in Enlightenment
natural law terms. Other commentators have focused more on the emergence of some modern version of natural law. That emergence has taken many forms, including economic natural law arguments, as in the law-and-economics movement, political natural law arguments, such as Lon Fuller's *The Morality of Law* or Ronald Dworkin's interpretation theory in *Law's Empire*, discussed below at § 13.1 nn. 37-38, and ethical natural law arguments, with theories as diverse as John Finnis’ updated version of Thomas Aquinas, Robert Nozick’s libertarianism, Bruce Ackerman’s liberalism, and John Rawls’ updated, more leftist neo-Kantian theory.

The term “economic natural law” is used to refer to those theories that judge the rightness of doctrine in terms of whether it promotes economic efficiency. The term "political natural law" is used to refer to those theories that focus on political arrangements and the connection of law to politics, or that focus on a set of conditions for political dialogue to determine ethical values for society, rather than developing from a natural law base some ethical or economic principles to guide society. The term "ethical natural law" is used to refer to those theories that claim to have developed through rational argumentation a set of ethical principles for society. For example, Lon Fuller’s approach represents an example of political natural law because of his view that a legal order is legitimate only to the extent that certain procedural arrangements are followed by the sovereign which give that sovereign political legitimacy. As Fuller stated, "Certainly there can be no rational ground for asserting that a man can have a moral obligation to obey a legal rule that does not exist, or is kept secret from him, or that came into existence only after he had acted . . . ." Ronald Dworkin’s approach is similarly a version of political natural law because of his view that

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33 John Finnis, Natural Law and Natural Rights (1980).


35 Bruce Ackerman, Social Justice in the Liberal State (1980).


37 Lon Fuller, *The Morality of Law* 39 (1964). This view is summarized at § 2.3.1 nn.28-29.
propositions of law are true if they figure in, or follow from, the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community's legal practice, i.e., the best political theory that explains the current legal order.38

Of course, as discussed at §§ 11.3.3 n.62 & 11.3.4.1 nn.65-66, one might classify the law-and-economics movement as a version of conservative pragmatic instrumentalism. This is how former University of Chicago Law School Professor, and now Seventh Circuit Court of Appeals Judge, Richard Posner views his approach. As one of the leading writers in the law-and-economics movement, Posner has written, "I consider myself to be a pragmatic economic libertarian. . . . I do not derive my economic libertarianism views from a foundational moral philosophy."39 However, just as it is probably more accurate to classify the early 19th-century focus on law and economics as a form of economic natural law theory, it may be better to classify the modern law-and-economics movement as an economic natural law approach, rather than a conservative version of instrumentalism. The rejection, cited above, by Judge Posner of foundational moral philosophy as a base for his law-and-economics approach may reflect only Posner's reaction to the critiques in the early 1980s of his attempt to ground law and economics in some foundational moral philosophy.40

With respect to revised versions of instrumentalism, there are a number of possible approaches, both critical and non-critical, as discussed at § 11.3.4. Whether some of these approaches are best categorized as versions of instrumentalism, because they presuppose judicial resort to background social policy to resolve leeways in the law, or are better characterized as some version of modern natural law, because they derive their normative component from background principles alone, may be a matter of dispute in some cases. Critical approaches that presuppose the "social construction of knowledge," and thus the inevitability of social influence in decisionmaking, are probably best characterized as modern versions of instrumentalism. This would include most versions of Critical Legal Studies41 and many versions of feminist or critical race theory. The feminist legal theory that best exemplifies this is the feminist legal theory that shares with the Critical Legal Studies Movement the "[p]ost-modern and post-structural traditions that have influenced left legal critics

38 Ronald Dworkin, Law's Empire 225 (1986). This view is addressed at § 16.2.1 n.16.


[to] presuppose the social construction of knowledge."\textsuperscript{42} The critical race theory included in this category would similarly involve those approaches adopting "critical or modernist approaches."\textsuperscript{43}

Some versions of feminist theory or critical race theory, however, reject the theoretical foundation of post-modern and post-structuralist thought in favor of some "moral realist" vision of our capacity through rational dialogue to develop ethical principles capable of rational defense. As Professor Deborah Rhode noted, "[A] standard critical strategy is to specify conditions under which answers would be generated. Habermas' ideal speech situation has been perhaps the most influential example. Under his theory, beliefs would be accepted as legitimate only if they could have been acquired through full uncoerced discussion in which all members of society participate. Some critical feminists, including Drucilla Cornell and Seyla Benhabib, draw on similar conversational constructs."\textsuperscript{44} Critical race theory that adopts what Professor Richard Delgado has called "conventional, quasi-scientific analysis" would similarly fall into this classification.\textsuperscript{45} Because all of these approaches are based on a belief in the possibility that rational dialogue can develop agreed-upon ethical principles to guide individual behavior, such approaches are probably best characterized as examples of modern ethical natural law.

Similar to these concerns, there is a question of whether some approaches categorized above as examples of modern ethical natural law would be more appropriately cast as revised versions of instrumentalism. For example, Bruce Ackerman’s discussion in \textit{Social Justice in the Liberal State}, cited above at § 13.1 n.35, may be an example of an approach that shares a post-modern and post-structuralist view regarding the social construction of knowledge, rather than the moral realist vision of our capacity through rational dialogue to develop ethical principles capable of rational defense.

The relationship among all these different modern and post-modern instrumentalist and natural law critiques to mainstream instrumentalism is discussed at § 15.4.3. That discussion concludes that they all represent transitional approaches between instrumentalism and a fully-developed, modern ethical natural law theory.

A second table, building on Table 2.4, may help clarify all of these relationships. Under the modified version of Gilmore's views discussed here, and reflected in Table 13.1 below, modes of judicial decisionmaking in American legal history have followed a counterclockwise pattern, from the formative era of ethical, political, and economic natural law; to the post-Civil War era of formalism; to the early 20\textsuperscript{th}-century transition to Holmesian jurisprudence; to Post-World War II instrumentalism; and finally to the emergence of some version of a modern natural law jurisprudence today. Concerning the specific dates for each era of American law, the dates listed in Table 13.1


\textsuperscript{44} Rhode, \textit{supra} note 42, at 636

overlap in each case by thirty years, roughly one generation, in order to underscore the point that there was not a sudden transformation in judicial style, and that in any event it is appropriate always to speak in terms of trends and tendencies of judges, not one approach adopted by all judges deciding cases during any particular time period. As Gilmore himself observed, "All generalizations are oversimplifications. It is not true that, during a given fifty-year period, all the lawyers and all the judges are lighthearted innovators, joyful anarchists, and adepts of Llewellyn's Grand Style – only to be converted en masse during the next fifty-year period to formalism and conceptualism. There are formalists during innovative periods and frustrated romantics during classical periods. When we reconstruct the past, we think we see that in one period the innovative impulse was dominant and that in another period the formalistic impulse was dominant. We are talking about temporary swings in a continuing struggle of evenly matched forces."46

For constitutional decisionmaking, more precise dates for each era are given. This is because, as indicated as the beginning of § 13.1, more precise benchmarks exist for when a majority of the Supreme Court switched to a different decisionmaking style. These more precise benchmarks are discussed at §§ 14.2.1-14.2.5. That discussion, and this Table 13.1, underscore that the framers and ratifiers lived in a predominantly natural law era, not a formalist, Holmesian, or instrumentalist era.

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

<table>
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<th>Formalism</th>
<th>economic political ethical</th>
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<td>Natural Law (Original, 1700-1880; Con. law, 1789-1873)</td>
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<td>(Modern, 1970 - Today; Con. Law, 1986 - ?)</td>
<td>ethical natural law</td>
<td>political natural law</td>
</tr>
<tr>
<td></td>
<td>economic natural law</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Law as Means to Ends; Functional or Pragmatic Approach; Law as Empirical Science</th>
<th>Holmesian</th>
<th>Instrumentalism</th>
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</thead>
<tbody>
<tr>
<td>(1900-1960 generally; Con. law, 1937-54)</td>
<td>1930-2000 generally; Con. law, 1954-86</td>
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46 Gilmore, supra note 1, at 16-17.
§ 13.2 A Similar Critical Legal Studies Version of American Legal History

Because the foregoing summary of the eras of American law incorporates the generally accepted account of formalism, Holmes, and modern instrumentalism, the summary should not be particularly controversial. Indeed, though mainstream accounts of the development of legal doctrine and a Critical Legal Studies version differ with regard to the oppressiveness of many legal doctrines, as noted at § 11.3.4.2.A, at the level of generality discussed here, this account of the eras of American legal history parallels exactly a Critical Legal Studies version of American legal history as described by Professor Betty Mensch in The History of Mainstream Legal Thought.47 Thus, whether one approaches law from a non-critical or a Critical Legal Studies perspective, the basic eras remain the same.

Under Professor Mensch’s account, the United States initially was in a period of pre-classical legal consciousness, the period defined here as natural law. As Professor Mensch described this period:

In flowery language drawn largely from the natural-law tradition, late-eighteenth and early-nineteenth-century legal speakers made extravagant claims about the role of law and lawyers. Law was routinely described as reflecting here on earth the universal principles of divine justice, which, in their purest form, reigned in the Celestial City. For example, the single most popular legal quotation, for rhetorical purposes, was taken from the Anglican theologian Hooker: "Of law no less can be acknowledged, than that her seat is the bosom of God; her voice harmony of the world."48

Following this period, there arose a period of classical legal consciousness, what Gilmore and others have called formalism. As Mensch stated: "By the 'rule of law' classical jurists meant quite specifically a structure of positivised, objective, formally defined rights."49 Reason, in such an age, is no longer considered as it was by natural law thinkers. Rather, reason is "now conceived, . . . not as embodying universal moral principles and knowledge of the public good [as it was by natural law thinkers] but strictly as the application of objective methodology to the task of defining the scope of legal rights."50 The goal was to produce "a grandly integrated conceptual scheme that seemed, for a fleeting moment in history, to bring coherence to the whole structure of American law."51

This vision of a grandly integrated conceptual scheme motored by an objective methodology to the task of defining legal rights – the formalist dream – broke down, noted Mensch, under the onslaught


48 Id. at 14 (citation omitted).

49 Id. at 18.

50 Id. at 18-19.

51 Id. at 18.
of those who argued that logic was not enough to resolve legal disputes in every case.\textsuperscript{52} As Holmes stated:

\begin{quote}
[W]henever a doubtful case arises, with certain analogies on one side and other analogies on the other, . . . what really is before us is a conflict between two social desires, each of which seeks to extend its dominion over the case, and which cannot both have their way. The social question is which desire is stronger at the point of conflict. The judicial one may be narrower, because one desire or the other desire may have been expressed in previous decisions to such an extent that logic requires us to assume it to preponderate in the one before us. But if that be clearly so, the case is not a doubtful one. Where there is doubt, the simple tool of logic does not suffice, and even if it is disguised and unconscious, the judges are called upon to exercise the sovereign prerogative of choice.\textsuperscript{53}
\end{quote}

Professor Mensch reflected this Holmesian insight in her discussion of the Realist Movement, of which Holmes can be seen as a founding father:

The realists pointed out that no two cases are ever exactly alike; there will always be some difference in the multitude of facts surrounding them. Thus, the "rule" of a former case can never be simply applied to a new case; rather, the judge must choose whether or not the ruling in the former case should be extended to include the new case. That choice is essentially a choice about the relevancy of facts, and these choices can never be logically compelled. Given shared social assumptions, some facts might seem obviously irrelevant (e.g., the color of socks worn by the offeree should not influence the enforceability of a contract), but decisions about relevancy of other distinguishing facts are more obviously value-laden and dependent on the historical context (e.g., the relative wealth of the parties). . . . [For the realists, t]here was no such thing as an objective legal methodology behind which judges could hide in order to evade legal responsibility for the social consequences of legal decision making. Every decision they made was a moral and political choice.\textsuperscript{54}

This Realist legacy led into the fourth period of American law, what Mensch described as attempts at modern reconstruction.\textsuperscript{55} The focus during this period, Mensch stated, was the instrumentalist focus on law as a functional policy science with judges taking a more active role in making explicit policy calculations.\textsuperscript{56} As Professor Mensch described this modern period:

\begin{enumerate}
\item Id. at 21-22.
\item Oliver Wendell Holmes, Jr., \textit{Law in Science and Science in Law}, 12 Harv. L. Rev. 443, 460-61 (1899).
\item Mensch, \textit{supra} note 47, at 22.
\item Id. at 24-31.
\item Id. at 25.
\end{enumerate}

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During the 1940's, Laswell and McDougal at Yale followed out the implications of realism by announcing that since law students were destined to be the policy makers of the future, Yale should simply abandon the traditional law school curriculum and teach students how to make and implement policy decisions. . . . What were once perceived as deep and unsettling logical flaws [were] translated into the strengths of a progressive legal system. For example, the indeterminacy of rules has become flexibility required for sensible, policy-oriented decision making; and the collapse of rights into contradiction has been recast as "competing interests," which are inevitable in a complex, tragic world and which obviously require an enlightened judicial balancing. In other words, we justify as legal sophistication what the classics would have viewed as the obvious abandonment of legality.57

Consistent with the classic account of the eras of American law discussed at § 13.1, Professor Mensch indicated that this attempt at modern reconstruction, while dominating legal discourse since World War II, has lost much of its force and, as of 1982 when her article was written, was under increasing attack from sources as diverse as "natural-law" theories; "representation-reinforcing" theories; "critical legal studies"; "law and economics"; "libertarianism"; and "outsider" jurisprudence by women and persons of color.58

§ 13.3 Results of The Decisionmaking Styles: Constitutional Law Doctrine

Given these analyses of the eras of American law, one way to view the Supreme Court is to note that instrumentalism has been on the wane on the Court with the retirements of Justices Brennan, Marshall and Blackmun between 1989-94. As discussed at §§ 11.3.2 & 11.4, Justices Stevens, Ginsburg, and Breyer have continued to carry on the liberal instrumentalist tradition, at least to a moderate extent. However, the debate on the Court among the remaining non-liberal, instrumentalist Justices, and any new Justices likely to join the Court in the foreseeable future, will more likely concern the three other approaches to decisionmaking: formalism, Holmesian, and natural law.

Of course, as discussed at § 11.3.3, it is certainly possible for a judge to be a conservative instrumentalist. Such a judge might be appointed to the Supreme Court in the near future. As noted at § 7.4.2 nn.236-39, many Democrats in the Senate concluded that some of President Bush’s nominations to the Courts of Appeals between 2001-2006, whom they filibustered, represented a brand of conservative instrumentalist judicial activism. Such a judge would be predisposed to support a conservative agenda by using leeways in the law to advance conservative policy positions.

Alternatively, such a judge might decide that the best way to advance the conservative agenda would be to adopt a formalist or Holmesian decisionmaking style. This judge would not adopt such a style because of an underlying belief that the formalist or Holmesian style represents a more defensible mode of decisionmaking than instrumentalism, but rather would adopt the style because in the existing political and social climate such a style would often lead to a conservative result in practice.

57  Id. at 24.

58  Id. at 31-33.
while at the same time avoiding accusations that the judge was deciding cases in an activist, policy-oriented manner.

A judge adopting such a tactic would simply "parrot" the formalist or Holmesian "line" in deciding cases, knowing that such an approach in today’s political and social climate would likely lead to conservative results most of the time. The only way to determine if such a judge were a true formalist or Holmesian, as opposed to a conservative instrumentalist pretending to be a formalist or Holmesian, would be examine those cases in which a formalist or Holmesian approach would lead to a liberal result and then see if the judge remained faithful to the formalist or Holmesian approach when deciding that case.

For example, regarding the issue of whether there is a due process limitation on punitive damages being awarded in civil cases, the typical conservative position would be to adopt a robust due process limitation in order to protect businesses from large punitive damage awards. The typical formalist position would be to acknowledge that neither the text nor the specific history surrounding the adoption of the Fifth and 14th Amendments contains any such due process limitation. True to their formalist decisionmaking style, both Justices Scalia and Thomas refused in *BMW of North America, Inc. v. Gore* and *State Farm Mutual Automobile Insurance Co. v. Campbell* to impose a due process clause limitation on punitive damage awards, despite that decision working against the typical conservative public policy result.

Of course, a conservative instrumentalist might still follow the formalist or Holmesian approach in a few cases. This would help preserve the illusion that the judge is a committed formalist or Holmesian, and thus preserve the judge's ability forcefully to argue that such an approach ought to be adopted for every case coming before courts. In other words, a conservative instrumentalist might conclude that seeming to remain a formalist or Holmesian purist was more important to the conservative cause than the result in any one case. This may be particularly true if a majority of the Court ended up adopting the conservative result anyway, as occurred in the *Gore* and *Campbell* cases. In any event, since such a judge would typically follow a formalist or Holmesian approach when deciding most cases, that judge would properly be placed in the formalist or Holmesian category, since that would represent how most cases would get decided before that judge. A judge who more routinely departed from the formalist or Holmesian position in such cases in favor of a conservative instrumentalist result, would more properly be viewed as a conservative instrumentalist.

A second aspect of focusing on current doctrinal results relates to modern formalist or modern natural law Justices. To state that there are a number of Justices who approach constitutional issues from the perspective of natural law or formalism today, approaches that dominated prior to 1937, does not necessarily mean that those Justices share the same substantive conclusions of the natural law or formalist Justices of the past on every constitutional issue. Rather, it means they share those

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60 538 U.S. 408, 429 (2003) (Scalia, J., dissenting); *id.* (Thomas, J., dissenting).

Justices’ general approach to judicial decisionmaking. Adopting that approach in modern times can lead to different substantive conclusions in how to define some aspect of constitutional doctrine today.

For example, as indicated at §§ 12.2.2.1-12.2.2.2, the natural law approach gives great deference to a sequence of judicial precedents, or later legislative and executive practice, as a gloss on meaning. This fact is evident in James Madison's approach to the issue of the constitutionality of the national bank in *McCulloch v. Maryland*. As discussed § 6.3.1 n.107, although initially opposing the bank as unconstitutional in 1791, in 1816 Madison supported the bank's constitutionality based upon repeated recognition by legislative, executive, and judicial actors of its constitutionality between 1791 and 1816. Similarly, Chief Justice Marshall began his opinion in *McCulloch* by noting the presumption of constitutionality in its favor based upon legislative, executive, and judicial practice.

Just as it did for Madison between 1791 and 1816, this gloss on meaning approach may suggest different substantive conclusions today for natural law judges than conclusions that were reached 150 or 200 years ago. For example, in discussing Congress' power under the Commerce Clause in light of any 10th Amendment limitations on that power, Justice O'Connor noted in *New York v. United States* that the "enormous changes in the nature of government" over the past two centuries and the "Court's broad construction of Congress' power under the Commerce and Spending Clauses" support the conclusion that certain federal governmental activities today are constitutional even if those activities were "unimaginable to the Framers." Similarly, in discussing congressional power under the Commerce Clause in *United States v. Lopez*, Justice Kennedy noted that federal power may be broader than conceived in 1820 based upon faithfulness to *stare decisis* and precedents since 1937, and changed economic factors from "an 18th-century economy, dependent then upon production and trading practices that had changed but little over the preceding centuries" to a 20th-century economy based on "a single market and a unified purpose to build a stable national economy.” Of course, despite attention to judicial precedents and legislative and executive practice as a gloss on meaning, natural law judges begin interpretation by focusing on the Constitution's text and purposes. Even with respect to these sources of interpretation, Justice O'Connor noted in *New York*, "[T]he powers conferred upon the Federal Government by the Constitution were phrased in language broad enough to allow for the expansion of the Federal Government's role."


63 17 U.S. (4 Wheat.) 316, 401-02 (1819).

64 *New York v. United States*, 505 U.S. 144, 157 (1992) (O'Connor, J., opinion for the Court). The full passage from which these quotes are taken appears at § 12.2.1.2 n.20.

65 514 U.S. 549, 574 (1995) (Kennedy, J., joined by O'Connor, J., concurring). Justice Souter's dissent in *Lopez* resonates even more strongly with the great natural law respect for *stare decisis*. *Id.* at 603 (Souter, J., dissenting).

66 505 U.S. at 157 (O'Connor, J., for the Court).
By the same token, modern formalist judges can be predicted to differ on some issues from their 1873-1937 counterparts. As indicated at § 9.2.2.2, formalist judges have respect for "settled law." Thus, as noted at § 7.3.2 n.111, in his opinion in United States v. Lopez, 67 Justice Thomas did not call for a complete return to a pure formalist reading of the Commerce Clause. Instead, he called for a balance between existing precedent and the formalist's main reliance on a literal reading of text and a specific historical intent. Similarly, on the issue of incorporation of the Bill of Rights into the Fourteenth Amendment, Justices Scalia and Thomas have indicated that though they do not think such an approach is consistent with literal text or the specific historical intent of the framers and ratifiers, they are committed to recognizing incorporation as a matter of "settled law." 68

In addition, sometimes the traditional and modern formalist positions can differ over the weight to be given to literal text versus specific historical intent if the two are in conflict. For example, as discussed at § 9.3.4, the traditional formalist approach embraced specific historical intent to support segregation in Plessy v. Ferguson. In contrast, the modern formalist approach of Justices Scalia and Thomas embraces literal text to reject Plessy in favor of the literal equality of a “color-blind” Constitution. 69

The same difference between a traditional and a modern Holmesian or instrumentalist approach is also theoretically possible. However, as an historical matter, the heyday of Holmesian decisionmaking was 1937-54, and the heyday of instrumentalism was 1954-86. Since these periods are part of modern constitutional law, there are not many areas where a difference appears between a traditional and modern Holmesian approach, or a traditional and modern instrumentalist approach. However, occasionally a difference can appear. For example, one difference between a traditional and modern Holmesian approach may be found in cases involving gender discrimination. The traditional Holmesian approach, with its deference to governmental action, supported the lack of heightened scrutiny in cases involving gender discrimination that were decided between 1937 and 1954. Chief Justice Rehnquist continued this minimum rational review in his dissents to the 1970s cases that evaluated gender discrimination with an intermediate level of review. However, from a modern Holmesian perspective, Chief Justice Rehnquist eventually became resigned to that intermediate level of review as a matter of “settled law.” 70

Similarly, as discussed at § 10.3.2 nn.53-59, the traditional extreme Holmesian approach was to view questions of gerrymandering as political questions, as represented by Justices Frankfurter and Harlan’s dissent in Baker v. Carr, and, after Frankfurter left the Court, Harlan dissenting in Reynolds

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Contrary to this position, modern Holmesian Chief Justice Rehnquist was committed to court scrutiny of legislative redistricting, joining Court majorities in *Shaw v. Reno*\(^{72}\) and its progeny, discussed at § 26.2.1.5.

These two examples, however, do not undercut the general observation that there is a close similarity between a modern Holmesian approach, such as that of Chief Justice Rehnquist, and the traditional Holmesian approach reflected in Justice Holmes' dissents between 1904-32 and in Supreme Court majority opinions between 1937-54. This observation is even more true regarding instrumentalism, for which the traditional 1954-86 approach remains the modern instrumentalist approach today. As discussed at § 11.3.2, the main difference among Justices adopting an instrumentalist approach is the degree to which they are extreme or moderate instrumentalists.

Given these observations, an informed analysis of the substance of constitutional doctrines typically must take into account six different substantive outcomes. As reflected in the discussion in Chapters 17-32, for most doctrines there is the traditional natural law approach of 1789-1873; the traditional formalist approach of 1873-1937; the Holmesian approach of 1937-54; the instrumentalist approach of 1954-86; a modern formalist approach; and a modern natural law approach.

In deciding cases, the modern natural law and modern formalist approaches use the same interpretive tools as their traditional counterparts, but they may reach slightly different conclusions on some doctrines. For formalist judges, this will typically be based upon differences in perception regarding the meaning of literal text or the specific historical intent of the framers and ratifiers of the Constitution. For natural law judges, this will also sometimes be based on differences regarding the purpose of constitutional provisions or general historical intent of the framers and ratifiers, later legislative and executive practice representing a gloss on constitutional meaning, or the weight given to a changed climate of judicial precedents. As these later sources are not favored much by formalist judges, there will be fewer cases than for natural law judges where modern formalist judges will permit these sources to be determinative of some new constitutional meaning.

### § 13.4 Decisionmaking Styles of the Justices: Current and Recent Past

To conclude this Chapter on the eras of American law, it may be helpful to summarize the general decisionmaking style of the current Justices on the Supreme Court, and those of the recent past. As of the 2004 Term of the Court, there were two formalists, Justices Scalia and Thomas; one Holmesian, Chief Justice Rehnquist; three moderate instrumentalists, Justices Stevens, Ginsburg, and Breyer; and three modern natural law Justices, Justices O’Connor, Kennedy, and Souter. Changes in Court membership since the 2004 Term naturally have affected the Court’s make-up. Although their judicial predispositions may not become clear until after a few years on the Court, the “New Justices Addendum” to this book predicts that Chief Justice Roberts will likely adopt a

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Holmesian decisionmaking style, with a slight affinity for formalism, like Chief Justice Rehnquist; Justices Alito, Gorsuch, and Kavanaugh will likely adopt a formalist decisionmaking style, similar to Justice Scalia, with a slight affinity for Holmesian deference; and Justices Sotomayor and Kagan will likely adopt a liberal moderate instrumentalist style, similar to Justices Ginsburg and Stevens.

In Table 13.4, the Justices on the Court since 1968 have been positioned so as to reveal their occasional affinities for a different style than their predominant style, as discussed at §§ 9.4, 10.4, 11.4 & 12.4. 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 this caveat, the alignment of Justices who served on the Court since 1968 is as follows:

Table 13.4: 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</th>
<th>Declares of the Law</th>
<th>Normativism: Judges as Normative Actors</th>
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<td>Harlan Stewart BREYER</td>
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<td>Law as Means to Ends; Functional or Pragmatic</td>
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Viewing the categorizations of Justices Alito, Gorsuch, and Kavanaugh as tentative, since 1968 there have been 4 clear formalists on the Court: 2 extreme, conservative formalist, Justices Scalia and Thomas; 1 extreme, liberal formalist, Justice Black; and 1 moderate, conservative formalist, Chief Justice Burger. As noted at § 9.4, Chief Justice Burger had a slight affinity for Holmesian decisionmaking, and thus is placed slightly in the direction of Holmesian decisionmaking. Justice Black had a slight affinity for instrumentalism, and thus is placed partly in that direction. Justice Thomas has a slight affinity for natural law, and thus is placed slightly in that direction. Justice Scalia was more of a pure formalist Justice, with no predisposition in any other direction.

Viewing Chief Justice Roberts’ categorization as tentative, among the 4 other Holmesian Justices who served on the Court since 1968, there have been: 1 extreme, conservative Holmesian, Chief
Justice Rehnquist; 1 extreme, liberal Holmesian, Justice White; and 2 moderate, conservative Holmesians, Justices Harlan and Stewart. As discussed at § 10.4, Chief Justice Rehnquist had a slight affinity for formalism. Thus, he is placed slightly in that direction. Justice White had a slightly affinity for instrumentalism, particularly regarding federal court power to enforce remedies and in cases involving race discrimination, as discussed at § 10.3.3. He is thus placed slightly in that direction. The natural law affinities of Justices Stewart, and even more so for Justice Harlan, discussed at § 10.4, are reflected in their placement in Table 13.4 as well.

Viewing Justices Sotomayor’s and Kagan’s categorizations as tentative, among the 9 instrumentalist Justices who have served on the Court since 1968, Chief Justice Warren, and Justices Brennan, Marshall, Douglas, and Fortas are placed directly under the heading of instrumentalism, reflecting their core instrumentalist decisionmaking style. They were the 5 extreme, liberal instrumentalists on the Court during the mid-to-late 1960s, with perhaps Justices Douglas and Fortas, listed at the end of the list, being the most extreme, liberal instrumentalists of all. Justices Blackmun, Stevens, Ginsburg and Breyer are placed above the heading of instrumentalism, reflecting a more moderate brand of liberal instrumentalism. As discussed at § 11.4, Justice Blackmun had, and to a slightly lesser extent Justices Ginsburg and Breyer have, an occasional affinity for natural law. Justice Breyer also has an occasional affinity for Holmesian deference to government.

Among the 4 natural law Justices on the Court since 1972, there have been 1 extreme, centrist natural law judge, Justice Souter; and 3 moderate, conservative natural law judges, Justices Powell, O’Connor, and Kennedy. As discussed at § 12.4.1, Justice Kennedy has an occasional affinity for formalism. Justice Powell, and even more so, Justice O’Connor, had an occasional affinity for Holmesian decisionmaking, as discussed at § 12.4.2. As discussed at § 12.4.3, Justice Souter has an occasional affinity for instrumentalism.

For other Justices on the Court during the modern era of Supreme Court decisionmaking (1937 to today), but not on the Court since 1968, the following brief summary indicates their general predispositions, as indicated by the discussions in Chapters 9-12:

6 Formalist Justices: 4 extreme, conservative formalists, Justices Van Devanter, McReynolds, Sutherland, and Butler; 2 moderate, conservative formalists, with Holmesian leanings, Chief Justice Hughes and Justice Owen Roberts.
9 Holmesian Justices: 2 extreme, liberal Holmestrians, Justices Brandeis and Frankfurter; 2 moderate, centrist Holmesians, Justice Jackson, who also had natural law leanings, and Justice Burton; 5 moderate, conservative Holmestrians, Chief Justice Vinson, and Justices Reed, Minton, Clark, and Whittaker.
6 Instrumentalist Justices: 3 extreme, liberal instrumentalists, Justices Murphy, Rutledge, and Goldberg; 3 moderate, centrist instrumentalists, Chief Justice Stone and Justices Cardozo and Byrnes.
0 Natural Law Justices: None other than Justices Powell, O’Connor, Kennedy, and Souter.

Combined with the Justices listed in Table 13.4, during the modern era there have been 13 formalists on the Court, with 7 serving during or before 1937; 14 Holmestrians, with a majority appointed and serving between 1937-1954; 17 instrumentalists, with a majority serving between 1954-1986; and 4 natural law Justices, all appointed and serving during the Burger, Rehnquist, or Roberts Courts.
CHAPTER 14: MATERIAL CAUSES OF THE FIVE ERAS OF AMERICAN LAW

As discussed in Chapter 13, five eras have existed in American law. These eras reflected the four different judicial decisionmaking styles. For constitutional law, these five eras are: a natural law era, 1789-1873; a formalist era, 1873-1937; a Holmesian era, 1937-1954; an instrumentalist era, 1954-1986; and a modern natural law era, 1986-today. As its most elementary level, the material cause of each of these eras of constitutional law were the Presidents who nominated, and the members of the Senate who confirmed, the Justices who sat on the Supreme Court. Identifying the political currents underlying the elections of these Presidents and Senators can help better define the form or shape of these eras of American law. In addition, the case results in these eras of constitutional decisionmaking depended not only on the style of decisionmaking that was applied in the cases, but also on the kind of cases that reached the Court. These cases, in turn, reflected the material reality of what was going on in society with respect to economic and social matters.

This Chapter will present a summary of highlights on how the Court’s decisionmaking has related to economic and social events in society, classifying those events by time into the five eras discussed in Chapter 13. Other highlights appear in Chapters 17-32, where specific cases are discussed and organized in doctrinal fashion as well as by the eras of decisionmaking. Similar to the four judicial decisionmaking styles, there are four approaches to political issues. These approaches are discussed at § 14.1. Details regarding each of the five eras, both in terms of politics and the related economic and social issues that defined each of these eras, are discussed at § 14.2. Fuller discussion of the nature of society and politics in the modern natural law era occurs at § 14.3. A few comments on the possible shape of social, political, and judicial decisionmaking in the future occur at § 14.4.

§ 14.1 Defining Four Approaches to Social and Political Issues

As discussed at §§ 2.2 and 2.3, judges must ask two main questions in deciding cases – the nature of law and the nature of the judicial task. For any politician entering public office, there are also two main questions to ask. These two questions involve the politician’s approach toward fiscal policy and toward social policy. One can have a conservative or progressive approach toward each.

In general, a conservative fiscal approach gives high priority to the balance sheet, matching governmental costs with revenues to try to achieve a balanced budget. In contrast, a progressive fiscal approach puts greater weight on using the government's fiscal resources to provide correctives to the business cycle to promote economic growth and lower unemployment. A progressive fiscal approach is thus willing to run deficits in order to stimulate the economy.

In general, conservative social policy emphasizes the traditional moral values of the majority of the community and is reluctant to have government take over functions that might better be handled by private individuals, community organizations, or religious organizations. For conservatives, the primary obligations of government are national defense and preserving law and order in society. Progressive social policy focuses more on protecting the rights of individuals, particularly the rights of individuals in the minority to dissent. Progressive social policy also responds to identified needs by looking for answers partly in governmental programs that protect individuals' health and safety concerns and provide a safety net for those in need. For progressives, governmental spending needs to reflect a balance between the needs of national defense and preserving law and order versus the
need for social health and safety programs and effective regulation, giving each their appropriate weight.

Just as combining the two possible approaches to the two judicial questions led to four judicial decisionmaking styles, combining conservative and progressive approaches toward fiscal and social policy yields four possible combinations of political perspectives. At one extreme are traditional conservatives who are conservative on both fiscal and social policy. In his heart, and in his rhetoric, though not in the large deficits that occurred during his presidency, President Reagan epitomized this kind of approach. Speaker Newt Gingrich and the House Republican rhetoric carried on this tradition in the 1990s with their emphasis on a balanced budget amendment to the Constitution, combined with a conservative approach toward social policy.

At the other extreme are modern liberals who are progressive on both fiscal and social policy. President Johnson epitomized this kind of approach in the 1960s. It is often associated with the phrase "liberal Democrats in Congress."

Third, there is the traditional liberal approach of the 18th and 19th centuries, which was conservative on fiscal policy, but progressive on social policy. As discussed at § 14.2.1, this was the position of Presidents Jefferson and Jackson in the early 19th century. It is the position of various groups in the center of American political debate today who are looking for a third way between the House Republicans and the liberal Democrats in Congress. Examples of this include: the "Big Tent" strategy of the Republicans; the "New Democrat" strategy of the Democrats; and various independent movements, such as the Reform Party, at least as represented by former Minnesota Governor Jesse Ventura, who described himself as a fiscal conservative and social progressive. California Governor Arnold Schwarzenegger similarly positioned himself as a fiscal conservative, but social progressive in his successful campaign in the California recall election of Governor Gray Davis in 2003.

Finally, there is a modern conservative position, progressive on fiscal policy, but conservative on social policy. President Nixon epitomized this approach with his fiscally progressive comment that "we are all Keynesians now," coupled with his socially conservative "law and order" approach. This position is also reflected in the conservative social policy, but fiscally progressive large deficit policies of Presidents Reagan, George H.W. Bush, and George W. Bush that occurred in response to economic recessions in 1981, 1990, and 2001, respectively. This modern conservative position was also reflected in the socially conservative populism of politicians like former Alabama Governor George Wallace.

Each of these approaches have predominated at various points in American history. As discussed at § 14.2, originally, during the natural law era of 1789-1873, the traditional liberal approach of the 18th and 19th centuries predominated as a matter of politics. During the formalist era of 1873-1937, the traditional conservative approach predominated. During the Holmesian era of 1937-54, the modern conservative position was prominent. During the instrumentalist era of 1954-86, the modern liberal approach predominated. As in constitutional law, its heyday was 1963-69. The predominant approach of the modern era suggests a modern version of the traditional liberal approach.
Of course, the reasons why each of these approaches predominated at any point in time is dependent on a range of social and political considerations. As discussed at § 14.3, as a general matter, the Democratic Party has always billed itself throughout American history as the party of the middle and working classes, laborers and farmers alike. In contrast, the Republican Party, along with its Federalist and Whig predecessors, has billed itself as the party of the business community and traditional White, Anglo-Saxon Protestant religious values. Two groups of swing voters, Southern religious conservatives and minorities, have determined in each era which political party predominantly had the electoral advantage.

When the Democratic Party has captured the substantial allegiance of both Southern religious conservatives and minorities, the Democratic Party has had an electoral advantage. This occurred during the pre-Civil War era, when Southern conservatives and Northern minority groups, such as Irish or Jewish groups, supported the Democratic Party more than the Federalist, Whig, or Republican Parties, and from the Great Depression until the Civil Rights Movement of the 1960s.

The Republican Party has had the electoral advantage when it captured greater allegiance among either of these two groups. The Republican Party thus had the electoral advantage from the Civil War to the Great Depression, when it captured greater allegiance among minority voters, particularly African-American voters, based on the Republican Party’s role in ending slavery and ensuring African-Americans the constitutional right to vote under the 15th Amendment. This right was adequately protected in the North, which was sufficient to preserve the overall electoral advantage of the Republican Party, while African-American voters in the South were disenfranchised as a practical matter as a result of Jim Crow legislation from the 1880s until voting rights acts in 1957 and 1965. Consistent with the proliferation of segregation statutes in the 1880s and 1890s, Democrats in the South “led organized efforts to disenfranchise Black voters. . . . In Louisiana, for example, in 1896 there were 130,344 Black voters. By 1904 there were 1,342. While Louisiana had elected a Black governor, and 123 Black legislators served in the state legislature between 1868 and 1877, by 1890 there were 130,344 Black voters. By 1904 there were 1,342. While Louisiana had elected a Black governor, and 123 Black legislators served in the state legislature between 1868 and 1877, by 1890 the last Black senator left office, followed by the last Black representatives in 1900. There was not another Black member of the legislature until 1890. The Republican Party has also had an increasing electoral advantage since the Civil Rights Movement of the 1960s based on capturing a greater allegiance among Southern religious conservatives. Such conservatives have tended to leave the Democratic Party in favor of the Republican Party, as the other elements of the Democratic coalition, minorities and non-Southern laborers and farmers, particularly as represented by unions, have pushed for progressive social values not shared by Southern conservatives.

At the time of the Great Depression, Franklin Delano Roosevelt was able to bring back minorities to the Democratic coalition by focusing on the shared economic interests of minority families and middle and working class white families. As discussed at § 14.4, for the Democratic Party to bring back sufficient numbers of Southern religious conservatives into the Democratic Party to reestablish the electoral advantage that the Democratic Party had between the Great Depression and the 1960s, a similar message of shared economic interests of minority families and middle and working class white families may be necessary in the post-2000 political climate.

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§ 14.2 Five Political Eras of American History and Supreme Court Doctrine

§ 14.2.1 The Original Natural Law Era: 1789-1873

The first age of American politics was the traditional natural law era, which existed from 1789 to 1873. The dominant political vision of this age was fiscally conservative and, within the context of 18th-century and 19th-century Western European notions, socially progressive, reflecting the traditional liberal approach of the Enlightenment. This traditional liberal vision was represented during the early part of this era by the Jeffersonian and Jacksonian Democratic Party. Both Jefferson and Jackson were strong believers in a balanced budget and fiscally conservative policies, while being socially progressive in reducing property qualifications on the right to vote and protecting individual economic and civil liberties, like freedom of speech, freedom of religion, and frontiersmen's individual freedom from governmental control.2 Similarly, the dominant judicial vision of this time was protective of the individual on economic rights, and thus took a protective approach to Takings Clause, Contracts Clause, and other economic matters. It has been noted, "[Chief Justice Marshall] called the property right 'sacred.' Marshall considered it to be unequivocally a natural right, thus following such liberal republicans as Locke and Adam Smith."3 Within the context of 18th-century and 19th-century Western European notions, the judicial vision also favored protection of civil rights, and thus was progressive on civil liberties matters where the text of the Constitution so permitted. This was reflected in Jefferson's opening paragraph of the Declaration of Independence with its unalienable rights to “life, liberty and the pursuit of happiness,” in the Constitution's Bill of Rights, and in works such as Thomas Paine's The Rights of Man.4 Of course, with regard to the issue of slavery, the bargain made in the Constitution legitimizing slavery in order to bring the Southern states into the Union did not permit the Justices to do the progressive thing from the perspective of natural law. Instead, even for natural law judges who themselves abhorred slavery, the plain text of the Constitution required them to uphold its constitutionality.5

As noted at § 13.1 nn.14-16, 30-40, there were three facets of this natural law period: ethical, political, and economic. With regard to ethical considerations, the issue regarding freedom of speech was raised with the passage in 1798 of the Sedition Act. The Act criminalized certain forms of politically partisan speech, which the Act termed as “sedition.” Compared with existing English law the Act was progressive, in that it did make “truth” a defense to the Act, which was not true of

2 See generally Alf J. Mapp, Jr., Thomas Jefferson 397-402 (1987) (discussing Jefferson's views as represented in his first inaugural address to the Nation); Arthur M. Schlesinger, Jr., The Age of Jackson 306-21 (1945) (discussing Jacksonian democracy).


4 Thomas Paine, The Rights of Man (1792).

the English sedition laws of the time. England did not establish a defense of truth until 1843. On the other hand, the Act appeared to be motivated primarily by political partisanship, as by its terms it lapsed in 1801, after the Presidential election in 1800. During the campaign of 1800, a number of Jefferson partisans were arrested under the Act. Jefferson and his allies used the passage and enforcement of the Act to brand President John Adams and his administration as hostile to the rights of free speech. After Jefferson’s election in 1800, the Sedition Act was not renewed, in part because of the understanding of Jefferson and his supporters that the Act constituted an infringement on the rights of free speech. The Supreme Court stated in 1964 in New York Times Co. v. Sullivan:

Although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history. Fines levied in its prosecution were repaid by Act of Congress on the ground that it was unconstitutional. . . . Calhoun, reporting to the Senate on February 4, 1836, assumed that its invalidity was a matter “which no one now doubts.” . . . Jefferson, as President, pardoned those who had been convicted and sentenced under the Act. . . The invalidity of the Act has also been assumed by Justices of this Court. . . These views reflect a broad consensus that the Act, because of the restraint it imposed upon criticism of government and public officials, was inconsistent with the First Amendment.

Regarding other civil liberties matters, there were few major Supreme Court cases during this period. One major reason for this, as discussed at § 27.2.1 n.95, was that the Bill of Rights was held to apply only to the federal government, and, as discussed below, for political reasons there was little federal regulation before the Civil War. Additionally, as discussed at § 27.2.1 n.96, the Due Process Clause was regarded as covering only procedural matters, and thus was not viewed as a source for substantive protection of rights. With the exception of the issue of slavery, discussed at the end of this section, few ethical natural law issues came before the Supreme Court during this period.

A number of important political natural law issues were addressed. First, the Court addressed a number of issues of separation of powers. The Court made clear its independence from the executive and legislative branches by deciding in 1792 in Hayburn’s Case that the Court had no power to render advisory opinions to those branches. The Court thus made it clear that the federal courts are not administrative agents of the executive or legislative branches. In 1803, the Court rendered its opinion on the topic of judicial review in Marbury v. Madison. With respect to

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7 376 U.S. 254, 276 (1964).
10 2 U.S. (2 Dall.) 409, 410 (1792).
11 5 U.S. (1 Cranch) 137 (1803).
judicial review, all courts in the United States, and most government officials and the American people, accept three principles rooted in *Marbury* and the 1816 case of *Martin v. Hunter's Lessee*. These principles were reaffirmed in 1958 in *Cooper v. Aaron*, the only Supreme Court opinion signed by all nine Justices. These three principles are:

1. The United States Constitution is our Nation's basic law;
2. It is a judicial duty to say what the law is, and thus whether a federal or state law, on its face or in its application, has violated the Constitution; and
3. With respect to the judiciary in both state and federal courts, decisions by the Supreme Court of the United States are the final authority on the meaning of the Constitution.

As discussed at § 17.2.2, *Marbury* was decided against a background of political disharmony between the Supreme Court, all of whose members had been nominated by Federalist Presidents Washington or Adams, and the Congress and White House, all of whom were in the hands of Jefferson’s party after 1800.

Second, the Court decided a number of important questions of federalism. When the Federalists held office, from 1789 to 1800, Secretary of the Treasury Alexander Hamilton persuaded Congress to adopt a program that favored commercial and manufacturing interests. The program arranged to pay off Revolutionary War debts, and included taxes and tariffs to finance that obligation and to protect infant domestic industries. A national bank was created in 1791 under a 20-year charter to help, among other things, stabilize the currency. The program reflected Federalist interest in establishing a strong pro-business national government. As discussed at § 7.1 n.13, this view was rejected by Jefferson, who believed the federal government should focus on foreign policy matters, leaving domestic matters largely up to the states. Moderate Jeffersonian President James Madison, however, shared some of the nationalist impulses of Hamilton, with whom he had worked to get the Constitution ratified through their joint writings in *The Federalist Papers*. As President in 1816, Madison supported re-creation of a national bank under a new 20-year charter, having experienced the inconvenience of not having a national bank between 1811-16 when trying to finance and pay troops during the War of 1812. Madison’s appointments to the Court between 1809-16, such as Justices Joseph Story and Gabriel Duvall, shared the Federalist vision of the national government.

Supreme Court opinions of this era thus shared the Federalist vision to preserve a broad power in Congress to promote a stable economy and to regulate commerce. In upholding the constitutionality of the creation of a national bank in *McCulloch v. Maryland*, Chief Justice Marshall’s stated the view that the Constitution, emanating from the people, created a government that is limited but supreme in its sphere, and that contains only an outline of great powers. The means for executing those powers were intended to be ample, so that federal laws are constitutional if not expressly

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12 14 U.S. (1 Wheat.) 304 (1816).
prohibited nor inappropriate for an end within the scope of the Constitution. In *Gibbons v. Ogden*, Chief Justice Marshall added that the power to regulate commerce among the states is a plenary power to make rules on commercial intercourse in all its branches which concern more states than one. Thus, Congress can regulate except for concerns that 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 government.” The states have reserved powers to regulate commerce for local purposes, as part of their police power, only so long as the state law does not conflict with federal law.

Chief Justice John Marshall’s opinions provided Congress with a basis for extensive regulation of the economy. However, with the exception of tariff policy, Congress remained largely inactive in economic matters before the Civil War. For most of this period, Congress and the presidency were dominated by the Jeffersonian, and later Jacksonian, wings of the Democratic Party. They shared a vision of states’ rights and a limited role for the federal government in domestic matters. Attempts by the occasional non-Democratic president during this era to get Congress to approve large-scale appropriations for internal improvements, such as President John Quincy Adams’ attempts between 1825-28, were rejected. President Jackson refused to re-charter the second national bank in 1836 when its 20-year charter ran out. Indeed, at the time of the Civil War, the Constitution of the Confederate States of America, which was based on the United States Constitution with “appropriate” modifications, such as “[n]o . . . law denying or impairing the right of property in negro slaves, shall be passed,” provided in the Commerce Clause that “neither this, nor any other clause contained in the Constitution, shall ever be construed to delegate the power to Congress to appropriate money for any internal improvement intended to facilitate commerce; except for the purpose of furnishing lights, beacons, and buoys, and other aids to navigation upon the coasts, and the improvement of harbors, and the removing of obstructions in river navigation; in all such cases such duties shall be laid on the navigation facilitated thereby, as may be necessary to pay the costs and expenses thereof.”

In short, from 1800 until 1860, the Jeffersonians and Jacksonians protected agricultural and southern interests by contending for narrow interpretations of congressional power under the Constitution and by opposing most economic regulations proposed in Congress. Thus, although the Supreme Court under Chief Justice Marshall made it constitutionally possible for Congress to exercise extensive regulatory power, that did not occur prior to the Civil War because of Southern political influence. Instead, during antebellum years, the energy of Congress increasingly went into two kinds of debates.

One was a debate over tariff policy. Northern states typically wanted higher tariffs on imported goods in order to protect the newly-developing industries in the North. Southern states typically wanted low tariff policy to make imported goods more affordable, and to prevent retaliation by other countries that might impose higher tariffs on the South’s export industry of cotton and other products. The other debate was over the slavery issue and how it related to the admission of new

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states and territories and the enforcement of the fugitive slave laws. On balance, because of the influence of the Southern states in the Jefferson/Jackson Democratic coalition, Southern states got substantially what they wanted.\textsuperscript{18}

Nominations by President Jackson between 1829-36 and by later Democratic Presidents moved the United States Supreme Court away from Chief Justice Marshall’s vision and in the direction of states’ rights and Southern interests. The most prominent of these appointments was President Jackson’s selection of Chief Justice Roger Taney to replace Chief Justice Marshall in 1835. Chief Justice Taney served on the Court until 1864. However, because little legislation was passed by Congress on economic matters during this period, few federalism cases occurred in any event.

Against a background of this lack of federal legislation, the states began to encourage economic development in a variety of ways, as by giving favorable tax and substantive law treatment to business corporations and making investments in business activities. When the states sought to avoid disadvantageous contracts, the Marshall Court made use of the Contracts Clause to hold the states to contracts that they had made with private individuals, as in \textit{Fletcher v. Peck} and \textit{Dartmouth College v. Woodward}.\textsuperscript{19} Meanwhile, steam engines began to supplement canals by powering boats and railroads. The states encouraged the development of industries that made use of these powerful new inventions. Many state laws encouraged the industries by devices such as granting eminent domain power and investing public money in private enterprise. Most regulations of business during this time were devised by the states.\textsuperscript{20} Often they were ineffective. Some ended up costing the states a great deal of money, and more than one-half of the state Constitutions were revised by the 1860s to prevent too much state involvement with private industry.\textsuperscript{21}

Reflecting the increased importance of economic natural law during the last half of the natural law era, the Taney Court did render a number of important economic natural law opinions. The first case of this kind was in 1837 in \textit{Charles River Bridge v. Warren Bridge}.\textsuperscript{22} In this case, the question was whether an existing monopoly licensee would be protected, or could a state legislature authorize a competing bridge to be erected. The earlier ethical natural law view of promoting stability and continuity in society by protecting existing economic arrangements, discussed at § 13.1 nn.12-16, and reflected in \textit{Fletcher} and \textit{Dartmouth College}, was rejected in favor of promoting competition. As noted at § 12.3.3 nn.157-58, Justice Story, more traditional and looking to the past, would have protected the monopolist; the Taney Court majority permitted the legislature to promote competition.

\textsuperscript{18} See generally Hall, \textit{supra} note 14, at 92-93, 138-39.

\textsuperscript{19} Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810) (a state legislative land grant could not be altered); Dartmouth College v. Woodward, 17 U.S. (4 Wheat) 518 (1819) (state legislature could not change provisions of a college charter because it was a contract).

\textsuperscript{20} See generally J. Willard Hurst, Law and the Conditions of Freedom in Nineteenth-Century United States (1964).

\textsuperscript{21} Hall, \textit{supra} note 14, at 103-04.

\textsuperscript{22} 36 U.S. (11 Pet.) 341 (1837), aff’g 24 Mass. (7 Pick.) 344 (1829).
The second major case of importance was *Swift v. Tyson*. In *Swift*, in an opinion authored by Justice Story, the Court adopted in 1842 the doctrine that there is a federal common law applicable to commercial transactions, which can overrule the commercial common law of state courts, in cases where federal jurisdiction exists, such as diversity jurisdiction in state common law cases where the plaintiff and defendant reside in different states. This federal common law was based on the law of nations with respect to commerce, and the law of nations was thought to rest on natural law. This doctrine was followed on *stare decisis* grounds by formalist-era courts. It was overruled by the Supreme Court in 1938, when Holmesian rejection of natural law led the Holmesian-era Court in *Erie Railroad Co. v. Tompkins* to reject the notion of a federal general common law and required federal courts to apply state contract, tort, and property principles in state law cases in federal court under diversity jurisdiction, as discussed at § 20.3.4 nn. 314-19.

A third important economic natural law case was *Cooley v. Board of Wardens*. In *Cooley*, the Court held in 1851 that some subjects of regulation are in their nature national because they imperatively demand a uniform national rule, and some subjects imperatively demand diversity. Congress has exclusive jurisdiction over the former, but the states have jurisdiction over the latter. As discussed at § 18.2.1.2 nn. 65-70, under *Cooley* the Court decided into which category any subject fits, rather than asking whether Congress had intended federal regulation to preempt state regulation in the area. The opinion freed the pro-states’ rights Taney Court to approve many state economic regulations, such as the Philadelphia port regulations upheld in *Cooley*. This was a useful power at the time because Congress was not acting forcefully to protect persons from certain negative consequences of the new economic activity, such as industrial injuries and injuries to passengers on steamboats and railroads. After the Civil War, the pro-business formalist Supreme Court used the doctrine more to strike down state regulations, as in *Wabash, St. Louis & Pacific Railway Co. v. Illinois*, which held unconstitutional an Illinois railroad regulation as interfering with the exclusive power of Congress to regulate interstate commerce under the *Cooley* doctrine.

The final major economic natural law case of the Taney Court was the Supreme Court’s opinion in 1857 in *Dred Scott v. Sandford*. The Supreme Court’s opinion in *Dred Scott* viewed the issue of slavery through the lens of economic natural law rights of slave owners, rather than ethical natural law arguments against the morality of slavery. As discussed at § 25.1 nn. 9-16, Chief Justice Taney’s opinion, reflecting his and other Justices more pro-Southern sympathies, went beyond the political compromise on slavery adopted in the Constitution, to propose an economic right in the slave owner to take the slave anywhere in the United States and seek the protection of federal law. By questioning the constitutionality of the congressionally-passed “Missouri Compromise,” which in practice had limited slavery to Southern states, the Court’s opinion in *Dred Scott* seemed to permit

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23 41 U.S. (16 Pet.) 1, 18-22 (1842).
24 304 U.S. 64, 71-80 (1938).
26 118 U.S. 557, 575-77 (1886).
slavery as a constitutional right to be imported into Northern states. This decision split the Democratic Party coalition of Northern and Southern Democrats, and galvanized support in the Northern states for the Republican Party, leading to the election of President Lincoln, which led to the Civil War. Given the split in the Democratic Party, caused by the cancer in the party represented by the institution of slavery, the mantel for carrying out the Enlightenment vision of liberty and equality of opportunity represented in the Declaration of Independence passed during the last part of the natural law era to the abolitionists and the Republican Party. In the aftermath of the Civil War, the Radical Republican Congress ensured adoption of the Enlightenment-inspired 13th, 14th, and 15th Amendments, which banned slavery, granted to each person due process and equal protection, and banned racial discrimination in the right to vote. Since these rights now formally appeared in the Constitution, and since Republican Presidents, including Lincoln, tended to nominate Justices reflecting a formalist style of legal reasoning, the Court soon moved into a formalist era.

§ 14.2.2 The Formalist Era: 1873-1937

The second age, the formalist era, lasted from 1873 to 1937. The politics of this era was dominated by Republican administrations catering to business interests and the traditional, conservative moral values of White Anglo-Saxon Protestants. During this period the Democratic Party elected only two Presidents, and both times the Republican Party was split, first when reform Republicans of the 1880s "Mugwumps" backed Grover Cleveland for President, and second when Teddy Roosevelt's "Bull Moose" party split the Republicans in 1912, leading to the election of Woodrow Wilson.

Important to the Republican dominance of politics during this era was the allegiance among minority voters, particularly African-American voters, based on the Republican Party’s role in ending slavery and ensuring in the 15th Amendment that the right to vote could not be denied because of race. As noted at § 14.1 n.1, this right was adequately protected in the North, which was sufficient to preserve the overall electoral advantage of the Republican Party, while African-American voters in the South were increasingly disenfranchised, as a practical matter, as a result of Jim Crow legislation.

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29 See generally Hall, supra note 14, at 189-210.
This allegiance was different than what had occurred prior to the Civil War. For example, one problem the Federalist Party had in the early 19th century was that their campaign to increase the number of minorities in their party, whom they had ignored during the end of the 18th century, was compromised when their actions did not match their rhetoric. As one author noted, “Nothing is quite as startling as the unabashed zeal with which Federalists courted the minority groups who had been the chief victims of their repressive legislation during the nineties. . . . Before 1800, they had been extremely hostile to ‘united Irishmen’ . . . . After 1800, they sometimes sang a different tune [while] continuing to pander to anti-Hibernian prejudices. . . . In Philadelphia after 1800, . . . a Jew was usually on the most important Federalist electioneering committees . . . . Of course, in other parts of the country Federalists continued to capitalize upon antisemitism.” 30 Similar xenophobic attitudes were represented by groups such as the Know-Nothing Party during the 1840s and 1850s. The Know-Nothing Party, like the earlier Whig Party, formed in 1834, and later Republican Party, formed in 1854, were pre-Civil War alternatives to the Democratic Party of Jefferson and Jackson.

The judicial policy of this era followed the Republican conservatism on both fiscal and social policy. The courts placed a high priority on protecting business from economic regulation, while the courts permitted the traditional moral values of communities to trample on individual civil rights. 31

Regarding civil rights, during and shortly after the ratification process of the Civil War Amendments, while the fervor over the abolition of slavery was still strong, the Radical Republican Congress enacted a number of civil rights laws, including laws intended to prevent racial discrimination by places of public accommodation. However, these laws, and enforcement of other civil liberties protections generally, were shredded by Court decisions during the last third of the 19th century. In 1873, in the Slaughter-House Cases, 32 the Court held that the Civil War Amendments authorized congressional action only against the states, not private individuals; that equal protection was limited to racial matters; that the due process clause offered no substantive protection against deprivation of property; and the Privileges and Immunities Clause of the 14th Amendment only protected a list of federal rights, not state rights. The decision that the 14th Amendment protections authorized congressional action only against the states was reaffirmed in 1883 in The Civil Rights Cases, 33 which invalidated the Civil Rights Act of 1875, an Act which punished racial discrimination in places of public accommodation by fine and possible imprisonment. Civil rights protection for


31 On economic matters, see, e.g., Hammer v. Dagenhart, 247 U.S. 251 (1918) (federal government cannot regulate child labor); Lochner v. New York, 198 U.S. 45 (1905) (New York statute regulating maximum working hours for bakers violates "liberty of contract," part of the 14th Amendment Due Process Clause); Hall, supra note 14, at 231-46. On civil rights matters, see, e.g., Schenck v. United States, 249 U.S. 47 (1919) (protestors of World War I thrown into jail for protest activities); Plessy v. Ferguson, 163 U.S. 537 (1896) (de jure segregation does not violate the Equal Protection Clause as long as the separate facilities are equal); Hall, supra note 14, at 247-66.

32 83 U.S. 36, 72-83 (1873).

racial minorities was further buried by the 1896 holding in *Plessy v. Ferguson* that local customs could be considered in determining whether racial classifications were unreasonable, and that in any event the Constitution protected only civil rights, not social rights, and where one sat on a train was not a civil right.

The Court’s decision in the *Slaughter-House Cases* did not have to be read as narrowly as the Court did in the years following the case. As discussed at § 25.3 nn.55-64, an interpretation of the *Slaughter-House Cases* more faithful to the natural law base of the 14th Amendment is possible. Instead, after 1873, the Court limited the *Slaughter-House Cases* Privileges or Immunities Clause analysis of rights protected by the clause to the literal examples given by Justice Miller of federal privileges or immunities, such as a right of access to seaports and right to petition the government for grievances. As discussed at § 18.2.2, the formalist-era Court limited the Commerce Clause analysis to regulations literally involving commerce, not civil rights statutes that had a substantial affect on commerce. As discussed at § 26.2.1.1.B, the Court adopted a literal interpretation of equal protection of the laws, which held that statutes requiring segregated facilities, or banning interracial marriage, did not deny individuals equal protection of the laws, since the laws literally treated persons of different races equally, in that they were both required to abide by segregation.

As a matter of politics, although minorities, particularly African-Americans, were an important part of the Republican political coalition at the time, helping to ensure Republican Party electoral advantage during this period, they were not welcome by the Southern-dominated Democratic Party of the time. Thus, with nowhere else to go, they could be taken for granted and had little real influence in Republican Party politics either. The Republican-dominated Supreme Court of the formalist era, therefore, gave minority perspectives very little weight, with the exception of cases like *Yick Wo v. Hopkins*, which held that the Equal Protection Clause did apply to any racial minority group, not just African-Americans.

Regarding economic matters, the pro-business part of the Republican coalition did wield great influence in the Republican Party. After the Civil War, Congress initially turned its attention to reconstruction in the South. Meanwhile, there had developed many nationwide businesses as America turned from an agricultural nation into an industrial nation. Until the Interstate Commerce Act regulating the railroads in 1887, however, few federal enactments were passed, as discussed at § 18.2.1.1 n.55. With emerging pressure from middle and working class families of all political preferences for regulation of unregulated corporate power, pressure developed, as Professor Howard Gillman has noted, from within “the post-Reconstruction Republican Party to reconstruct the federal judiciary so that it would become a powerful – and politically insulated – force promoting their program of economic nationalism.” As Professor Gillman noted:

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34 163 U.S. 537, 545-52 (1896).

35 118 U.S. 356, 369-74 (1886).

36 Hall, supra note 14, at 93-94, 204-05.

37 Howard Gillman, *The Lochner Era as Partisan Entrenchment: A Political Science Perspective on the Origins of Laissez-Faire Constitutionalism* 1 (AALS Conference on
This role for the federal courts was made possible by [the Republican] party’s fortuitous control of the Presidency and the Senate during most of the postwar period and by its fortuitous short-term control of the entire federal government at key moments – just long enough to entrench its controversial conservative economic agenda in two statutes, the Judiciary and Removal Act of 1875 and the Evarts Act of 1891.

[I]n the wake of the mid-term elections of 1874, where Democrats regained control of the House of Representatives, Republican leaders quickly brought up for consideration in [a] lame duck session . . . a bill to expand the jurisdiction of the federal courts. In contrast to earlier removal legislation which focused on beefing up enforcement of a limited set of civil rights, the main purpose of the Judiciary and Removal Act of 1875 was to redirect civil litigation involving national commercial interests out of state courts and into the federal judiciary. Technically, this meant granting the federal judiciary general “federal questions” jurisdiction – that is, the authority to have original jurisdiction in all civil and criminal cases “arising under” the laws of the United States, and removal jurisdiction in state civil cases that raised issues of federal law or that involved parties from different states.

[As] long as Republicans controlled the House, the Senate, or the presidency, the new role for the federal courts would remain entrenched; and given the power of “eastern capital” in the Senate this veto-point remained strong throughout the period.38

As Professor Gillman noted, to facilitate the Republican agenda of economic nationalism, it was necessary to staff the federal courts with judges who would be “reliable caretakers of this agenda.” Until Grover Cleveland’s inauguration in 1885, the Republican Party controlled the presidency and the Senate. Further, even “Cleveland’s agenda for the Democratic Party” was perfectly consistent with the Republican goal of “economic conservatism and nationalism.” A review of the fifteen justices who were appointed between 1870 and 1893 confirms that they “were selected by presidents and confirmed by senators who carefully noted both their devotion to party principles and ‘soundness’ on the major economic questions of the day,” especially their “attitude toward regulation of interstate commerce by the individual states.”39

Most of these Justices either were former railroad attorneys, had served as railroad directors, or otherwise had “an influential clientele of railroad, banking, oil, coal, iron, and steel interests.” Though these Justices “were not always of one mind on all issues relating to economic nationalism,” these Justices “fit within a fairly narrow ideological space that supported the assigned mission of federal courts during this period.”40

Constitutional Law, June 5-8, 2002) (www.aals.org/profdev/constitutional/gillman.html). Professor Gillman is a Professor of Political Science and Law at the University of Southern California.

38 Id. at 2.
39 Id. at 3.
40 Id. at 3-4.
As a consequence, as Professor Gillman noted:

Predictably, businesses flocked to these courts seeking more favorable case outcomes and legal doctrines. By January 1, 1878 the federal circuit court in Chicago has 3,045 suits pending, ten times the antebellum average. According to a House of Representatives Report in 1876, diversity cases were “the largest and most rapidly-increasing class of Federal cases,” arising from the rapid economic development and “the formation of numerous great corporations whose business connections extend into many States.”

At the top of this hierarchy the Supreme Court increased its supervisory authority over local economic regulation by invoking the commerce clause with unprecedented frequency and interpreting it to require courts to eliminate barriers to the free flow of interstate goods and services. . . . By 1890, the Commercial and Financial Chronicle commented that “the findings of our highest court are such as to put to rest” the dangers of “Socialistic legislation” and thus mark “an epoch in the industrial and constitutional history of the country.”

The increased caseloads resulting from these developments created real problems with the workload of the existing federal judiciary. Gillman noted:

[T]he preferred Democratic response to these pressures was not an improvement in the ability of federal courts to manage this workload; it was “complete elimination of all jurisdiction based on diverse citizenship.” . . . It was not until 1889, with the start of the 51st Congress, that Republicans once again controlled the House, Senate, and the presidency and were thus in a position to respond as they saw fit to the pressures on federal courts. . . .

The resulting legislation was patchwork reform . . . [It] formally kept both the district and circuit courts but abolished the appellate jurisdiction of the circuit courts, thus leaving them to operate as trial courts alongside the district courts. It also identified defined classes of cases that could be appealed directly from the federal trial courts to the Supreme Court, and then channeled all other appeals through nine newly created circuit courts of appeal, which would have the final say in virtually all diversity suits unless the appellate judges certified that the case should be decided by the United States Supreme Court [or the Supreme Court granted a petition for certiorari]. The three-judge panels on these courts would be made up of one new court of appeals judge for each circuit plus available circuit or district court judges.

The Evarts Act was finally passed in March of 1891 by the lame-duck 51st Congress. . . . The legislation was effective in reducing the Supreme Court’s caseload. The number of cases before the justices fell from 623 in 1890 to 379 in 1891 and 275 in 1892. More importantly, the act – the first significant restructuring of the federal judiciary since the Judiciary Act of 1789 – made it possible for the 1875 jurisdictional changes to persist. It also helped removed some of the traditional localizing pressures on Supreme Court justices caused by circuit-riding. As a consequence, the Supreme Court could continue its development as a truly national institution, pursuing national political agendas by exercising those expanded powers and responsibilities.
that had been assigned to it as a result of the postwar political construction of federal judicial authority.\textsuperscript{42}

The development of the federal judiciary, including the addition of Circuit Courts of Appeals from the nine created in the Evarts Act to the existence today of 11 Circuit Courts of Appeals, the Court of Appeals for the District of Columbia, the Federal Circuit Court of Appeals, and other specialized federal courts, is discussed at § 17.2.3.1 n.146.

Consistent with these pro-business congressional influences on the workload of the federal judiciary during the formalist era, the formalist-era Court limited the ability of the federal government to regulate businesses. Congress was held to have power to regulate under the Commerce Clause only over subjects in interstate commerce or that directly affected interstate commerce. States were held to have exclusive power over intrastate economic activity, and that included manufacturing, agriculture, and mining, because all of this activity occurred before a subject was bought and sold, and thus was not literally commerce, and in any event occurred before the product entered interstate commerce, and thus was not literally commerce among the states,\textsuperscript{43} as discussed at § 18.2.2 nn.71-82. The formalist-era Court did inject some flexibility into its otherwise mechanical reasoning by allowing federal regulation of intrastate activities where that was necessary for effective regulation of interstate activities, as in \textit{The Shreveport Rate Cases} in connection with railroads, or \textit{Swift & Co. v. United States}, regulating an activity that was part of a stream of commerce across state lines, such as the stockyards in Chicago,\textsuperscript{44} discussed at § 18.2.2 nn.83-84.

Even as regards state legislation, the Court found a way to strike down much state legislation as unconstitutional. As discussed at § 27.3.2.1 nn.148-56, although the Court had rejected a substantive due process argument in the \textit{Slaughter-House Cases} in 1873, by 1897, the Court decided in \textit{Allgeyer v. Louisiana}\textsuperscript{45} that the liberty mentioned in the 14\textsuperscript{th} Amendment includes the right to earn a living by any lawful calling, and not to have that right limited by state legislation except for certain specified purposes. In \textit{Lochner v. New York},\textsuperscript{46} decided in 1905, the Court similarly held that the right to make a contract in relation to one's business is part of the "liberty" protected by the 14\textsuperscript{th} Amendment. It could be interfered with only by laws that reasonably relate to the health and safety, morals, or general welfare of the public. Applying that test, the Court invalidated a law that barred a bakery employee from working more than 60 hours a week. The Court said the law was a mere "meddlesome interference" with the rights of the individual because it had no such direct relation

\textsuperscript{42} \textit{Id.} at 5-7.


\textsuperscript{44} Houston E. & W. Ry. Co. v. United States (\textit{The Shreveport Rate Case}), 234 U.S. 342, 351-52 (1914); Swift & Co. v. United States, 196 U.S. 375, 398-400 (1905).

\textsuperscript{45} 165 U.S. 578, 589-90 (1897) (a state cannot make it illegal for residents to use the mails to contract with a New York insurance company).

\textsuperscript{46} 198 U.S. 45, 58-62 (1905).
to or substantial effect upon the health of an employee as to justify the court in regarding it as a health law. Justice Holmes, dissenting, with his usual willingness to defer to legislative decisions, said the case had improperly been decided on an economic natural law theory of *laissez-faire*. He said the Constitution does not embody a particular economic theory, and the word "liberty" is perverted unless a rational and fair person necessarily would admit that the law infringes fundamental principles as understood by the traditions of our people and our law.47

In the years immediately following *Lochner*, the Court did invalidate in 1908 state and federal laws that prohibited employers from forbidding their employees to join labor unions,48 a result that inhibited the growth of labor unions during this period. However, between 1907 and 1913, the Court upheld a range of other state and federal labor reform statutes, such as “laws banning child labor, regulating the hours of labor of women, making mining companies liable for their willful failure to furnish a reasonably safe place for workers, and mandating an eight-hour day for federal workers or employees of federal contractors.”49 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.*”50

After 1922, however, four extreme formalists were simultaneously 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

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47 *Id.* at 74-76 (Holmes, J., dissenting).

48 Adair v. United States, 208 U.S. 161 (1908) (invalidated state and federal legislation forbidding employers to require employees to agree not to become or remain members of a labor organization during their employment).


50 Bernstein, *supra* note 49, at 350, *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.*”).
Hughes or Justice Roberts from 1930-37. Thus, during this period the *Lochner* doctrine began to be applied more vigorously. A number of reformist labor laws were struck down, including a minimum wage law for women and children, banning use of certain materials in production, regulating the prices of theater tickets, and regulating the entry into a business.51 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.

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 toward 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*, 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* and *The Wealth of Nations*. As discussed at § 16.2.1 nn.10-11, Adam Smith’s key concept in *The Theory of Moral Sentiments* was that individuals should behave according to the logic of an “impartial spectator.” Such an individual gives other individuals equal concern and respect, “view[ing] 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 the impartiality between us.”52 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. Such perversions distort the fair price that would be determined under ideal competitive conditions. 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

51 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).

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.”\(^{53}\) Fourth, when a competitive market is not functioning properly, government regulation is warranted to correct that imbalance. Though not a perfect reflection of Adam Smith’s theories, the economic natural law theories that were used to change common-law doctrine before the Civil War, noted at § 13.1 nn.5-15, reflected this kind of balancing of the needs of economic growth versus fundamental fairness to individuals.

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*. As discussed at § 27.3.2.1 n.155, they did allow governmental regulation of monopolies on grounds such businesses were “affected with the public interest.” However, in other cases, such as legislation trying to correct the bargaining power disparities between corporations and workers, the *Lochner*-era courts did not follow Adam Smith’s teachings. As a consequence, they 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. 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 major issues of public interest by methods other than the party politics that had characterized much of the 19th century. 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. They also supported the 16th, 17th, and 19th Amendments, dealing with income taxes, direct election of Senators, and granting women the right to vote.\(^{54}\)

Groups today that are concerned about the comparative disadvantage workers face in the United States given less adequate labor, environmental, and safety regulations abroad reflect similar concerns. Adam Smith’s doctrine favors free, but fair, trade, with fairness defined not by reducing American workers to third-world status, but by trade agreements which help workers in those countries get equal rights, so that comparative productivity advantages will determine trade outcomes, not exploitation. Tariffs on goods to equalize the impact of third-world exploitation is not inconsistent with Adam Smith.

Economic growth, such as during the Roaring 20s, meant that as a political matter court decisions striking down Progressive Era legislation did not critically undermine support for the Republican Party. Republican Presidents thus continued to appoint conservative formalists to the Court, such as President Taft appointing Justices Van Devanter and Lamar in 1910 and Justice Pitney in 1912, and President Harding appointing former President Taft as Chief Justice in 1921 and Justices Sutherland and Butler in 1922. Reflecting the Democratic coalition of conservative Southerners and middle and working class families, Democratic President Woodrow Wilson appointed a Southern

\(^{53}\) *Id.* at 223. The full passage from which this quote is taken appears at § 16.2.1 n.11.

conservative formalist to the Court in 1914, Justice McReynolds, but then a liberal Holmesian advocate for middle and working class families, Justice Brandeis, in 1916.

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 many minority voters to vote Democratic on grounds that the Democratic Party would better protect their economic interests. President Roosevelt’s “New Deal” created many federal agencies to regulate the economy. Before 1937, the Supreme Court declared most of these laws unconstitutional.55 It was the shift in doctrinal results that occurred in 1937 to uphold New Deal regulation that marked the end of the formalist era and the beginning of the Holmesian era, from 1937 to 1954, as discussed next, at § 14.2.3.

§ 14.2.3 The Holmesian Era: 1937-1954

The third age of politics and judicial decisionmaking, the Holmesian age from 1937 to 1954, triumphed when the Supreme Court adopted President Roosevelt’s view that the Court should permit the government to enforce legislation reflecting Roosevelt's progressive view of economic policy. At the same time, the Court continued to allow the traditional moral values of the community to trump individual rights in most cases.56 As has been noted, on most issues of civil liberties, the Holmesian deference-to-government model sides with the government, not the individual.57

In politics as well, this was a period of progressive fiscal policy, but continued conservative social policy. As Professor Hall noted, "Between 1917 and 1945, . . . [r]acism, nativism, and national-security hysteria shaped the legal culture in ways that mocked the rule of law."58 Only at the margins, like President Truman integrating the armed forces, was politics progressive on civil liberties during this era. The witch-hunts of the House Un-American Activities Committee and the McCarthyism of the early 1950s are more typical of the political discourse of this era than robust protection for freedom of speech or freedom for dissent.

Based on shifts in voting patterns caused by the Great Depression, a majority of minority voters were now part of the Democratic coalition. However, their interests were subordinated to the interests of Southern conservatives. It was only after Brown v. Board of Education in 1954, the Civil Rights Act of 1957, the Civil Rights Act of 1964, and the Voting Rights Acts of 1965, that the interests of minority voters began to prevail over the interests of Southern conservatives within the Democratic coalition.

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56 See Hall, supra note 14, at 271-84.


58 Hall, supra note 14, at 265.
Beginning in 1937, the Court overturned most of the restrictions that the Court had placed on economic regulatory power during the formalist era, with a majority applying Holmesian ideas. In 1937, President Roosevelt sought to enlarge the Court in order to “pack” it with Justices who would change the Commerce Clause and *Lochner*-era formalist approach and would 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.59

As noted at § 7.4.2 text following n.231, as a constitutional matter, 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, as discussed at § 9.3.2, began to decide cases upholding the power of Congress and the states to regulate economic matters. Given this shift, the “Court-Packing Plan” became unnecessary and it died in Congress during the summer of 1937. At the time, this switch in voting gave rise to the phrase, “the switch in time that saved nine.” As subsequent historical documents reveal, the initial shift in these cases was made at the Court’s weekly conference after the November, 1936 elections, which Roosevelt won in a landslide, but before the “Court-Packing Plan” was announced.60

Beginning in 1937, the Court said that it would make a realistic appraisal of connections between a regulated activity and interstate commerce and if the subject, in the aggregate, substantially affected interstate commerce, it could be regulated by Congress.61 As a result, not one federal commercial law, either on its face or as applied, was declared unconstitutional during the Holmesian era, even though the government grew very substantially in response to the Great Depression and to World War II. The Court also overruled in 1937 cases that had followed *Lochner v. New York*.62 Since 1937, the Court has routinely upheld laws fixing minimum wages and maximum hours, protections for union members, and entry conditions on business.63 There has been no fundamental right to liberty of contract. By 1941, all the Justices on the Court who had opposed New Deal regulations had left the Court, and President Roosevelt was eventually able to appoint seven Justices who agreed with the view that New Deal regulations are constitutional.

59  Id. at 281-82.


62  West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

In respect to social matters, however, the Holmesian Court did little to undo the separate but equal doctrine of *Plessy v. Ferguson*. As discussed at § 26.2.1.1.C, the Court did begin to scrutinize whether various separate accommodations, or separate schools, were in fact equal in practice. If they were not, the Court would rule the practice unconstitutional. Only a few such rulings occurred during the Holmesian era. During World War II, the President ordered the internment of Japanese-Americans located on the West Coast. The Supreme Court acquiesced, although the Court said that restrictions curtailing the civil rights of a single group deserve the “most rigid scrutiny,” a concept that in the hands of the later instrumentalist Warren Court came to have real teeth after 1954. Meanwhile, racial discrimination continued in most phases of society, including employment, public education, places of public accommodation, and employment. On civil rights matters, a Holmesian approach substantially defers to existing governmental practice, as discussed at §§ 3.2 & 10.2.1.2.

§ 14.2.4 The Instrumentalist Era: 1954-1986

The view that World War II had been fought in order to preserve the ideals of democracy abroad and at home affected post-War sentiments regarding civil liberties matters, particularly matters of racial discrimination. The Civil Rights movement was underway in the early 1950s when it was substantially advanced in 1954 by the decision that inaugurated the instrumentalist era, *Brown v. Board of Education*. The Supreme Court held in *Brown* that racial discrimination in public education violated the Equal Protection and Due Process Clauses. In a number of other decisions, the instrumentalist Court outlawed race discrimination in all public facilities and encouraged the drive that was occurring in society toward enhancing the economic status of minorities and women. The Court moved into an age of progressivism on both economic and social policy. While the Supreme Court continued to allow federal and state governments to enforce economic regulation reflecting a progressive view of economic policy, individual rights began to trump majoritarian consensus in many cases.

The instrumentalist era was somewhat unique in American legal history, in that the Court took the lead in pushing for social change, rather than the Justices reflecting changes already existing in the

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65 Korematsu v. United States, 323 U.S. 214, 216 (1944), discussed in Hall, supra note 14, at 251-52, 265.


68 See, e.g., Johnson v. Virginia, 373 U.S. 61, 62 (1963) (“[I]t is no longer open to question that a State may not constitutionally require segregation of public facilities.”).

political order, as the Supreme Court in 1937 had reflected shifts in politics that occurred with President Roosevelt’s election in 1932, or the formalist-era Supreme Court had reflected the shift toward the pro-business perspective of the post-Reconstruction Republican Party after the Civil War. The politics of the Kennedy and Johnson administrations in the 1960s, however, soon caught up and moved to modern liberalism as well. President Kennedy and Johnson’s appointments to the Supreme Court, such as Justices Goldberg, Fortas, and Marshall, solidified a liberal instrumentalist majority on the Warren Court during the mid-to-late 1960s, as discussed at § 11.2.2.2.

As a political matter, even President Richard Nixon, who was personally more conservative on fiscal and social policy than Johnson, proved no challenge to the welfare state modern liberalism of the Democratic majorities in Congress. Thus, many initiatives that we take for granted today as part of the modern liberal state were begun under the Nixon Administration, including the Environmental Protection Agency, the Occupational Health and Safety Administration, the Consumer Product Safety Commission, and the Food Stamp program. President Nixon’s appointments to the Supreme Court, however, shifted the Court away from the clear 5-Justice instrumentalist majority that existed on the Warren Court in 1968 prior to President Nixon taking office in January, 1969. President Nixon’s nominations ended up being somewhat eclectic, with Chief Justice Burger, who replaced Chief Justice Warren, reflecting a moderate formalist approach; Justice Blackmun, who replaced Justice Fortas, ending up a moderate instrumentalist; Justice Rehnquist, who replaced Justice Harlan, reflecting an extreme Holmesian approach; and Justice Powell, who replaced Justice Black, being a forerunner of the modern natural law approach. The decisionmaking styles of these Justices is summarized at §§ 9.4, 10.4, 11.4 & 12.4, and reflected at § 13.4 in Table 13.4.

During this period, women entered the economy in ever greater numbers. As the economy grew more complex, so did the government, at national, state, and local levels. A great network of social programs were created to deal with matters of health and industrial injuries. All of these laws were upheld, as were many spending programs that included conditions regulating the activities of recipients, even if those conditions could not have been mandated under the Commerce Clause.

The most dramatic event in society during this era, however, was the civil rights movement. The Court energize the movement in 1954 by its decision in Brown v. Board of Education. The next great events were passage of the Civil Rights Act of 1964 and the Voting Rights Act of 1965. Among the provisions of the Civil Rights Act was a bar against racial discrimination in employment and places of public accommodation. As discussed at § 18.2.4, in Heart of Atlanta Motel, Inc. v. United States, the Court upheld application of the Act to a motel that served interstate travelers but

70 See generally Hall, supra note 14, at 286-87, 300-08.

71 Id. at 304-08.

72 See, e.g., South Dakota v. Dole, 483 U.S. 203 (1987) (Congress could withhold 5% of highway funds from any state that permits purchase of alcoholic beverage by persons under 21).

had a policy of racial discrimination. That case was extended in *Katzenbach v. McClung*, where the Court allowed the Act to be applied to a restaurant without proof that it had served persons traveling interstate. The Court indicated that the Civil Rights Act could be applied to any restaurant that either serves or offers to serve interstate travelers, or serves a substantial amount of food that had moved in interstate commerce.

The instrumentalist Court also created many new procedural protections for defendants in criminal cases, as discussed at § 23.2. The Court also gave greater protection from discrimination to women and other identifiable groups, such as illegitimate children, as discussed at §§ 26.3.1.2 & 26.3.2.

**§ 14.2.5  The Modern Natural Law Era: 1986-Present**

Since 1986, the Supreme Court has moved away from the liberal activist vision of the Warren Court, and has begun to carve out a majority seemingly committed to returning constitutional law to the natural law judicial decisionmaking philosophy of the framing and ratifying period. After 1986, the post-instrumentalist Court has begun to reflect earlier views on federalism in line with the Marshall Court’s dual theory of sovereignty, in cases like *New York v. United States*, *U.S. Term Limits, Inc. v. Thornton*, and *Printz v. United States*; has enforced limits implicit in the Marshall Court’s opinion in *Gibbons v. Odgen* that Congress can only use the Commerce Clause power to regulate aspects of economic activity, in cases like *United States v. Morrison*; and, harking back to protection given property interests by Chief Justice Marshall in *Dartmouth College v. Woodward*, the Court has made it easier for property owners to prove that a regulation constitutes a taking under the Takings Clause, as in *Dolan v. City of Tigard*. The Court has also interpreted the doctrines of free speech, particularly regarding equal access, and freedom of association to support local private organizations, consistent with de Tocqueville’s observations about early 19th-century America.

These changes are related to political developments since the 1960s. First, the reality of substantially stagnant real wages for most workers during the 1970s and 1980s, produced in part by greater international competition and by higher costs for raw materials, such as the emergence of OPEC and higher oil prices during the 1970s, combined with the increasing budget deficits of the

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76 United States v. Morrison, 529 U.S. 598 (2000) (Congress lacks the power under the Commerce Clause to make gender-motivated violence a federal crime), discussed § 18.2.5.

77 512 U.S. 374 (1994) (the impact of an exaction demanded as a condition for a building permit must be roughly proportional to the impact of the building permit), discussed § 22.2.5.1.

1970s and 1980s, served to undermine a number of voters' faith in progressive fiscal policy, associated most strongly with President Johnson’s “Great Society” programs of the 1960s. Second, the adoption under the Johnson Administration of civil rights legislation like the Civil Rights Act of 1964 and the Voting Rights Act of 1965, and the national Democratic Party’s support for affirmative action and abortion rights from the 1970s on, pushed a number of Southern religious conservatives into the Republican camp: Nixon’s so-called “Southern Strategy,” used in part by Nixon in his 1968 election campaign and reflected in Kevin Phillips’ famous 1969 book, The Emerging Republican Majority. The resulting elections of Presidents Reagan and George H.W. Bush between 1980 and 1992 led to the appointment of a majority of non-instrumentalist Justices who place more weight than do instrumentalist Justices on federalism, private property rights, and rights of private association in general. This led to an increasing number of 5-4 decisions, with majority opinions joined by Nixon-appointee Chief Justice Rehnquist; Reagan appointees Justices O’Connor, Scalia, and Kennedy; and Bush appointee Justice Thomas.

Many of these cases have remained 5-4 decisions, however, because of the election of President Clinton in 1992. Based on his campaign of focusing on the economic interests of middle and working class families, Clinton was able to bring back into the Democratic fold a sufficient number of middle and working class Southern religious conservatives in order to be elected, winning states like Arkansas, Kentucky, Louisiana, Missouri, and Tennessee in the 1992 and 1996 elections. President Clinton’s two nominations to the Supreme Court in 1993 and 1994, Justices Ginsburg and Breyer, have been moderate liberal instrumentalists. They have joined in a number of 4-person dissents with Justice Stevens, a moderate liberal instrumentalist, as discussed at § 11.3.2, who was appointed by President Ford, and Justice Souter, a natural law judge with instrumentalist leanings and great respect for the instrumentalist precedents of the preceding 30 years, as discussed at §§ 12.3.2 & 12.4.3, who was appointed by President George H.W. Bush.

This make-up of the Supreme Court meant that from 1994-2005 there was a block of 3 conservative positivists, formalist Justices Scalia and Thomas and Holmesian Chief Justice Rehnquist, and a block of 3 moderate liberal instrumentalists, Justices Stevens, Ginsburg, and Breyer. The swing votes were the natural law Justices O’Connor, Kennedy, and Souter. These swing votes moderated instrumentalist doctrine, as noted above at § 14.2.5 nn.75-78, but as natural law judges they were cautious in the way they dealt with instrumentalist-era precedents. For abortion regulations that apply prior to viability, a majority replaced strict scrutiny with a rational basis test, unless the regulation constitutes an undue burden. Even where strict scrutiny applies, review is strict in theory, but not fatal in fact.79 During this time, the level of review remained largely the same for laws regulating freedom of speech. However, it was relaxed for laws that are neutral with respect to religion but which have some incidental benefits to religion, such as state-supported education

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79 Planned Parenthood v. Casey, 505 U.S. 833, 877 (1992) (“undue burden” is shorthand for a law that has the purpose or effect of placing a substantial obstacle in the path of a women seeking an abortion of a nonviable fetus), discussed at § 27.3.4.1; Grutter v. Bollinger, 539 U.S. 306, 326 (2003), quoting Adarand Constructors, Inc v. Pena, 515 U.S. 200, 234 (1995) (“strict” in theory is not “fatal” in fact), discussed at § 26.2.1.4.D.
programs for disadvantaged students that involve public school teachers or vouchers.\textsuperscript{80} Employed or career women have become an ever more significant part of the Nation’s economy and public life, with the Court continuing vigorous scrutiny of laws containing gender classifications.\textsuperscript{81}

\textbf{\textsection{14.3} Further Details on the Modern Era of American Politics: 1986-2000}

In general, the Supreme Court and its constitutional law decisions have been reactions to developments in society rather than being a stimulus for social change. This is perhaps largely a result of the judicial process itself, because it requires some years for most cases to reach the Court. Only during the instrumentalist era, beginning in 1954, was the Court ahead of the Nation when it decided the leading cases. Reflection on the cases and their societal background lends support to Holmes’ observation that the “substance of the law at any given time pretty much corresponds, so far as it goes, with what is then understood to be convenient; but its form and machinery, and the degree to which it is able to work out desired results, depend very much upon its past.”\textsuperscript{82}

If the connections suggested above between politics and judicial decisionmaking styles have resonance, there should be in contemporary politics a reflection of the tone and debates of the founding period, given the return of constitutional law decisionmaking to the natural law philosophy of the framing era. Some details on that aspect of contemporary society follow.

During the founding period, the two parties that competed for political control were the Federalist party of John Adams and Alexander Hamilton and the Republican Party, later renamed the Democratic Party, of Thomas Jefferson and James Madison. In broad terms, the Federalist party was the party of big business and the active fundamentalists of the New England Puritan tradition. They drew much of their political philosophy from the classic and Christian natural law tradition, which in its English version was represented by Hooker, Blackstone, and Burke. In contrast, Jefferson's party was billed more as the party of the working man, and had its political philosophical roots in the Enlightenment, with religious beliefs a matter for personal conscience, and not for governmental imposition.\textsuperscript{83}

In terms of politics, the Federalist campaigns against Jefferson stressed that he was too liberal and radical in domestic policy, and could not be trusted with foreign policy. As has been noted, “Many [Federalists] attacked Jefferson as a betrayer of Washington and a traitor to his country. . . . A letter . . . printed in the \textit{Connecticut Courant} . . . summarized the questions hurled from many New England pulpits: ‘Do you believe in the strangest of all paradoxes – that a spendthrift, a libertine, or

\textsuperscript{80} See, e.g., Agostini v. Felton, 521 U.S. 203 (1997) (aid to schools); Zelman v. Simmons-Harris, 536 U.S. 639 (2002) (vouchers), discussed at \textsection{32.1.3.1.B.1.}

\textsuperscript{81} See, e.g., United States v. Virginia, 518 U.S. 515 (1996), discussed at \textsection{26.3.1.2.}

\textsuperscript{82} Oliver Wendell Holmes, Jr., \textit{The Common Law} 1 (1881).

\textsuperscript{83} \textit{See generally} Mapp, supra note 2, at 399-400.
Jefferson was able to triumph over Adams in 1800, and thereafter his Democratic Party continually triumphed over the Federalists, by being able to command the allegiance of a majority of the middle and working classes, laborers and farmers alike, through a policy of fiscal conservatism, small government, and a balance of powers between the states and the federal government in Washington, while continuing to protect, within the framework of early 19th-century notions of civil liberties, a progressive policy regarding freedom of speech, freedom of religion, and other personal civil liberties. This approach prevented a sufficient number of the middle class from joining the business interests and fundamentalist Christians of the Federalist Party, and their later incarnation in the Whig Party, so that the Democratic party dominated politics during the first half of the 19th century. Only when the issue of slavery split the Northern and Southern Democratic parties after the *Dred Scott* decision in 1857 was the Republican party, the heirs of the Federalists and Whigs, able to build its own majority coalition.

The connections between the modern Republican party and the Federalist Party, with their bases in big business, and their supporters among the professional elite, and Christian fundamentalists, is obvious. So, too, the connections are obvious between the modern Democratic Party and Jefferson's Democratic Party in terms of their base with the working and middle class with a progressive tradition on civil rights matters.

The modern era is also an age, like Jefferson's age, where the swing voters are fiscally conservative and socially progressive. This differs from most politics since 1932, where the Democratic Party could rely on electing a majority to Congress based on promoting a progressive fiscal policy. For most of this period, progressive fiscal policy was viewed as successful in dealing with the Great Depression and as being responsible for the post-World War II economic boom of the 1950s and 1960s. Twenty years of stagnant real wages and sky-rocketing budget deficits during the 1970s and 1980s, however, undermined a majority of voters' faith in progressive fiscal policy, and pushed a number of voters who used to be fiscally and socially progressive modern liberals to adopt a fiscally conservative posture. Thus, not enough fiscally progressive voters remain for the Democratic Party to remain a majority party based upon fiscal progressivism alone.

This new age of politics also differs from the period between the Civil War and the Great Depression. During that period, the Republican party dominated federal politics because of the loyalty of socially progressive voters who viewed the Republican Party as the party that ended slavery and passed the socially progressive Civil War amendments. Although fiscally conservative, these traditional liberal voters of the Enlightenment tradition are not wedded to the Republican Party

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84 *Id.* at 385-86.

85 *Id.* at 370-74, 377-80.

86 *Id.* at 399-400 (discussing Jefferson's position favoring a balanced budget, states' rights, freedom of speech and religion, and protecting laborers and farmers from corporate oppression).
today, as they were after the Civil War, because they view too many elements in the Republican Party today as too socially conservative. Though socially progressive, these fiscally conservative voters are not wedded to the Democratic Party either because of the Democratic Party's legacy since 1932 of being fiscally progressive.

This analysis suggests that for the Democratic Party to return to being the majority party in Congress and to win the Presidency on a regular basis, Democrats will have to abandon an agenda based solely on the modern liberal coalition of the 1960s which was based on purely fiscally progressive policies. In the modern era of politics, the Democrats will be able to win only by putting together the same coalition that Jefferson did in 1800. This would involve winning back fiscally conservative, socially progressive voters by promoting a smaller, more decentralized government, as in "[t]he age of big government is over," as President Clinton said in his 1996 State of the Union Address; combined with a focus on middle class interests, such as a focus on middle class wages and health care, middle class tax relief, and providing responsible protection for Medicare, Medicaid, and Social Security; and painting the Republicans as the party of big business and a threat to individual liberties of freedom of speech, freedom of religion, and cultural diversity, the modern equivalent of Jefferson's charges against the oppressive and xenophobic character of the Alien and Sedition Acts of 1798.

In response, the modern Republican party has a number of ways to try to defeat this coalition, remain the majority party in Congress, and win the Presidency on a regular basis. One way would be to keep together its base in the business community and fundamentalist Christian voters, while convincing a sufficient number of fiscally conservative, but socially progressive voters to vote Republican on a consistent basis. This would be done by persuading them that the Democratic party is likely to remain too liberal on fiscal matters, and thus Democrats can be predicted to continue to waste their tax dollars on big government programs not directly related to their interests. If the Democratic party does not move to the Jeffersonian vision described above, this Republican argument that the Democrats are "tax and spend liberals" should consistently work, as it did in the congressional elections in 1994, and the presidential elections in the 1980s of Presidents Reagan and Bush against Walter Mondale and Michael Dukakis. Unless the Democratic Party changes and becomes more fiscally conservative, it will continue to be perceived as too liberal, in the modern sense of fiscally and socially progressive, to command majority support today.

A second way for the Republican party to become the dominant party would be to continue to find effective wedge issues to split the Democratic party, as slavery split Northern and Southern Democrats before the Civil War. The debate over affirmative action may be such a wedge issue today. Instead of splitting Northern and Southern Democrats, affirmative action may split white and minority middle and working class Democrats. Of course, President Clinton tried to mitigate the effects of that wedge issue with his comments to "mend, and perhaps eventually end" affirmative action (which was targeted to white middle and working class Democrats), while continuing a socially progressive commitment to remedying the continuing effects of prior racial discrimination (which was targeted to minority middle and working class Democrats).

A third possible way for the Republican Party to become a majority party on a regular basis would be to convince enough fiscally conservative, but socially progressive voters to become conservative on social issues also, and thereby build a majority party based upon socially conservative values
alone. In the earlier natural law era, that attempt failed, as the socially progressive Enlightenment natural law approach to social issues prevailed over the classic and Christian socially conservative tradition of the Federalist party. Similarly, it is unlikely that the Christian Coalition wing of the Republican Party can sufficiently expand its base to make the Republican Party a majority party without resorting to including in the Republican "Big Tent" fiscally conservative, but socially progressive voters. This was tested in part by Pat Buchanan's run for the Presidency. Pat Buchanan tried to build a coalition based upon: (1) the traditional conservatism of Christian Coalition voters; (2) the modern conservatism of Richard Nixon and the George Wallace tradition of socially conservative populism; and (3) embracing the wedge issue of affirmative action, combined with xenophobic rhetoric over immigration. Pat Buchanan’s effort suggests that this combination of voters would not likely be successful in gaining much more than 40% of the electorate in a general election, or perhaps 45% with a very successful “mobilize the base” electioneering strategy.

A fourth way for the Republican Party to become a majority party would be to convince the swing voters that the Republican Party best represents the “Big Tent” mentality. The rephrasing of Republican Party rhetoric as reflecting “compassionate conservatism” may be an attempt to convince socially progressive voters that Republicans share their progressive concern with compassion. The prominence in the Republican Party of elected officials who are more moderate on social issues, such as Governor George Pataki in New York, or Governor Arnold Schwarzenegger in California, is another reflection of this concern. In states like New York and California, social moderation is critical for a candidate to have a good chance at state-wide election.

Campaigning in 1992 as a New Democrat, President Clinton appealed to the Jeffersonian tradition of fiscal conservatism and balanced budget rhetoric, combined with being progressive on social issues. Just as Jefferson was successful against President Adams in 1800, Clinton was successful in 1992 in painting President Bush as being too closely associated with the business elite, and as not caring enough about the middle class. So, too, just as Jefferson was able to tarnish President Adams with being a threat to individual liberties by his support for the Alien and Sedition Acts of 1798, subsequent to the 1992 Republican Convention, Clinton was able to tarnish Bush as being too obsequious to the Christian Coalition-inspired wing of the Republican party.

During his first two years in office, however, Clinton ignored the lessons of Jefferson, and appealed back to the modern liberal wing of the Democratic party, associated with President Johnson's "Great Society" programs, which still controlled the Democratic leadership positions in Congress. Thus, in 1994, the Republicans were able successfully to paint President Clinton as a modern liberal whose campaign as a New Democrat, really an old Jeffersonian Democrat, was just talk. Thus, in 1994, a significant number of fiscally conservative, but socially progressive voters who had split their tickets and supported Presidents Reagan and Bush in the 1980s, while still voting for Democrats in Congress, and who voted both for Democrats in Congress and Governor Clinton in 1992, either did not show up at the polls or supported Republican candidates for Congress.

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Between 1994 and 2000, the Republicans, led by Speaker Newt Gingrich in the House from 1994-98, paid great attention to their base within the corporate elite and socially conservative voters, and less attention to how the impact of their policies were being perceived by the fiscally conservative, but socially progressive voters, who made the difference in the 1994 congressional elections. Thus, the Republicans left themselves open to the charge of continuing to cater too much to the corporate business elite, in terms of issues like tax policy, and as not being socially progressive enough on middle and working classes issues like Medicare and Medicaid, such as the charge that they wanted to slow the growth in these programs to the point that services would need to be cut, and thus undermining the necessary social safety net in which socially progressive voters believe. In each of the congressional elections of 1996, 1998, and 2000, therefore, Republicans lost seats in Congress.

With respect to the presidential elections in 1996 and 2000, the swing votes were again the same group of voters who were the swing votes in 1992 and 1994: the fiscally conservative, socially progressive voters of the Enlightenment tradition. As the authors of this book wrote early in 1996, “[A] message to grab such voters had to combine, as it did for Jefferson, fiscal conservatism on the budget; a balanced role for the States and the federal government; protection of individual rights, but a recognition, consistent with Enlightenment philosophy, that individuals not only have rights, but responsibilities; and a vision of equal protection which is informed by the Enlightenment perspective that individuals should be given an equal opportunity to compete, but there is no guarantee of equal outcomes for any individual, or for any group, in society. In addition, there was a need to appear to be on the side of the middle and working class, and thus to be concerned about their medical care, their education, and the environment in which they live, while protecting them from exploitation by big business. In such a climate, politically popular tax cuts would need to be clearly linked to providing more money in the pockets of the middle and working class, rather than merely relieving the tax burden for the relatively wealthy.”

During the 1996 campaign, the candidate that best appealed to this tradition was William Jefferson Clinton, not Bob "Jefferson" Dole. Between 1994 and 1996, through both policy actions and rhetoric, President Clinton returned to the New Democrat, Jeffersonian vision, including signing the Welfare Reform Act of 1996, embracing the fiscally conservative goal of balanced budgets, and remarking in the 1996 State of the Union address that “[t]he age of big government is over.” As history records, President Clinton defeated the Bob Dole handily in the 1996 presidential election.

With regard to the 2000 presidential election, an article written by one of the co-authors of this book in the fall of 1998 and published in the summer of 1999, took this Jeffersonian analogy one step further. As that article stated:


Thomas Jefferson defeated John Adams in the presidential election of 1800. . . . During the next few elections, the Federalist Party lost touch with the electorate, principally because their distaste for Thomas Jefferson became the focal point of their political agenda. They ran against the popular Jefferson on grounds of his personal shortcomings. Despite these attacks, Jefferson remained popular with the people because of the “peace, prosperity, and expansion of the country [the Louisiana Purchase]” during his administration. In the election of 1808, Jefferson’s right-hand man, the bland but morally upright James Madison, won easily.

Over the next decade, the Federalist Party fell into disarray. Their core agenda was support for the business community, emphasis that they were the party of morality and traditional Christian values, and attempts to expand their political base to minority groups that they had ignored prior to 1800. This message was ineffective against the Jeffersonian message of fiscal conservatism on the budget; a balanced role for the States and federal government; a recognition, consistent with Enlightenment philosophy, that individuals not only have rights to equal opportunity, but responsibilities; and a political philosophy of being on the side of the common man.91

The article then asked “will today’s Republicans, perhaps faced with similar cultural cross-currents from two centuries ago, be more politically savvy than their Federalist counterparts of yesteryears.”92 In that regard, the article published in 1999, noted:

From 1800 until 1840, only one non-Jeffersonian was elected president: John Quincy Adams, the son of President Adams whom Jefferson defeated in 1800. . . . Quincy Adams adopted the rhetoric of the Jeffersonians, disassociating himself from the rhetoric of the defunct Federalist Party. This suggests that if a Republican candidate emerges who picks up President Clinton’s Jeffersonian themes of “opportunity” and “responsibility”; merges elements of the Christian and Enlightenment traditions with a focus on “love of neighbor as oneself”; steers clear of the mania of personal attacks on Clinton’s character; and happens to be the son of the President whom Clinton defeated in 1992, that candidate might have a chance against the “bland, but morally upright” Al “James Madison” Gore and his wife, Tipper “Dolley Madison” Gore.93

This description of the possibility of a successful Republican campaign is, of course, the campaign run by George W. Bush, the son of the President whom Clinton defeated in 1992. Bush’s focus on “changing the tone in Washington” steered clear of personal attacks, while his campaign, as summarized in his Inaugural Address, touched on the themes of America “since Jefferson” as a land of opportunity where “everyone deserves a chance,” combined with the “responsibility” each of us has “beginning with your neighbor.”94 Had the Republicans done the same thing the Federalist Party did in 1808, when they ran the same candidate, Charles Cotesworth Pickney, that they had run in

91  Id. at 828-30.
92  Id. at 830.
93  Id. at 830 n.80.
1804, the Republicans would have run Bob Dole again in 2000. There is a good chance Al Gore would have been able to win that election, as did James Madison against Pickney in 1808.

As suggested by this analysis, the modern-day Quincy Adams’ chances of prevailing would improve if that candidate could paint Al Gore as not the “bland, but morally upright” modern equivalent of James Madison, but instead “overbearing” and “morally compromised.” For example, the Bush campaign focused on the audible “sighs” of Vice-President Gore during the first Presidential debate as part of creating a media contrast between a more laid-back candidate Bush with a more overbearing Al Gore.\(^{95}\) The Bush campaign focused on tying Al Gore to campaign financing problems and Gore’s embellishments of personal remembrances – the charge of the Bush campaign that Gore was a “serial exaggerator.”\(^{96}\) It would also help to paint Al Gore not as a continuation of Jeffersonian balanced budget, fiscal conservative policies, but instead a tax-and-spend liberal of the classic “Great Society” modern liberal mode. This was reflected in the Bush campaign’s attempt to paint Al Gore as a tax-and-spend liberal in the tradition of Walter Mondale and Michael Dukakis. As then-Governor Bush said during the final Presidential debate, “You [Gore] propose more than Walter Mondale and Michael Dukakis combined. In other words – this is a big spender.”\(^{97}\)

Despite these attempts, Vice-President Gore might still have prevailed in the 2000 election had he run more as did James Madison, the President’s right-hand man on issues of public policy, but with more personal integrity. Instead, Gore choose to run more as “his own man,” a populist with his campaign headquarters in his home state of Tennessee. In terms of historical parallels, Gore’s focus on how George W. Bush’s policies would disproportionately favor corporations and the wealthy was similar to that of the most famous Tennessee populist of the early 19\(^{th}\) century, Andrew Jackson. Indeed, to the extent there are “Clinton” and “Gore” wings of the Democratic Party, they are similar to the “Jeffersonian” and “Jacksonian” wings of the Democratic Party in the 19\(^{th}\) century. For example, Vice President Gore’s acceptance speech at the Democratic National Convention in 2000, while criticized by some as too left-of-center, is in the tradition of Andrew Jackson’s populism. Jackson’s populism, while not resonating within the power elite of his time,\(^{98}\) was embraced by the core rank and file voters of his age.

The election of 2000 was similar, in many respects, to the election of 1824. In that election, as in 2000, there were four candidates for president who attracted more than token support. The four

\(^{95}\) See, e.g., BBC News, *Gore and Bush re-enter the ring* (Oct. 11, 2000) (www.bbc.co.uk, then click on “BBC News”, then search using the article’s title) (“The vice president says he will also tackle the perceived problem he had last week with appearing condescending by sighing and rolling his eyes after his opponent’s answers.”).


candidates in 1824 were Andrew Jackson, who received 153,544 popular votes and 99 electoral votes; John Quincy Adams, who received 108,740 popular votes and 84 electoral votes; Secretary of the Treasury W.H. Crawford, who received 46,618 votes and 41 electoral votes; and Congressman Henry Clay, who received 47,136 popular votes and 37 electoral votes. The four candidates in 2000 were Vice-President Al Gore, Governor George W. Bush, Green Party candidate Ralph Nader, and Reform Party candidate Pat Buchanan. In that election, as in 2000, the candidate who finished first in the popular vote, then Andrew Jackson, lost the presidency to the candidate who finished second in the popular vote, Quincy Adams, because of the operation of the electoral college process.

Under the electoral college process, when no candidate receives a majority of the electoral votes, the election goes to the House of Representatives, where each state gets one vote determined by the majority of that state’s congressional delegation. Regarding the election in 1824, it has been noted, “On the evening of January 9, 1825, Clay visited Adams for a ‘confidential interview,’ the details of which Adams did not report, even in his diary. But shortly thereafter Clay’s supporters swung their votes to Adams, while partisans of Jackson and Crawford screamed that a ‘corrupt bargain’ had been made. When the House of Representatives voted for President on February 9, 1825, Adams received the votes of 13 states, Jackson 7, and Crawford 4. ‘May the blessings of God rest upon the event of this day!’ Adams wrote in his diary. Significantly, when he announced the appointment to his Cabinet, Clay headed the list as Secretary of State.” Each of the preceding three Presidents – Madison, Monroe, and Quincy Adams – had used the position of Secretary of State as a stepping stone to later becoming President.

During the next 4 years, Quincy Adams ran his administration substantially without regard to the closeness of the election, pushing with little modification the policies he ran on in his campaign. Quincy Adams never changed his style of presidency during his entire four years, even as his disagreements with Congress grew. Quincy Adams trusted in the wisdom of his views, along with reading the Bible every morning and night and trusting in the power of God, to see him through.

Some have noted the same strong religious faith in George W. Bush. The result was that, subject to short-term fluctuations, Quincy Adams did not increase his electoral popularity during his term in office, while the forces opposed to Adams coalesced around Andrew Jackson, who swept into power during the election of 1828, ushering in the age of Jacksonian Democracy. Quincy Adams was defeated in 1828, with Jackson receiving 647,276 popular votes and 178 electoral votes to

100 Id. at 61-62.
101 Id. at 45, 53, 60.
102 Id. at 62.
Quincy Adams’ 508,064 popular votes and 83 electoral votes.\(^{104}\) Jackson’s triumph over Quincy Adams in 1828 was obtained, in part, upon the perception among Jackson voters that he had been “cheated” out of the 1824 election.\(^{105}\)

\section*{§ 14.4 \ Reflections on the Nature of Politics and the Supreme Court Post-2000}

Although gazing into crystals balls is a perilous enterprise, the following thoughts on the future direction of American politics, and thus possible membership on the Supreme Court, are useful to make. These thoughts, building on the connection between the Bush/Gore election of 2000 and the Quincy Adams/Andrew Jackson election of 1824, are substantially based on an article written by one of the co-authors of this book during 2002, and published in the summer of 2003.\(^{106}\)

In contrast to Quincy Adams’ limited popularity during his term in office, George W. Bush’s popularity became very high as the Commander-in-Chief leading the war on terrorism following the events of September 11, 2001. History predicts, however, that this popularity will not necessarily be long-lasting. The jump in election parallels, skipping over the presidencies of James Madison and James Monroe, and moving from Jefferson’s reelection in 1804 (Clinton’s reelection in 1996) to the Adams/Jackson contest in 1824 (Bush/Gore in 2000), has been matched by the quick moving events of today.

The main occurrences of the Madison and Monroe presidencies were the attack on the nation and the burning of Washington D.C. by the British during the War of 1812 (the attack on the World Trade Center being a similar attack on American soil by an outside enemy today); the “Era of Good Feeling” that resulted from the nation pulling together following the burning of Washington D.C. (the coming together of the nation regarding the war on terror following September 11th being the modern equivalent); and the unraveling of the “Era of Good Feeling” because of the recession of 1819-22, and the different political responses to that economic downturn (the era of partisan politics returning to Washington, D.C. focused on differing economic responses to the recession of 2001). President Monroe was the beneficiary of the “Era of Good Feeling” even during the first part of the recession, and thus won the election in 1820 virtually unanimously, receiving 231 out of 232 electoral college votes, one elector having “cast his ballot for John Quincy Adams, supposedly to preserve for Washington the honor of having received the only unanimous vote.” However, continuation of economic problems over the next few years, and different proposed political responses to it, provoked lively elections in 1824 and 1828.\(^{107}\)

\(^{104}\) See Whitney, supra note 99, at 62, 74.

\(^{105}\) See supra text accompanying notes 100-01.


\(^{107}\) On the Madison and Monroe Presidencies, see Whitney, supra note 99, at 45-47, 54-55.
If Bush had been up for reelection in 2002, close to the events of September 11, he might well have
an easy time at reelection. The congressional elections in 2002 reflected President Bush’s
continuing popularity. However, by the time of the reelection campaign in 2004, this boost was
always likely to be diminished, and the campaign was always likely to be close. This is true despite
the attempt by President Bush and his advisers to try to extend the modern “Era of Good Feeling”
boost in popularity into the election in 2004 by continuing to have President Bush front and center
as the face of the war against terrorism. Such a similar boost is likely to be a smart strategy for any
succeeding Republican candidate in 2008 or thereafter. If they are smart, Democrats will preempt
any attempt by Republicans to translate the continuing war on terrorism into a Republican issue by
getting out in front and being as “hawkish” on terrorist regimes as the Republicans.

It should be noted that such hawkishness is good public policy, as well as good politics. Following
the Cold War, the main foreign policy threat today is terrorism, particularly in the form of
development of weapons of mass destruction by rogue nations of “global reach.” As one of the co-
authors of this book wrote in 1999, two years prior to September 11, “Groups that do not embrace
[a] vision of toleration will be tolerated only to the extent that they are isolated or ineffective in their
practices because all individuals should be protected from group domination. This is a necessary
corollary to the fact that . . . moral rights involve ‘the equality of human rights and respect for the
dignity of human beings as individuals,’ a dignity which no society, or community within society,
should be permitted to infringe.”

Of course, this statement of hawkishness does not mean that Democratic candidates need embrace
the unilateralist way foreign policy is being carried out by the Bush administration. Critics of the
Bush Administration foreign policy are likely to continue to contend that some of the Bush foreign
policy is reminiscent of the big bully on the block trying to boss other children around or, with
respect to the Kyoto treaty, the international criminal court, or the United Nations generally, taking
my ball and going home. Nevertheless, unless a Democratic candidate is perceived as being as
strong on national defense as was Andrew Jackson in the 19th century, the chances of the electoral
success of an economic populist message like that of the era of Jacksonian Democracy will be much
reduced. Andrew Jackson had the support of Southern conservatives in his elections as President.
A message of shared economic interests regarding jobs, health care, and education addressed to both
Northern and Southern middle and working class families might work for a Democratic candidate,
but only if the candidate is perceived as sufficiently strong on national defense.

Consistent with the parallel from the earlier natural law period of American politics, and the focus
of swing voters being fiscally conservative, but socially progressive, to be successful Democratic
candidates must avoid the perception that they are fiscally progressive “tax and spend liberals.” Part
of avoiding this perception is the embrace of balanced budgets, as President Clinton did during the
1990s. Part of it too is making the point that government spending measured as a percentage of the
country’s gross domestic product was smaller under Presidents Carter and Clinton than it was under
Presidents Reagan or either Presidents Bush. Under Carter, federal spending “amounted to about
21% of the country’s gross domestic product. That number inched up under Reagan and the elder
Bush to 22%. It declined under Clinton to 20%. When Clinton left office, the federal government

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108 Kelso, supra note 90, at 826 & n.63.

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accounted for a smaller part of the domestic economy than any time since the 1960s.”

Perhaps a more accurate characterization of budget priorities since 1968 is that Republican Presidents, reflecting a conservative social agenda, have tended to allocate a greater percentage of government spending to departments like Defense, while Democratic Presidents, reflecting a progressive social agenda, have focused more on achieving an appropriate balance between defense spending and spending on social programs under departments like Health and Human Services or the Environmental Protection Agency. For example, President George W. Bush’s “projected 30 percent rise in defense spending through 2007 would establish a pace only slightly slower than President Reagan’s hikes from 1981-85, the largest ever during peacetime.”

The election in 2004 was different in one important respect than the 1828 election between Andrew Jackson and John Quincy Adams. Al Gore, the Jackson equivalent in the 2000 election, chose not to run again, unlike Jackson who ran again in 1828. However, the candidate who emerged as the Democratic nominee, Massachusetts Senator John Kerry, reflected the Jacksonian populist vision, and had the strongest military record, combined with the size and look of Andrew Jackson. In the election campaign, however, President Bush and his advisers were successful in being able to portray Senator Kerry as not strong enough on national defense, and Senator Kerry, being from Massachusetts, was never able to connect with Southern middle and working class families regarding jobs, health care, and education. Further, President Bush was able to use Democratic support for gay rights as an effective wedge issue to blunt any Democratic inroads into middle and working class families on economic issues, which was critical in key swing states like Ohio or Missouri, states that Clinton won in 1992 and 1996. This issue of gay rights, including the issue of gay marriage, as a political issue now and in the future is discussed at § 16.2.4.

Without regard to any particular election, the basic theme of this analysis remains. Putting to one side the issue of gay rights, where in the short run the conservative social position commands majority support, but eventually the progressive position will prevail, as discussed at § 16.2.4, attracting the controlling votes in contemporary American politics, like in the initial era of American politics, is likely to continue to revolve around an appeal to fiscally conservative, but socially progressive voters. The success of either Republican or Democratic candidates who best appeal to such voters will likely determine the outcome of most future Presidential elections. Republicans who run to their base of socially conservative voters in swing districts or swing states, or for nationwide office, will likely do so at their peril. For example, Margaret Thatcher remade the Tory Party in England as a solid conservative party, pushing the moderate conservatives, or “wets” as they were called, to one side. The Tory party is now a minority party in England. Similarly, the Conservative Party in Canada had adopted a more hard right stance. Only by adopting a more moderate stance, such as advanced by David Cameron in Britain, or Stephen Harper in Canada, do those parties stand chances of electoral success.

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109 John Balzar, Debunking the Big-Spender Myth, in The Los Angeles Times B17 (Jan. 11, 2002).

While many of President Bush’s policies have catered to his socially conservative base, his speeches have been well-drafted to highlight Bush’s concern for middle-class issues such as education, health care, economic security, the environment, and protecting workers from corporate scandals.  

For example, the Bush campaign in 2000 focused on the tax cuts going to all Americans, particularly those in the middle and working classes, by highlighting examples of middle class voters who would benefit from his tax cut plan at each campaign stop.  As the media reported during the campaign, “[G]overnor [Bush] said yesterday that he is the true patron of the middle class. . . . ‘I don’t believe in the rhetoric that he [Gore] used at his own convention, when he said that only the “right people” will get tax relief. . . . I think the “right people” are all people in America who pay taxes.’”

President Bush’s economic policy rhetoric since then has continued this same theme.

There is, however, a potentially politically dangerous disconnect between the rhetoric of Bush speeches, which is the needed message of “looking out for the middle class” and the reality of Bush policy.  For example, the economic reality of the Bush tax plan actually enacted into law, while cutting income taxes for everyone who pays them, substantially benefitted more the wealthy.

Similarly, despite well-crafted State of the Union speeches, the reality of Bush’s proposed budgets have focused less on the middle class and more on protecting what President Eisenhower called “the military/industrial complex.” The budgets have proposed large increases in defense programs, while proposing cuts in a range of social programs, creating potential long-term threats to Social Security and Medicare, adopted questionable positions on environmental issues like global warming, reduced business regulations of all kinds to the advantage of corporate America, and failed to fund fully domestic programs, such as those involving education, promised earlier.

One major problem of the Federalist Party in the early 19th century was that their actions did not match their rhetoric.  Under Presidents Washington and Adams, the Federalist Party was committed to taking public policy positions independent of politics.  It has been noted, “The men who led the Federalist Party before 1800 – George Washington, John Jay, and the other gentlemen of the old school – believed the sacred duty of a public man was to pursue ‘the common good’ without permitting himself to be distracted by the opinions of his friends and constituents, by opinions merely popular.  In their minds, a politician who sought merely to follow public opinion was derelict

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111 See, e.g., Text: The State of the Union Address (Jan. 29, 2002) (www.whitehouse.gov, then find subheading “Major Speeches”, then click on “State of the Union 1-29-02”).

112 See, e.g., Glen Johnson, Tax plan woos middle-class votes (Sept. 19, 2000) (www.boston.com, then search Archives using the article’s title).


115 Citations to articles addressing each of these issues with respect to a disconnect between the rhetoric of President Bush’s speeches and the reality of Bush Administration budget proposals appear at Kelso, supra note 106, at 1991 n.52.
in his duty, devoid of honor and integrity, guilty of wanton and reckless political behavior.” Later, however, the Federalist Party became known as the party that would say anything to get elected. For example, before 1800, the Federalist Party used the argument that “stability” in office-holding was important, a position that supported keeping Federalist office-holders in office. After losing the election in 1800, the Federalist Party adopted the view that “rotation” in office was important, a shift transparently designed for the purpose of encouraging the voters to throw the Jeffersonians out of office who had won the presidential and congressional elections in 1800.116

There is a similar need today for the Republican party to be careful not to create the image that they will do, or say, anything in the course of debate, while failing to live up to their political rhetoric. Similar to the politically-motivated Federalist shift on “stability” versus “rotation” in office after 1800, the Republican zeal for term limits before 1994, which would have helped throw Democratic majorities out of the House and Senate, cooled after 1994 when the Republicans took control of the House and Senate. During the debate on campaign finance reform in 2001, the House Republican leadership offered amendments claiming to advance the cause of campaign finance reform, despite the fact the leadership was committed to killing the bill. Even a balanced columnist like David Broder noted that the Republican behavior during the campaign finance debate gave “hypocrisy a bad name.”117 The realities of Social Security reform proposed by the President in 2005 raise similar concerns. In a quote attributed to Abraham Lincoln, “You can fool some of the people all of the time, and all of the people some of the time, but you cannot fool all of the people all of the time.”118

With regard to possible Supreme Court nominations, the nature of contemporary politics also has relevance. To the extent that the swing voters remain fiscally conservative and socially progressive, this would mean that Presidents would have a more difficult time appointing Justices who do not seem to share that Enlightenment vision. Unquestionably, some conservative Republicans may wish to “pack” the Supreme Court with conservative formalist or Holmesian Justices. Some Democrats might wish to “pack” the Court with liberal instrumentalists. Over time, the more likely confirmations will be Justices in the mold of Justices O’Connor, Kennedy, or Souter. Such a Justice would enhance the influence of the modern natural law style of decisionmaking on the Court.

Consistent with the thesis of this section, however, if President Bush or later Republican Presidents are able to govern successfully from a more conservative perspective, as Republican Presidents did between 1868 and 1932, then a majority of the Justices may come to reflect a conservative formalist interpretation style, as happened on the Court between 1873 and 1937. The Addendum to this book does predict that Chief Justice Roberts will likely reflect a conservative Holmesian style of interpretation, with an occasional leaning in the direct of formalism. Justice Alito will likely reflect a conservative formalist perspective, similar to that of Justice Scalia, with a slight affinity for Holmesian deference. If later Democratic Presidents are able to govern from a more liberal perspective, as they did during the Kennedy and Johnson Administrations, then a majority on the

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116 Fischer, supra note 30, at 150-51, 161.
Court may once again come to reflect an extreme, liberal instrumentalist perspective, as occurred between 1963 and 1969, or at least reflect a moderate, liberal instrumentalist perspective, as occurred during the remaining years between 1954 and 1986.

With regard to potential connections between contemporary politics and earlier eras of American political and social history, Karl Rove, the President’s chief political advisor, has stated his opinion that contemporary politics is most like the period of 1896 surrounding the election of President William McKinley.\(^{119}\) Conservative pro-business Republican presidents of that era were able to defeat Democratic populist candidates repeatedly, with Democrat William Jennings Bryan being defeated three times for president. The Court during the McKinley era did reflect a conservative, formalist constitutional interpretation style, as discussed at § 14.2.2.

However, as discussed at §§ 15.4.1-15.4.2, for a number of reasons the modern period is not likely to reflect a return to a formalist period, but rather to reflect a modern period of natural law. To the extent the phrase “compassionate conservative” is merely a mask for the “corporate conservatism” of the McKinley era, it is likely that such a “corporate conservative” policy will not prevail in the fullness of time in the modern era. Similarly, to the extent that the Bush Administration rhetoric concerning spreading freedom and democracy throughout the world, which does reflect a modern natural law approach, as discussed at § 15.4.1 nn.77-81, is merely a mask for the McKinley-era view of “manifest destiny” and the expansion of the power of the American “nation state” around the world, that “nation state” policy of “manifest destiny,” like earlier European versions of “manifest destiny,” discussed at § 15.4.2 nn.82, or as it was sometimes called, “White Man’s Burden,”\(^{120}\) will likely not prevail in the fullness of time in the modern era either.

As noted at § 16.3 text following n.79, based upon the long-term results of President Nixon’s “Southern strategy” of the 1960s and 1970s, noted at § 14.2.5, the Republican Party has had the advantage in terms of electoral politics during the 1990s and beginning of the 21st century because the Republican Party has included in its “Big Tent” traditional conservatives, Dixiecrat former Democrats, and Rockefeller Republicans. While a larger number of Dixiecrat Democrats left the Democratic Party over the past 40 years, only a few Rockefeller Republicans left the Republican Party. While the cut-off date for this book is the opening of the Supreme Court’s term in October, 2006, as noted at § 1.1, to the extent the Republican Party commits more completely to the traditional conservative “Dixiecrat” view of social policy, more “Rockefeller Republicans,” particularly in the Northeast and Midwest, may choose to vote Democratic. This would return the parties to more equal competitive balance for the mid-term elections in November 2006, and elections thereafter. S

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\(^{119}\) Use of any standard internet search program using the words “Karl Rove” and “William McKinley” will yield thousands of hits about Rove’s views on the McKinley era and politics today.

\(^{120}\) Use of any standard internet search program with the words “manifest destiny” and “White Man’s Burden” will yield thousands of hits, with hundreds of hits if “William McKinley” is added.
CHAPTER 15: EFFICIENT CAUSES OF THE FIVE ERAS OF AMERICAN LAW

The four distinct judicial decisionmaking styles, discussed in Chapters 3 and 9-12, have resulted in five eras of American law, as discussed in Chapter 13. As noted in Chapter 14, these five eras are also reflected in changing political and social events. Factors associated with those changes are considered in Chapter 15, particularly factors that can be identified as efficient causes tending to bring about the changes and give them distinctive characteristics.

The basic thesis in this Chapter is that when a critical mass of social actors in any society attain a particular level of cognitive development, social perspective-taking, and moral reasoning, the legal and political institutions in that society will change to reflect that fact. Part of that change in the United States will be the appointment of Justices to the Supreme Court whose views on these matters will more likely reflect the new level of reasoning. These appointments help create and support the progression in American legal history, discussed in Chapters 13 and 14, from the traditional natural law era, through formalism, Holmesian, and instrumentalism, into a period of modern natural law.

To begin with consideration of moral reasoning, the ideals and goals of citizens and judges regarding how society and its laws should be directed are among the underlying efficient causes of political and social events. It is true, of course, that decisions by judges on constitutional matters are hemmed in to a large extent by text, context, history, practice, and precedent, and the facts of particular cases that are before the Court. However, as a consequence of general judicial predispositions, discussed at § 4.4.1, the judge’s views on the content of constitutional text, context, and history are likely to be influenced by the judge’s predispositions regarding moral reasoning. Further, to the extent that society’s legislative, executive, and social practices change to reflect a new kind of moral reasoning, those later practices will be a “gloss” on constitutional meaning for all but formalist judges. For natural law and instrumentalist judges, there is also some room for relying on background moral principles embedded in the law, with those background principles affected by the moral reasoning in society, particularly as reflected in social practices or moral ideals embedded in common-law, statutory, or constitutional doctrine.

Although ideals and goals form the moral reasoning of all persons in society, many variations occur. Some persons judge what is right in terms of following the customs of neighbors and friends in the local community, including customary notions of morality as reflected in traditional religious doctrine. Other persons judge rightness by following either the letter or the purpose of majority-supported rules in society at large. Others may judge rightness by using only rules that have emerged from a process of reasoned choice. Still others may rely on a system that derives rules rationally, starting from a general premise such as “love of neighbor as oneself” or “treat persons with equal concern and respect.” At any given time, one of these perspectives may predominate in a given society, just as one of the judicial decisionmaking styles may predominate for legal reasoning.

As discussed in Chapters 13 and 14, it is clear that there has been a sequential evolution in American legal history with regard to views on the nature of the judicial decisionmaking task, as reflected in the five different eras of judicial decisionmaking. There is a related question of whether there has been a similar sequential evolution in the views of individuals in American history regarding
different kinds of moral reasoning, and whether that sequence is predictable. According to some
scholarly observers, there are regular and predictable stages in terms of how individuals develop in
terms of their cognitive development, social perspective-taking, and moral reasoning skills. Chapter
15 summarizes these stages and shows connections between the evolution of capacities in these
areas and the five eras of American law, as well as in the evolution of societies in general.

The analysis in Chapter 15 begins with Professor Michael Walzer’s views describing five general
kinds of societies that have existed in world history, discussed at § 15.1. Next, Professor Lawrence
Kohlberg’s theory is addressed. Professor Kohlberg’s theory postulates that there is a fixed set of
six stages of moral reasoning through which individuals progress from childhood to becoming an
adult. Each one of Professor Walzer’s kinds of societies can be seen to be related to one of
Professor Kohlberg’s moral reasoning stages, as discussed at § 15.2. These stages of moral
reasoning development in turn replicate what happens during the cognitive maturing process of each
individual, as described by Doctor of Science and Professor Jean Piaget, and during the related
advances in social perspective-taking ability, as described by Professor Robert Selman, as discussed
at § 15.3. When a critical mass of social actors in any society attain a particular level of cognitive,
social perspective-taking, and moral reasoning development, then attitudes toward the political and
legal institutions of that society should tend to reflect that new stage of moral development. In both
American legal and political history in particular, and in the development of societies in world
history in general, this is what one tends to see. The relationships among the stages described by
Piaget, Selman, and Kohlberg, and legal and political history, is discussed at § 15.4. Based upon
this discussion, Chapter 16 addresses how these considerations affect the final cause or purpose of
legal and political change, that is, the ends toward which societies evolve over time.

In order to present and interrelate the views of Walzer, Kohlberg, Piaget, and Selman, even in the
summary form attempted here, it is necessary to introduce their terminology. Many of these terms
are not likely to be familiar to the average reader of legal materials. To overcome this problem, an
effort has been made in the sections which follow to provide examples, analysis, and restatements
that should help make the unfamiliar terms more meaningful to individuals trained in the law. In
addition, it may be helpful to refer ahead, when one of four Tables is mentioned, to that Table, all
of which appear at the end of this Chapter, at § 15.4.4 text following n.106. Although the materials
at the beginning of the Chapter may seem to focus on matters somewhat removed from
constitutional law, the material will soon refocus on constitutional decisionmaking and its relation
to world events.

§ 15.1 Kinds of Societies in World History

In his book, On Toleration,¹ Professor Michael Walzer identified five kinds of societal arrangements
in world history: individual nations in international society, multinational empires, consociations,
nation states, and immigrant societies. Walzer also identified five different approaches toward
diversity: resignation, indifference, stoicism, curiosity, and enthusiastic endorsement.² Although

¹ Michael Walzer, On Toleration 14-36 (1997). Professor Walzer is UPS Foundation
Professor of Social Science at the Institute for Advanced Study in Princeton.

² See id. at 10-11.
Walzer did not make the point explicitly, his discussion showed that each kind of societal arrangement can be associated with one of the approaches to diversity. These associations appear in Table 15.1 at the end of this Chapter, and are discussed below.

Individual nations in international society are associated with resignation. They put up with the different views and traditions of their neighbors because, short of war or economic sanctions, they must. As Professor Walzer phrased it, resignation is defined as “resigned acceptance of difference for the sake of peace.” Individual nations in international society are associated with resignation because, given the nature of international society, “the costs [of intervention] are likely to be high: they involve raising an army, crossing a border, killing and being killed.” Nevertheless, as Walzer noted, individual nations may “use force to stop what is going on if what is going on is awful enough [such as] . . . cruelty, oppression, misogyny, racism, slavery, or torture. . . . [In addition,] intolerable practices in sovereign states might be the occasion for economic sanctions.”

Multinational empires are associated with indifference: the ruler of such an empire tolerates regional variation because it is irrelevant to maintaining power over the empire. Walzer defined indifference as “relaxed, benignly indifferent to difference: ‘It takes all kinds to make a world.’” This attitude is associated with multinational empires because “settled imperial rule is often tolerant – tolerant precisely because it is everywhere autocratic (not bound by the interests or prejudices of any of the conquered groups, equally distant from all of them).”

Consociations, basically multinational empires of only two or three main groups, like Belgium divided into French and Dutch halves, are associated with stoicism. Stoicism is defined by Walzer as “a principled recognition that the ‘others’ have rights even if they exercise those rights in unattractive ways.” The idea of a consociation, Walzer noted, is “a simple, unmediated concurrence of two or three communities (in practice, of their leaders and elites) that is freely negotiated between or among the parties. They agree to a constitutional arrangement, design institutions and divide offices, and strike a political bargain that protects their divergent interests. . . . [E]ach group lives in relative security, in accordance with its own customs.” The main groups in a consociation cannot afford to be indifferent to one another because, unlike a multinational empire, they are too close in space, but rather they must learn to live with one another unmediated by the outside transcendent power of the multinational empire.

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3  Id. at 10.
4  Id. at 20.
5  Id. at 20-21.
6  Id. at 10.
7  Id. at 15.
8  Id. at 11.
9  Id. at 22-23.
Nation states tend to be associated with curiosity: they have basic rules for all citizens in their state, no matter what their background, but these rules leave sufficient leeway for diversity of sub-communities within them. For Walzer, curiosity is defined as “an openness to the others; curiosity; perhaps even respect, a willingness to listen and learn.”\textsuperscript{10} In nation states, toleration is commonly focused not on groups but on their individual participants, who are generally conceived stereotypically, first as citizens, then as members of this or that minority. As citizens, they have the same rights and obligations as everyone else and are expected to engage positively with the political culture of the majority . . . . Minority religion, culture, and history are matters for what might be called the private collective.”\textsuperscript{11} One must note this caveat, however. The curiosity associated with nation states does not extend to enthusiastic endorsement of diverse practices. Thus, as Walzer indicated, “Any claim to act out minority culture in public is likely to produce anxiety among the majority . . . . In principle, there is no coercion of individuals, but pressure to assimilate to the dominant nation, at least with regard to public practices, has been fairly common and, until recent times, fairly successful.”\textsuperscript{12} This attitude is classically described as the “one melting pot” approach to immigrant socialization.

Finally, immigrant societies tend to endorse enthusiastically the diversity of their immigrant subgroups. Walzer defined enthusiastic endorsement as “enthusiastic endorsement of difference: an aesthetic endorsement, if difference is taken to represent in cultural form the largeness and diversity of God’s creation or of the natural world; or a functional endorsement, if difference is viewed, as in the liberal multicultural argument, as a necessary condition of human flourishing, one that offers to individual men and women the choices that make their autonomy meaningful.”\textsuperscript{13} Individual men and women in immigrant society are “encouraged to tolerate one another as individuals, to understand difference in each case as a personalized (rather than a stereotypical) version of group culture – which also means that the members of each group, if they are to display the virtue of tolerance, must accept each other’s different version.”\textsuperscript{14} Walzer indicated that in his view the United States in the last half of the 20th century is the best example of a successful immigrant society.\textsuperscript{15}

\textbf{§ 15.2 Kohlberg’s Six Moral Reasoning Stages}

In his work on the differences in moral reasoning styles of individuals, Professor Lawrence Kohlberg identified six different stages of moral reasoning that individuals progress through from childhood

\begin{itemize}
\item \textsuperscript{10} \textit{Id.} at 11.
\item \textsuperscript{11} \textit{Id.} at 25–26.
\item \textsuperscript{12} \textit{Id.} at 26.
\item \textsuperscript{13} \textit{Id.} at 11
\item \textsuperscript{14} \textit{Id.} at 31.
\item \textsuperscript{15} See \textit{id.} at 32–35.
\end{itemize}
to becoming an adult. The level to which most persons in a society have progressed is closely connected to the kind of society that exists and to the attitudes of its members regarding the toleration of diversity within that society. The first five of Kohlberg’s stages have direct connections to Walzer’s five kinds of societies and their attitudes toward toleration of diversity in society. These associations appear in Table 15.1. In addition, a different approach to toleration typically exists within each of these societies in terms of the individual’s life in any one community in the society versus cross-community toleration within the society. These associations are depicted in Table 15.2. Both of these Tables appear at the end of this Chapter, at § 15.4.4 text following n.106.

Kohlberg’s first stage is the stage of egocentric reasoning about morals. At this stage, individuals will choose self-interest over all else, except when limited by punishment. As Kohlberg noted, “Right is literal obedience to rules and authority, avoiding punishment, and not doing physical harm . . . physical damage to people and property . . . This stage takes an egocentric point of view . . . Actions are judged in terms of physical consequences rather than in terms of psychological interests of others.” This is the classic attitude of individual nations in international society, who pursue their own national self-interest limited only by the specter of economic sanctions or war, with intervention in international society typically involving one country doing physical damage to people or property of another country. In such a society, there is no necessary toleration for individuals in any community, and no cross-community toleration except by resignation. The morality of likely punishment, Kohlberg’s Stage 1, guides the societal approaches to toleration, and strong authoritarian regimes can impose their will on their citizens, and will do so without any moral qualms. As noted at § 15.4.1, this low-level of moral reasoning has no counterpart in the accepted judicial decisionmaking traditions of American judges at any time in our colonial or post-colonial history.

Kohlberg’s second stage of moral reasoning is still egocentric, but with the addition of the principle of equal exchange: if I demand something for myself, others can rightly demand the same thing for themselves. Kohlberg stated, “What is right is following rules when it is to someone’s immediate interest. Right is acting to meet one’s own interests and needs and letting others do the same. Right is also what is fair; that is, what is an equal exchange, a deal, an agreement. The reason for doing right is to serve one’s own needs or interests in a world where one must recognize that other people have their interests too.” This is the attitude of multinational empires, where each sub-community wants to preserve its own traditions, and thereby is willing to tolerate other communities preserving their own traditions by being indifferent to them. In multinational empires, there is no necessary toleration for individuals within any community, but some cross-community toleration exists bred of the Stage 2 principle of equal exchange. Under this principle, if one’s own community wants to impose its standards internally, the same right of imposition should be given to other communities.

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16 See 1 Lawrence Kohlberg, The Philosophy of Moral Development 409–13 (1981). During his lifetime, Professor Kohlberg was a Professor of Psychology in the Graduate School of Education at Harvard University and headed their Center for Moral Development.

17 Id. at 409.

18 Id.
Judicial decision making under the United States Constitution has also displayed a level of moral reasoning that is above this second stage. As discussed at § 15.4.1, at Stages 1 and 2, rules are imposed upon people from above, conforming to the age of Emperors or Kings. Only at Stage 3 are rules the product of democratically agreed-upon consent. In addition, judicial decision making under an Emperor or King is likely to be significantly influenced by political considerations that retard the development of any particular judicial decision making style.

Kohlberg’s third stage, and all his later stages, are closely connected with the American judicial and political eras. The third stage involves moral reasoning based upon the values of the community within which one lives. As Kohlberg defined it, “What is right is living up to what is expected by people close to one or what people generally expect of people in one’s role as son, sister, friend, and so on. . . . It also means keeping mutual relationships, maintaining trust, loyalty, respect, and gratitude. . . . The person relates points of view through the ‘concrete Golden Rule,’ putting oneself in the other person’s shoes. He or she does not consider generalized ‘system’ perspective.” 19 This basis for moral judgment leads to a stoic appreciation of the legitimacy of each community developing its own value system, the basis of life in a consociation. In consociations, there will be some minimal toleration within each community, bred of the basic principle of stoicism that “‘others’ have rights even if they exercise them in unattractive ways.” 20 There is also cross-community toleration bred of the same stoic impulse and Kohlberg’s Stage 3 level of moral reasoning, which involves each community developing its own ethical values to govern behavior of that community. At this stage, each community, through its own interaction and reasoning about concrete problems, what Kohlberg called the “concrete Golden Rule,” develops its own set of customs and expectations.

This concept of individuals setting their own rules for themselves is the critical aspect of the advance from an age of Emperors or Kings to an age of democratic mutual consent. As Professor Walzer noted at § 15.1 n.9, in practice the leaders and elites of the various communities in a consociation freely negotiate a constitutional arrangement, design institutions and divide offices, and strike a political bargain that protects the divergent interests of each community in society. Each group lives in relative security, in accordance with its own customs. As discussed at § 15.4.1 nn.50-59, this kind of society describes America from the Revolutionary War, Articles of Confederation, and the Constitution to the Civil War. Reflecting Stage 3’s focus on community customs, judicial decision making in such a society will be based on the customary interpretation style of that society. As discussed at §§ 8.4.1, 12.3.3, 13.1 & 14.2.1, for the colonial and post-Revolutionary War America, this was the traditional 18th- and 19th-century natural law style of interpretation.

Kohlberg’s fourth stage is the stage of individuals following the rules of society because they are society’s rules. At stage four, “The right is doing one’s duty in society, upholding the social order, and maintaining the welfare of society or the group. What is right is fulfilling the actual duties to which one has agreed. . . . A person at this stage takes the viewpoint of the system, which defines roles and rules. He or she considers individual relations in terms of place in the system.” 21 This is

19 Id. at 410.
20 See Walzer, supra note 1, at 11.
21 Kohlberg, supra note 16, at 410–11.
the attitude of nation states, which define individuals as citizens and apportion responsibilities to
ingividuals as citizens, but recognize that different nations and their citizens may have different rules
that are to be followed. In nation states, greater toleration within communities is likely to exist based
upon Kohlberg’s Stage 4 principle of equal rights of citizenship for all individuals within society
following that society’s rule of law. Cross-community toleration is enhanced in such a nation state
by curiosity about the rules that different groups seek to impose upon themselves. However, as
Professor Walzer noted at §15.1 n.12, in nation states minority religion and culture are matters for
private practice. Claims to act out minority culture in public are likely to produce anxiety among the
majority and be inconsistent with the “one melting pot” approach to socialization. As discussed at
§15.4.1 nn.60-66, America truly became a nation state—“One Nation, Indivisible, with Liberty and
Justice for All,” as stated in the 1892 Pledge of Allegiance—after the Civil War. This Stage 4 rule-
maintaining morality is reflected in the rule-maintaining focus of the formalist decisionmaking style.

Kohlberg’s fifth stage is the stage of social contract thinking: one adopts rules that are the product
of group choice, and values are relative to that group. Under such a view, “What is right is being
aware of the fact that people hold a variety of values and opinions, that most values and rules are
relative to one’s group. These ‘relative’ rules should usually be upheld, however, in the interest of
impartiality and because they are the social contract. Some nonrelative values and rights such as life,
and liberty, however, must be upheld . . . regardless of majority opinion. . . . [L]aws and duties
[should] be based on rational calculation of overall utility: ‘the greatest good for the greatest
number.’”22 Such an approach yields endorsement of the validity of choices made by different groups,
and forms the basis for the enthusiastic endorsement of immigrant societies. In an immigrant society,
there is even greater toleration within communities based upon the larger number of equal citizenship
rights that emerge from Kohlberg’s Stage 5 social contract, which is based on an understanding of
value relativity. Cross-community toleration is enhanced even more by the enthusiastic endorsement
of the diversity aspect of immigrant societies. As noted at §15.1 n.15, Professor Walzer viewed the
United States in the last half of the 20th century as the best example of a successful immigrant society.
As discussed at §15.4.1 nn.72-76, this social values morality is reflected in the instrumentalist style
of judicial decisionmaking and its resort to background social policies to resolve leeways in the law.

Kohlberg’s sixth stage of moral reasoning is the stage of universal principles of ethics based upon
reason, leading to equal respect and dignity for each individual in society. Kohlberg noted, “This
stage assumes guidance by universal ethical principles that all humanity should follow. . . . Particular
laws or social arrangements are usually valid because they rest on such principles. . . . Principles are
universal principles of justice: the equality of human rights and respect for the dignity of human
beings as individuals. . . . The reason for doing right is that, as a rational person, one has seen the
validity of principles and has become committed to them.”23 Walzer does not describe a society
related to such moral reasoning principles. However, such a society can be called a “post-modern”
society, with an approach to toleration based upon rational understanding of diversity and moral
principles based upon rational understanding. As discussed at §§16.2.1-16.2.3, such rational
principles of justice can be generated, and will adopt as the foundational rational principle that of

22 *Id.* at 411-12.
23 *Id.* at 412.
equal concern and respect for others, that is, the basic principle of love of neighbor as oneself, the principle lying at the heart of all major secular and religious philosophic traditions. As discussed at § 15.4.1 nn.77-81, this concern with rational moral principles in society is reflected in a modern natural law approach to judicial decisionmaking.

In addition to these stages, there are transitional stages between each of Kohlberg’s 6 stages of moral reasoning. These transitional stages are important from the perspective of making connections among moral reasoning, cognitive development, and styles of judicial decisionmaking. For example, as noted below, Kohlberg’s transitional Stage 4½ is reflected in the Holmesian style of decisionmaking, which is best understood as a transition between Stage 4 formalism and Stage 5 instrumentalism.

Some of these transitional stages are explicitly identified by Kohlberg. Others are implicit in his writings. Still others must be implied. The transitions from Stages 1 to 2, and 2 to 3, are implicit in Kohlberg’s discussion of the moral principles of Stage 2. As defined by Kohlberg above, at § 15.2 n.18, Stage 2 includes three different concepts. First, there is the concept of following “someone’s immediate interest.” Second, there is the concept of “acting to meet one’s own interests and needs and letting others do the same.” Third, there is the concept of right being “what is fair; that is, what is an equal exchange.” As discussed at § 15.3 nn.28-36, these three related concepts are best conceived as three sub-stages of Stage 2 moral reasoning. The first, following “one’s immediate interest,” is the transitional sub-stage from Stages 1 to 2; the second, “acting to meet one’s own interest and letting others do the same,” is the core moral principle of Stage 2; the third, “what is fair [is] an equal exchange,” is the transitional sub-stage from Stage 2 to Stage 3. Following Kohlberg’s terminology of Stage 4½ to describe the stage between Stages 4 and 5, these three sub-stages can be called Stages 1½, 2, and 2½.

Kohlberg explicitly recognized a transitional stage between Stages 4 and 5. He defined this stage as Stage 4½. At this stage, “[C]hoice is personal and subjective. It is based on emotions, conscience is seen as arbitrary and relative, as are ideas such as ‘duty’ and ‘morally right.’ . . . At this stage, the perspective is that of an individual standing outside of his own society and considering himself as an individual making decisions without a generalized commitment or contract with society.”24 This attitude of relative morality among the citizens of a mature nation state will push the nation state away from its initial “melting pot” approach toward a more full-fledged curiosity of the diversity of views based on the different relative moralities of individuals in society. A mature nation state, populated by people adopting Kohlberg’s Stage 4½ principle of moral relativity, will recognize that the law of the nation state is legitimate not because it is the law, the Stage 4 reason, but because among all different relative views the nation state represents the views of the dominant forces in society.

As discussed at § 15.4.1 nn.67-71, this emphasis on morality emanating from the dominant forces in society is reflected in the Holmesian style of judicial decisionmaking. The moral skepticism of Stage 4½ is matched by Holmes’ skepticism regarding moral reasoning, discussed at § 3.2 nn.32-36. Similar to Kohlberg’s Stage 4½ being a transition between Stages 4 and 5 of individual moral

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24 Id. at 411.
development, the Holmesian approach represents a transition between formalism and instrumentalism in American legal history.

Just as there is this transitional stage between Stages 4 and 5, there are also transitional stages between Stages 3 and 4, and Stages 5 and 6. As with Stage 4½, the underlying transition involves some greater measure of ethical moral relativity, as the individual is between the more fixed moral ideals of the preceding and succeeding stages. As discussed at § 15.4.1 nn.50-59, and reflected in Table 13.1, at Stage 3 this is reflected in a transition from the ethical natural law of Stage 3 to the greater morally relativistic ideals of political and economic natural law, from which follows the Stage 4 formalist rule-maintaining morality. As discussed at § 15.4.3 nn.88-96, at Stage 5 this is reflected in a transition from instrumentalism to various versions of instrumental political critique, such as the Critical Legal Studies Movement, or modern economic natural law, as in the writings of Richard Posner, or modern political natural law, as in the writings of Ronald Dworkin, as part of a transition to the modern ethical natural law of Stage 6. All of these connections between Kohlberg’s moral reasoning stages and the judicial decisionmaking styles are summarized in Table 15.3 at the end of this Chapter, at § 15.4.4 text following n.106.

§ 15.3 Piaget’s Theory of Individual Cognitive Developmental Stages, Selman’s Social Perspectivism, and Kohlberg’s Moral Reasoning Stages

Kohlberg’s stages of moral development have their roots in stages of individual cognitive development, and the ability of individuals at different stages of cognitive development to take into account more completely other individuals’ perspectives, what is called “social perspectivism” or “role-taking capacity.” As individuals apply increased cognitive skills and role-taking capacities to moral problems, their response to moral dilemmas changes. The best known and most elaborate scheme of cognitive development derives from the work of Jean Piaget. A good summary of social perspectivism or role-taking capacity appears in the work of Robert Selman.25 To appreciate fully Kohlberg’s stages of moral development, and thus to understand better how those moral reasoning stages are related to the judicial decisionmaking styles, summarized at § 15.2 and developed at § 15.4, it is necessary to understand Piaget’s cognitive developmental stages and their connection to Selman’s social perspective-taking stages.

Piaget’s studies into human cognitive development suggest that cognitive development can be broken down into stages through which each individual must pass. The number of stages and the boundaries between them are, of necessity, somewhat arbitrary, but the basic contours of the process are clear.

Initially, from birth to age two, the child is in a “sensori-motor” stage. In this stage, basic conceptions about the nature of the material world begin to be formed. In his work, Piaget identified six sub-stages within this stage, each sub-stage dealing with a particular skill or ability that the child exhibits or learns. For purposes of social perspective-taking and moral development, the most fundamental concept that the child learns during this time is that of individuality and separation from other objects. By the end of this stage, the child is aware that he is separate from other individuals

and objects, and that punishment is therefore particularized to specific individuals for specific actions.  

This advance in cognitive development is mirrored in Selman’s stages of social perspective-taking by the advance at Selman’s Level 0 through the basic sub-stages A and B. These sub-stages have been summarized as follows: “At level A the child may have a sense of the other, but does not distinguish between [the] thought and perceptions of himself and the other. At level B the child clearly distinguishes himself from the other, but does not see any commonality between his thoughts and the other’s.”  

Because the child does not see any commonality between the two, the only reason for not doing what one wants is to avoid being punished, Kohlberg’s Stage 1 level of moral reasoning.

Piaget’s next stage of development, for most children from ages 2 to 7, is called preoperational thought. Piaget broke down this stage into two major sub-stages: preconceptual thought (from two to four years of age) and intuitive thought (from four to seven years of age). In this stage, the child is able to represent objects and events symbolically, and not just act towards them but think about them. However, the child’s thought is characterized by egocentricism. The child finds it difficult to understand how anyone can see things from a point of view different than the child’s own view. As Piaget has stated, “[T]he child supposes that every one necessarily thinks like himself . . . . [H]is logic lacks exactitude and objectivity . . . because the social impulses of maturer years are counteracted by an innate egocentricity.” At this stage, “The preoperational child is completely egocentric. Although he is beginning to take a greater interest in the objects and people around him, he sees them from only one point of view: his own.”

This kind of predictable egocentricism of children can be described as part of the “original sin” of childish ways of thinking. Through experience with objects the child comes to learn that predictions based upon egocentric logic do not always come true. As Piaget stated, “[T]he child, after having regarded his own point of view as absolute, comes to discover the possibility of other points of view and to conceive of reality as constituted, no longer by what is immediately given, but by what is common to all points of view taken together.” Through playing with other children the child is also forced to adapt to and learn about others’ perspectives. As has been noted, playing with others eases the transition from the egocentric stage of rule manipulation to the next two stages of cooperation and cooperation.

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31 Piaget, supra note 26, at 247.
These advances in cognitive development are mirrored in Selman’s stages of social perspective-taking. Three distinct stages are identified by Selman. The first stage reflects Selman’s Level 0, sub-stages C and D. These levels have been summarized as follows: “Next (level C), the child attributes his own thoughts to the other by putting himself in the other’s position. Given an identity in situation with the other, he naively assumes similarity between the other’s thoughts and his thoughts. . . . [At level D, there begins to develop an awareness] that the other has viewpoints based on his own reasoning, and those may or may not be similar to the child’s.”

These levels reflect the pure egocentricism at the beginning of preoperational thought. At this stage, because the subject assumes a similarity between his own thoughts and those of others, the subject stops to consider only one perspective, his own, the stage of following “one’s immediate interest.” As discussed at § 15.2 text following n.23, this aspect of Kohlberg’s Stage 2 is called in this Chapter Stage 1½.

The next stage identified by Selman is Level 1. As defined by Selman, “At this time there is an awareness of the distinct subjectivity of each person’s own viewpoint. The child recognizes that even when in the same situation as another person, the other may construe it differently than he does. He recognizes further that access to varying information will result in different subjective interpretations. However, he cannot simultaneously entertain both his own and another person’s viewpoint. He also lacks the ability to see himself from the perspective of another person.”

This level of subjective social perspectivism is related to Kohlberg’s Stage 2. As with Stage 2’s precept of “acting to meet one’s own interests and needs and letting others do the same,” there is recognition at this level that others have interests that may be different from yours. However, as with Selman’s Level 1 inability to “simultaneously entertain both his own and another person’s viewpoint,” the Stage 2 child “serves his own needs or interests,” not another’s. Because of Selman’s Level 1 inability to take another’s perspective, no concept of fairness in exchange can develop.

The final development within preoperational thought comes, as Piaget noted, when the child discovers “the possibility of other points of view and to conceive of reality as constituted, no longer by what is immediately given, but by what is common to all points of view taken together.”

This is reflected in Selman’s Level 2 of social perspective-taking. At this level, “There now develops a reciprocal understanding that just as the child himself can view the other as a subject, it is also true that the other can view him as a subject. This awareness that the other can view him as a subject will influence his actions toward the other. The child can also now view himself through the perspective of another. The advance encompassed at this level is limited by the fact that the reflections involved take place sequentially and, therefore, the child is still locked into a dyadic [i.e.,

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33 Shantz, supra note 27, at 284.


35 Piaget, supra note 26, at 247.
This advance results in two consequences with respect to moral reasoning. First, because the child can take the other’s perspective, a concept of intrinsic fairness toward the other begins to emerge. However, second, because the child viewpoint and another’s viewpoint can only be held sequentially, the child cannot internalize another’s judgment in the child’s own moral reasoning. This combination of fairness toward others without internalizing their view results in a morality that focuses on equal exchanges as the common ground between individual cooperative efforts. This is the morality of Kohlberg’s Stage 2 precept of “what is fair [is] an equal exchange.” As the most advanced kind of Stage 2 moral reasoning from the perspective of Selman’s social perspective-taking categories, that stage is called in this Chapter Stage 2½, as discussed at § 15.2 text following n.23.

The child’s experiences with objects and others leads into Piaget’s third basic stage of cognitive development, the stage of concrete operational thought. At this stage, the child is able to recognize the mutual subjectivity of each person’s view, which allows the individual truly to reflect upon another’s point of view as well as his or her own. As phrased in Selman’s Level 3 of social perspective-taking, “There occurs a mutuality of role-taking. The child becomes aware that each person in a dyadic situation has the capability of a simultaneous knowledge of his own and the other’s subjectivity. [The child] can transcend the immediate dyadic situation to adopt an abstract third-person perspective which permits observation of [the child’s] own interaction with the other and their mutual subjectivity.” Moral reasoning related to this stage of cognitive and social perspective-taking similarly is focused on mutual interpersonal relationships. As defined at Kohlberg’s Stage 3 of moral reasoning, “What is right is living up to what is expected by people close to one or what people generally expect of people in one’s role as son, sister, friend, and so on . . . .” In terms of most individuals’ development, this stage reflects the teenage focus on peer group morality, and the giving of primary loyalty to one’s local community, i.e., one’s team or gang, and its shared beliefs.

During the later stages of concrete operational thought, Piaget noted that the individual begins to be able to recognize not only the mutual subjectivity of each person’s individual view, but also an ability to take group perspectives. This is reflected in Selman’s Level 4 of social perspective-taking. At this level, “The young person by now has generated a generalized other perspective which [the person] knows [is shared] with others. It is a perspective that others in the community may also hold regardless of their social position. It is comprised of an integration of communally shared values, attitudes, and beliefs. There is now an idea of a social system perspective which goes beyond the

Rosen, supra note 34, at 59-60.

See Piaget, supra note 32, at 139-47.

Id.

Rosen, supra note 34, at 59-60.

Kohlberg, supra note 16, at 410.

See Piaget, supra note 32, at 139-47.
abstract third-person perspective of Level 3 that observes only a specific dyadic interaction.”42 This Level 4 social perspective-taking underlies the advance to Kohlberg’s Stage 4 of moral reasoning. At Kohlberg’s Stage 4, right is defined as “doing one’s duty in society, upholding the social order, and maintaining the welfare of society or the group. . . . A person at this stage takes the viewpoint of the system, which defines roles and rules.”43 At this stage, one’s loyalty is not as much to the community, as at Stage 3, but to the nation as a whole.

The final stage of cognitive development for Piaget is called formal operational thought. The defining feature of formal operational logic is the ability fully to put oneself into others’ perspectives, to think abstractly about propositions and not be mired in one’s own narrow framework, and to recognize that viewpoints other than one’s own must be given proper respect. As Piaget phrased it, “The new feature marking the appearance of [formal operational thought] is the ability to reason by hypothesis. . . . Instead of just coordinating facts about the actual world, hypothetico-deductive reasoning [the scientific method] draws out the implications of possible statements and thus gives rise to a unique synthesis of the possible and necessary.”44 This advance in cognitive reasoning ability is mirrored in Selman’s final stage of social perspectivism, Level 5. At Level 5, “The relatively of socially rooted perspectives is discerned. A perspective which goes beyond the confines of any given society in which one happens to find himself can be adopted.”45

This Level 5 ability is reflected in Kohlberg’s final three stages of moral development: Stages 4½, 5, and 6. As Kohlberg has noted, all these stages are termed “post-conventional” precisely because the moral reasoning in each of these stages goes beyond the confines of any given society’s conventions.46 As discussed in the next section, § 15.4.1 nn.67-81, applying this post-conventional formal operational thought, with its hypothetico-deductive reasoning of the scientific method, to the basic question of the justification for moral rules would cause the adoption of the Stage 4½’s view that moral choice is “personal and subjective” and that whatever values are adopted are merely the product of the dominant forces in society. Applying formal operational thought also to the question of the means by which social ends are advanced would cause a push for fair procedures reflective of other individual’s perspectives in addition to one’s own to implement values that are the product of social contract choice, Kohlberg’s Stage 5. Finally, applying formal operational thought to basic ends themselves would cause adoption of Kohlberg’s Stage 6, which is based upon rational principles of justice about which all rational individuals can agree. Table 15.3, at § 15.4.4 text following n.106, summarizes each of these connections among Piaget’s stages of cognitive development, Selman’s stages of social perspectivism, and Kohlberg’s stages of moral development.

42 Rosen, supra note 34, at 59-60.
43 Kohlberg, supra note 16, at 411-12.
45 Rosen, supra note 34, at 59-60.
§ 15.4  Moral Reasoning and Societal Development in America and Elsewhere

§ 15.4.1  Cognitive Development and Moral Reasoning Stages as Efficient Causes of the Five Eras of American Judicial Decisionmaking

As noted at the beginning of § 15.2, each one of Professor Walzer’s kinds of societies can be seen to be related to one of Professor Kohlberg’s moral reasoning stages. Consistent with Kohlberg’s moral stages of growth, societies, like individuals, should tend to develop in sequential fashion from one type of society to another. The reason is that when a critical mass of social actors in any society attain a particular level of moral reasoning development, attitudes toward toleration and the moral and legal institutions of that society should tend over time to reflect that new stage of development. Judicial decisionmaking styles will then tend to reflect that stage of development as well. In American legal history, that pattern exists. There is a relationship among the stages described by Kohlberg and the predominant decision methods of the courts, as discussed below. Of course, as discussed at § 15.3, these stages of moral reasoning development in each social actor in society are based upon what happens during the cognitive maturing process of each individual, as described by Piaget.

As noted at § 15.2 n.19, Kohlberg’s third stage involves moral reasoning based upon the values of the community within which one lives. As Kohlberg stated, “The person relates points of view through the ‘concrete Golden Rule,’ putting oneself in the other person’s shoes. He or she does not consider generalized ‘system’ perspective.”47 With respect to the issue of the relationship between moral reasoning and legal and political institutions, Kohlberg noted that Stage 3 is the first stage where democratic institutions are possible because a Stage 3 moral thinker recognizes that people make their own rules for themselves. At Stages 1 and 2, rules are merely imposed upon people from above, which conforms to the age of Emperors or Kings.48 Jean Piaget similarly observed that at early stages of moral development “rules are eternal, due to the authority of parents, of the Gentlemen of the Commune, and even of an almighty God”; it is only later, based on the advance from pre-operational thought to concrete operational thought, that rules are understood to be “the outcome of a free decision and worthy of respect in the measure that it has enlisted mutual consent.”49 Thus, a handy reference guide for determining when a society is evolving from a Stage 1 or 2 society, to a Stage 3 society, is the existence of a democratic revolution. In order for the replacement of the “divine right of kings” mentality by movements of “self-determination” and a desire for “democratic mutual consent,” it often happens that a political revolution must occur.

In Stage 1 or 2 societies, there is not likely to be a strong tradition of judicial independence from the Emperor or King. Judicial decisionmaking in such societies, therefore, is likely to be significantly influenced by political considerations that may retard development of any particular judicial decisionmaking style. Once the age of democracy begins, however, clear connections exist between Kohlberg’s moral developmental stages and the styles of judicial decisionmaking. Table 15.3, at §

47  Id. at 410

48  Id. at 147-68.

15.4.4 text following n.106, includes a summary of these connections among Kohlberg’s stages of moral development and the four judicial decisionmaking styles. Kohlberg’s Stage 3 of “community-based norms” is reflected in the traditional ethical natural law of the colonial period of American legal history; Stage 3½ is reflected in the political natural law of the framing and ratifying period and the economic natural law of early 19th-century America; Stage 4's following “society’s rules” is reflected in post-Civil War formalism; Stage 4½’s precept that values are “personal and subjective,” and thus any society’s values are merely the values of the dominant forces in society, is reflected in the Holmesian style of decisionmaking; Stage 5’s “social contract” model of values arising from democratic participation with a background concern for the “greatest good for the greatest number” is reflected in instrumentalism; Stage 5½ criticism of the inadequacy of such social contract proceduralism is reflected in various critiques of law and politics, including attempts at reconstruction reflected in modern economic and political natural law models; and Stage 6's “rational principles of justice” is reflected in the emergence of modern ethical natural law.

As noted above, Kohlberg’s Stage 3 concerns custom and community expectations where “[w]hat is right is living up to what is expected by people close to one.” This is reflected in the common law decisionmaking style of 18th-century America. As discussed at § 13.1 n.13, Professor and Historian William Nelson noted that this was a period of ethical unity and community based norms where consensus “was promoted by the fact that nearly all members of society shared common ethical values and imposed those values on the occasional individual who refused to abide by them voluntarily.” As Dean Pound phrased it, “[W]e are concerned immediately with the eighteenth century natural law which became embodied for us in the Declaration of Independence and is behind our bill of rights. . . . [This is the] ethical form, in which moral precepts dictated by reason are the ideal . . . .” The law of such a society will develop in response to concrete problems raised for the courts and legislatures as filtered through custom and community expectations. This is the traditional common law, or natural law, approach to law. As Pound stated, “The believers in eighteenth-century natural law did great things in the development of American law because the theory gave faith that they could do them. Application of reason to the details of the received common law was what made the work of the legislative reform movement of enduring worth.”

The democratic political revolution that occurs at Stage 3, however, is likely to be restricted by the limitations of Piaget’s concrete operational thought, discussed at § 15.3 nn.37-40, that lies behind Kohlberg’s Stage 3 level of moral reasoning. Thus, although there may be a concept of equal dignity of each individual based upon the ability to take another’s perspective as well as one’s own, in practice this concept will be limited by the concrete reality of the times. For example, although the Declaration of Independence stated in broad terms that all individuals are “created equal” and entitled to the inalienable rights of “life, liberty, and the pursuit of happiness,” the concrete customary practices in America in the 18th century denied that equality to slaves, women, and even some white men without property, who were all at that time denied various rights, including the right to vote.

52 Id. at 27.
This conflating of “reason” versus “custom” is typical of moral reasoning at the beginning of a democratic era, where moral reasoning may well be based upon concrete operational thought. Professor James Whitman has noted this tendency in 18th-century thought in America, England, and Continental Europe. As stated in his article entitled Why Did the Revolutionary Lawyers Confuse Custom and Reason,53 “This Article offers a general historical account of how the constitutionalist lawyers of the eighteenth-century world came to mingle ideas of customary right with characteristically eighteenth-century ideas of deductive natural law.” As Whitman stated:

Prime among such passages familiar to eighteenth-century readers was Bolingbroke’s famous and influential statement: “By constitution we mean, whenever we speak with propriety and exactness, that assemblage of laws, institutions, and customs, derived from certain fixed principles of reason, directed to certain fixed objects of public good, that compose the general system, according to which the community hath agreed to be governed.”54

The limitations of concrete operational thought are reflected in an important limitation on Stage 3 democratic mutual consent. Because of concrete operational thought, there is a “fusion of fact and norm; when the [individual] first begins to cognize how an actor ought to act rather than how he does act, he has not yet clearly differentiated the two. What is morally right to do, then, tends to be defined in terms of what most people or most occupants of a particular role do in fact do.”55 Thus, as Kohlberg stated, at Stage 3 the conventional morality of one’s peers, friends, and those with whom one interpersonally interacts are of primary importance. As has been noted about Blackstone’s theory of the common law:

The first and most famous principle was the idea that the source of common law is custom: that “the only method of proving, that this or that maxim is a rule of the common law is by showing that it hath been always the custom to observe it.” The second principle was that custom itself was the expression of a nation’s shared values, or, as we might say today, of its public conception of justice. “[R]eason is the life of the Law; nay the common Law itself is nothing else but reason . . . .” The equation of the common law with reason reflects a very special kind of natural law theory, one in which the source of natural justice was as much the people who were governed under the law as some independent moral truth that could be derived through philosophical reason.56

This conflating of custom and reason is precisely the basis for Holmes’ criticism, cited at § 3.4 n.92, that “jurists who believed in natural law seemed to [Holmes] to be ‘in that naive state of mind that accepts what has been familiar and accepted by them and their neighbors as something that must be


54 Id. at 1325 (citation omitted).


accepted by all men everywhere.” As applied to classic Stage 3 natural law that relies on custom as one basis for reason, Holmes’ criticism is right. It is not right, however, if applied to a modern Stage 6 natural law that is based solely on reason, and not on custom. The contours of such a Stage 6 natural law are developed at § 16.2.

Initially, America reflected Kohlberg’s Stage 3 level of concrete operational thought with regard to moral reasoning. In the late colonial period, most persons’ loyalties were directed toward local communities and organizations rather than a nation state. Reflecting the connections noted at § 15.2 between Kohlberg’s Stage 3 and Professor Walzer’s consociation form of society, the Continental Congress and the original Articles of Confederation were clearly consociation forms of government, reflecting current natural law writings on “confederate republics” of continental European writers like Montesquieu, Vattel, and Pufendorf. Even post-Constitution, pre-Civil War America is best conceived as a consociation of Northern and Southern states, similar to Belgium with its French and Dutch halves, rather than a true nation state. For example, not only did Henry Clay and the National Republicans of the 1820s and early 1830s never persuade a majority of voters to adopt their views regarding considering economic development from the perspective of the nation as a whole under “the American system,” but some Southern state courts refused to enforce federal law with which they disagreed. Persons in pre-Civil War America tended to give their primary allegiance to their state and region of the country, not the United States as a whole. As a prominent, but typical, example, despite disagreeing with the successionist movement on the eve of the Civil War, General Robert E. Lee gave his primary allegiance to Virginia and the South, rather than to the United States. When Jefferson spoke of “my country,” he typically meant Virginia.

While the Declaration of Independence and Bill of Rights reflected aspects of Stage 3 ethical natural law based upon certain common values held in society, as Pound noted above at § 15.4.1 nn.51-52, the drafting of the Constitution of the United States also reflected aspects of the Stage 3½ transition from a society based on ethical community norms to a society based on aspects of political natural law. The main features of the Constitution were all structural features of federalism and separation of powers, including the important concept of an independent judiciary. The framers and ratifiers were acutely aware of the possibility of political “factions” and the impact of such factions on law and society, as indicated in famous The Federalist Papers No. 10, which begins, “Among the numerous advantages promised by a well-constructed Union, none deserves to be more accurately developed than its tendency to break and control the violence of faction.” This change in focus influenced society in a number of ways. As Professor Nelson noted in a study of legal change in Massachusetts during this period:


The first breach in the old order occurred in the 1780s, when agrarian debtors, mostly in Western Massachusetts, began organizing politically to complain that existing judicial procedures prejudiced their defense in suits begun by creditors to collect debts. Their argument was that access to justice was one of the rights of man for which the War of Independence had been fought and that the structure of the legal system and the legal profession precluded them from effective access to the courts in debt collection suits. But when they organized to petition the legislature they were met by a counter-organization of lawyers and creditors. During the next decade, for the first time in Massachusetts history, the politics of the state was dominated over an extended period by interest groups . . . divided over a fundamental socioeconomic issue.

Thereafter similar divisions continued to occur. By 1810 the state was split politically over another central social question: whether to retain its religious establishment [of the Congregationalist Church]. Of course, the fact of this division seriously impaired the state’s ancient ethical unity. More important, though, was the outcome of the religious controversy – the effective disestablishment of the church.

Nineteenth-century society was [also the result of an additional] force that emerged during the revolutionary period – a desire for economic growth. Particularly after 1790 the Massachusetts economy grew and changed so rapidly that by 1830 what had been an essentially agrarian subsistence economy, in which commercial activity was confined to a few coastal ports, was transformed into an industrialized market economy of statewide dimension.

This transformation of the economy produced much legal change, the most important element of which was the emergence of legal doctrines that recognized the materialism of the age and legitimated the idea of competition.59

More generally, as quoted at § 13.1 n.14, in 1938 Dean Pound phrased this point about ethical, political, and economic natural law as follows: "In the nineteenth century, the stabilizing and conserving natural law takes on three forms: ethical, political, and economic. The ethical form, in which moral precepts dictated by reason are the ideal, is the oldest . . . . It is replaced in early nineteenth-century America by the political form in which an ideal of 'the nature of American institutions' or the 'nature of free institutions' or the 'nature of free government' is the starting point. Later, as the stabilizing side of natural law comes to be the one stressed chiefly, an economic ideal of a society ordered by the principles of the classical political economy prevails." As applied to constitutional law, this progression in American legal history was addressed at § 14.2.1.

Kohlberg’s fourth stage is the stage of individuals following the rules of society because they are society’s rules. At discussed at § 15.2 n.21, at Stage 4, “The right is doing one’s duty in society, upholding the social order, and maintaining the welfare of society or the group. What is right is fulfilling the actual duties to which one has agreed. . . . A person at this stage takes the viewpoint of the system, which defines roles and rules. He or she considers individual relations in terms of

59 Nelson, supra note 50, at 5-7.
The transition to Stage 4 involves individuals being able to take not only the perspective of those in the immediate community, but to take a system perspective. Thus, at Stage 4, the individual “progresses towards a more balanced or equilibrated system of moral judgment: the diffuse norms of Stage 3 become ‘hardened’ into concrete laws and rules which specifically define right action and which apply equally to all actors.” Nevertheless, because this stage is also reflective of concrete operational thought, there remains a fusion of fact and norm. Thus, “the value of a system of moral rules or laws is not differentiated from the value of maintaining those rules or laws. The rightness of a given system of laws is taken for granted, and the maintenance of law accordingly becomes an end in itself.”

This kind of moral reasoning is reflected in jurisprudential works like John Austin’s *The Province ofJurisprudence Determined* or Hans Kelsen’s *Pure Theory of Law* with its concept of a society’s “basic norm” or “Grundnorm.” At this stage, “each actor must orient to the other’s orientation as part of a larger shared system of roles and rules to which all are oriented. The underlying and defining characteristic of Stage 4, in sum, is the emergence of a stable, balanced, and equilibrated system in which all individuals equally participate and from which all interpersonal or moral judgments are derived.” Any individual challenging the rightness of some existing doctrine is not likely to meet by a Stage 4 thinker with engaged discussion on the topic, but instead is likely to be met by the familiar refrain, “Love it or leave it.”

In the United States, the Stage 3 period ended with the triumph of Union forces at the end of the Civil War, and the ratification of that Union triumph through adoption of the Civil War Amendments to the Constitution. The next stage of American history, after the Civil War, reflected movement toward a Stage 4 nation state, a true Union. As stated in the 1892 Pledge of Allegiance, we became “one Nation, Indivisible, with Liberty and Justice for all.” The Stage 4 concept of the emergence of a “stable, balanced, and equilibrated system in which all individuals equally participate” was reflected in banning slavery and involuntary servitude in the United States (the 13th Amendment); granting each individual born in America citizenship rights, and all persons due process and equal protection rights (the 14th Amendment); and in granting constitutional protection to vote for members of any race (the 15th Amendment), and for women (the 19th Amendment). Of course, reflecting the concrete operational thought basis of Stage 4, liberty and equality were again limited by concrete practices, such as Jim Crow legislation. Kohlberg’s Stage 4 level of moral reasoning is reflected in the formalist approach toward law that predominated after the Civil War. The motto

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61 Kuhn, Langer, Kohlberg & Hahn, *supra* note 55, at 139.

62 *Id.* at 140-41.


64 Kuhn, Langer, Kohlberg & Hahn, *supra* note 55, at 139-40.
of formalism is that rules are rules and should be followed. This is the same motto held by a Stage 4 thinker in Kohlberg’s system. As noted at § 3.1 n.5, formalism is based on an assumption that law is composed of a system of rationally related rules, and that the judicial task is to apply those rules mechanically to the case at hand. Judges should not make rules; they should merely apply existing law.

In Stage 4, as Professor Walzer noted about nation states, “toleration is commonly focused not on groups but on their individual participants, who are generally conceived stereotypically, first as citizens, then as members of this or that minority. As citizens, they have the same rights and obligations as everyone else and are expected to engage positively with the political culture of the majority . . . . Minority religion, culture, and history are matters for what might be called the private collective.”65 As Walzer indicated, “Any claim to act out minority culture in public is likely to produce anxiety among the majority.”66 This attitude, classically described as the “one melting pot” approach to socialization, was dominant in America during the formalist era from 1873 to 1937.

The transition from Stage 4 to later moral stages is based, as noted at § 15.3 nn.44-46, on the transition from concrete operational thought to formal operational thought. It has been noted:

The transition from concrete to formal operations can be summarized at its most general level as a reversal in the direction of thinking between reality and possibility. At the level of concrete operations the [individual] is limited to a direct organization of empirically given data; possibility is conceived only as a prolongation of operations applied to a given set of concrete data. At the formal operational level, the [individual] attempts to locate reality as one sector within the group of possible transformations; thus, there is a subordination of reality to possibility. The most general and profound result of this reversal is that the [individual] can now reason about propositions removed from their concrete appearance and hence independent of their truth.67

For this reason, as Piaget has stated, formal operational thought “involves different operations from reasoning about action or reality. Reasoning that concerns reality consists of a first degree grouping of operations, so to speak, i.e., internalized actions that have become capable of combination and reversal. Formal thought, on the other hand, consists in reflecting (in the true sense of the word) on these operations.”68 Thus, with regard to moral reasoning:

Initially, the [individual] only makes judgments of fact, what is [the preconventional level of moral reasoning Stages 1 and 2]. [The individual] then becomes capable of making judgments about that fact: i.e., norms or rules applying to fact [the conventional level of moral reasoning Stages 3 and 4]. Only at the most advanced level does [the individual] become capable of

66 Id. at 26.
67 Kuhn, Langer, Kohlberg & Hahn, supra note 55, at 103-04.
68 Piaget, supra note 26, at 149.
second-order operations: operations on operations or judgments about judgments. The subject [thus] makes judgments about a system of moral rules or laws . . . .

Such second-order operations begin at Kohlberg’s transitional stage, Stage 4½, where moral choice is seen as personal, subjective, arbitrary, and relative. At this stage, “the perspective is that of an individual standing outside of his own society and considering himself as an individual making decisions without a generalized commitment or contract with society. . . . This transitional stage in which the [individual] becomes aware of the arbitrariness of [the individual’s] own rule system often takes the form of what can be termed a ‘metaethical regression’: because any system of rules is conceived as arbitrary and the judgments deriving from it accordingly ‘relativistic,’ the [individual] in [this] metaethical mode of judgment rejects all systems of rules or norms.”70 Moral reasoning will thus be based on the values of the dominant forces in society. This stage of moral reasoning is basically a “second-order” reflection on Stage 1’s premise of following rules in order to avoid punishment by the dominant forces in society. In terms of individual development, this stage is reflected in college-age students’ rebellion against the Stage 4 “rules of the system” mentality.

This transitional Stage 4½ and skepticism regarding the validity of any moral system is the basis of Holmesian skepticism. As noted at § 3.2 nn.35-41, Holmes’ view was that law cannot be tested by an external standard of moral rightness. Rather, law is a reflection of the outcome of the dominant political process. Holmes saw, however, that the dominant group in society can change. Thus, law must change to reflect new power relationships and be a means to the end of facilitating that process.

The Holmesian era in American society occurred with the breakdown of the formalist era and its replacement by the posture of Holmesian deference to government. This change was brought about by a sequence of legal commentary, beginning with Holmes, but extended during the first half of the 20th century by Dean Roscoe Pound’s sociological jurisprudence and by Professor Karl Llewellyn and the Realist Movement of the 1920s and 1930s. Their writings undermined unquestioning acceptance in the Stage 4 rule of law mentality in favor of a view that values are “personal and subjective” and that the dominant values of any society are merely those of the dominant forces in society. Emergence of formal operational thought is also reflected in the more explicit analytic reasoning about the structure of rules characterized by the Holfeldian system of rights, duties, privileges, and immunities.71 This deference-to-government mentality triumphed on the Supreme Court between 1937 and 1954.

Of course, it is important to note that which group represents the dominant force in any particular society is a matter of political and social history dependent upon the customs of moral reasoning at

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69 Kuhn, Langer, Kohlberg & Hahn, supra note 55, at 141.

70 Id.

Stage 3, the version or kind of political and economic natural law adopted at Stage 3½, and the rules adopted during the “rule-maintaining” morality of Stage 4. For example, Stalin’s Soviet Union, Hitler’s Germany, Gladstone and Disraeli’s 19th-century Victorian England, and post-Civil War America, are all examples, from the perspective stated here, of Stage 4 nation states, although they obviously differed greatly in the concrete rules and practices adopted in each of those societies.

Kohlberg’s fifth stage is the stage of social contract thinking: one adopts rules that are the product of group choice, and values are relative to that group. Under such a view, “What is right is being aware of the fact that people hold a variety of values and opinions, that most values and rules are relative to one’s group. These ‘relative’ rules should usually be upheld, however, in the interest of impartiality and because they are the social contract. Some nonrelative values and rights such as life, and liberty, however, must be upheld . . . regardless of majority opinion. . . . [L]aws and duties [should] be based on rational calculation of overall utility: ‘the greatest good for the greatest number.’”

Regarding moral reasoning at Stage 5, Kohlberg noted:

The progression from [Stage 4 and 4½ to Stage 5] is best summarized as a transition from a ‘rule-maintaining’ to a ‘rule-creating’ perspective. The [individual] at Stage 5 becomes concerned with the principle or principles which might generate a given system of rules, rather than the set of rules itself. Stemming from the search for principles in terms of which to base moral judgments, there occurs for the first time a concern with universal natural rights of all humans, in that it is from the existence of such universal human rights that universal principles of moral duty or obligation to others might be derived.

Moral reasoning at this stage, however, only uses rational thought as a means to ends defined in other ways. Since rationality is restricted to means, and the test of rational means can be agreed upon in the form of consistency with the hypothetico-deductive technique of scientific investigation, there is an overriding concern that the means for generating principles be rational. As Kohlberg stated:

The “rights,” or the general welfare consequences, insured by social contract procedures remain to some extent a derivative of these procedures rather than the purpose for their existence. Correlatively, then, the Stage 5 social contract conception yields something less than a set of universal, totally generated moral principles; it yields a universal set of procedural principles but not a universal set of moral oughts.

In such a system, individuals are typically assumed to follow their own rational self-interest, limited by the procedures generated under the Stage 5 social contract to ensure fairness toward all. For this reason, the Stage 5 level of moral reasoning can be understood as reflecting a “second-order” understanding about Stage 2’s principle of self-interested instrumental exchange, the level at which each individual follows his own interest, but recognizes others have an equal right to do the same.

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73 *Id.* at 141-42.

74 *Id.* at 142.
As noted, because Stage 5 moral reasoning only uses rational thought as a means to ends defined in other ways, there is an overriding concern that the means or process for generating principles be rational. Procedural-based legal approaches, such as the 1950s and 1960s Legal Process School, are one reflection of such an approach. Actual assurance of meaningful participation by all citizens, such as in the Civil Rights Act of 1964 and the Voting Rights Act of 1965, is another reflection. This obsession with process can appear puzzling to individuals who approach questions of morality from Stage 6’s moral reasoning premises. As Professor Laurence Tribe has noted, “The process theme by itself determines almost nothing unless its presuppositions are specified, and its content supplemented, by a full theory of substantive rights and values – the very sort of theory the process-perfectors are at such pains to avoid. If that proposition . . . is correct, it leaves us with a puzzle: why do thoughtful judges and scholars continue to put forth process-perfecting theories as though such theories could banish divisive controversies over substantive values from the realm of constitutional discourse.”

This move to Stage 5 comes about as the individual recognizes the need to work together to achieve the individual’s own ends in a society committed to the public good. This is the stage of instrumentalist reasoning. A judge reasoning from these premises must test the formulation and application of each rule by its purpose or policy to ensure the social ends to which society was committed in passing the law or the Constitution are carried out. Where the reason for the rule stops, there stops the rule. Such an approach yields endorsement of the validity of choices made by different groups. As Professor Walzer indicated, individuals in a society composed of a variety of immigrants are “encouraged to tolerate one another as individuals, to understand difference in each case as a personalized (rather than a stereotypical) version of group culture – which also means that the members of each group, if they are to display the virtue of tolerance, must accept each other’s different version.” As noted at § 15.1 n.15, in Professor Walzer’s view contemporary America, post-\textit{Brown v. Board of Education} in 1954, has been a good example of a successful immigrant society in practice.

Kohlberg’s sixth stage of moral reasoning is the stage of universal principles of ethics based upon reason, leading to equal respect and dignity for each individual in society. Kohlberg noted, “This stage assumes guidance by universal ethical principles that all humanity should follow. . . . Particular laws or social arrangements are usually valid because they rest on such principles. . . . Principles are universal principles of justice: the equality of human rights and respect for the dignity of human beings as individuals. . . . The reason for doing right is that, as a rational person, one has seen the validity of principles and has become committed to them.”

The last stage of moral reasoning, Stage 6, involves applying formal operational thought to basic ends themselves. At this stage, rationality becomes not only a means to solving certain problems, but an end-in-itself. As Kohlberg noted, “The reason for doing right is that, as a rational person, one

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\(^{76}\) Walzer, \textit{supra} note 1, at 31.

\(^{77}\) Kohlberg, \textit{supra} note 16, at 412.
has seen the validity of [the] principles and has become committed to them."78 These Stage 6 rights “can be phrased in terms of the concept of liberty, equality, reciprocity or simply in terms of the concept of the equal worth of all human beings as ends in themselves, rather than means,”79 or more generally what every rational human being owes to every other rational human being.

In terms of “second-order” reasoning, Stage 6 basically involves taking the concept of equal dignity of each individual that emerged at Stage 3 and transcending the concrete, that is, customary or traditional, limitations on that view that exist at Stage 3, and that form the substantive basis for the system-morality perspective of Stage 4. Thus, any customary or traditional limitations on advancing equal dignity for all individuals – whether slavery; other forms of race, gender, or other kind of discrimination; or simply leaving some children behind – should disappear from Stage 6 moral reasoning. Some of these limitations may have already disappeared based upon earlier events, such as in American history the North defeating the South and abolishing slavery after the Civil War; or segregation of the military replaced by integration during the Holmesian era of the 1940s; or the age of civil rights for minorities and women during the instrumentalist era of the 1960s and 1970s. More complete implementation of the principle of equal dignity for all individuals, such as “leaving no child behind,” or universal health care, should come about as part of a Stage 6 society.

Of course, various individuals in any society may hold moral reasoning precepts of Stages 1, 2, 3, 4, 5, or 6, or one of the transitional stages, even if the dominant legal tradition of that society reflects one style of moral reasoning. Such a disconnect between the dominant legal tradition of a society and individuals in society is more likely for societies at advanced stages of development because each generation of children must be successfully educated to be able to achieve advanced cognitive, social perspective-taking, and moral reasoning skills to embrace fully that advanced level of societal development. For example, in modern Western industrialized societies, there can be expected to be a tension between those who would cling to the Stage 4 melting pot theory of the nation state, with its emphasis on formalist application of the traditional rules of society versus those who embrace the Stage 5 relativism and celebration of the diversity of an immigrant society. In contemporary political rhetoric in the United States, it is the Republican Party that is most associated with traditional moral values and with “melting pot” or “assimilation” rhetoric. It is Republican judges, like Supreme Court Justices Scalia and Thomas, who are most associated with a formalist approach toward law. In contrast, the Democratic Party is more associated with moral relativism, celebration of diversity, and building a political party based upon a coalition of different immigrant groups. It is Democratic judges who more likely reject formalist approaches to law, instead deciding cases in instrumentalist fashion to protect vigorously the free speech and other rights of minority groups.

In such circumstances, issues of federalism may seem particularly important, because in Stage 5 immigrant societies there is pressure for power to devolve from the national center of the nation state to the local immigrant communities. Even those individuals who celebrate the Stage 4 nation state, however, may also prefer power to devolve to states if they perceive the national government as more receptive to Stage 5 diversity notions, while certain state politics are dominated more by

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78 Id. at 412.
79 Kuhn, Langer, Kohlberg & Hahn, supra note 55, at 142.
traditional Stage 4 notions. This was true during the 40 years of Democratic Party dominance of the federal House of Representatives from 1954-1994, while a number of states, particularly in the South and Mountain West, were dominated by conservative, and increasingly Republican, politicians.

This tension between the melting pot theory and federalism will be superseded, however, if society moves past the nation state/immigrant society debate to Kohlberg’s Stage 6 of moral reasoning: universal rational principles of ethics in a post-modern society. If this occurs, the more important question for a society is what will emerge as the universal principles of justice based upon reason that will guide such a society as it evolves from a modern immigrant society into a post-modern society. In such a post-modern society, basic principles of justice will be based upon universal human rights to which rational individuals have become committed.

Signposts of such a change would involve public debate by both major political parties moving to reflect the Stage 6 principle of equal concern and respect, that is, equal dignity for all individuals or, as encapsulated in the Bible, the principle of “love of neighbor as oneself.” The resonance in modern political debate of the phrase “leave no child behind,” without regard to the merits of any particular “Leave No Child Behind” bill, is one signpost on this road. The view that American society should eventually be able to deal justly with the legacy of past racism and achieve in the future a just color-blind society of equal dignity for all individuals regardless of race or ethnicity is another signpost. Another signpost may be the view that government should be responsive to all citizens, and their concerns with education, health care, the environment, and other such matters, and not merely reflect what emerges from Stage 5 procedurally sound special interest lobbying. The movement to support a “living wage,” not merely a “minimum wage,” may be another signpost.

The move to Stage 6 would reflect the “post-modern” approach to toleration based upon a rational understanding of diversity. Judicial decisionmaking in such a society would most naturally reflect a modern natural law approach based upon rational understanding of moral principles. Groups that do not embrace this vision will be tolerated by the government and the courts only to the extent that they are isolated or ineffective in their practices because at Stage 6 all individuals should be protected from group domination. Because of the perceived universality of these principles of moral judgment, this protection from domination would naturally extend not only to domestic law, but also to rooting out intolerant international groups of global reach.

Under such a Stage 6 moral vision, the protection of individual rights to liberty and equality are paramount. Thus, at Stage 6, a pluralistic democratic society is viewed not as an end-in-itself, as it is at Stage 5, but rather as the best means by which to ensure that society protects and advances the set of Stage 6 universal principles of justice. In short, the protection of liberty and equality for all individuals, and not necessarily any outcome of a democratic process, is what is critical.

As discussed at §§ 16.2.2-16.2.3, the precise content of these rational principles of justice should be the same whether based on Stage 6 secular Enlightenment natural law or Stage 6 religious God-given natural law. Thus, at Stage 6, it would not matter whether members of the society believed in Jefferson’s first, more secular, draft of the Declaration of Independence, which referred to “all men are created equal and independent; that from that equal creation they derive in rights inherent and inalienable, among which are the preservation of life, and liberty, and the pursuit of happiness,”
or the final, more religious, draft which stated 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.” In either case, at Stage 6 the full promise of the Declaration of Independence should be recognized that “to secure these rights” – those rights transcending the concrete limitations of a Stage 3 Declaration of Independence, discussed at § 15.4.1 nn.51-56 – “governments are instituted among men, deriving their just powers from the consent of the governed.” As President George W. Bush stated in a 2003 speech to the National Endowment for Democracy, “We believe that liberty is the design of nature. We believe that liberty is the direction of history. We believe that human fulfillment and excellence come in the responsible exercise of liberty. And we believe the freedom, the freedom we prize, is not for us alone. It is the right and the capacity of all mankind.”

A summary of these connections among Piaget’s stages of cognitive development, Kohlberg’s stages of moral reasoning, and the judicial decisionmaking styles appears in Table 15.3. The connections among Piaget’s view of formal operational thought representing second-order operations, or judgments about judgments, and Kohlberg’s Stages 4½, 5, and 6 representing second-order operations about the moral judgments of the sensori-motor based Stage 1, the preoperational thought based Stage 2, and concrete operational thought based Stages 3-4, discussed at text following notes § 15.4.1 nn.70, 74 & 79, appears in Table 15.4. Both Tables appear at § 15.4.4 text following n.106.

§ 15.4.2 Moral Reasoning and the Eras of Societies In World History

The same stages of societal development that exist in American political and legal history exist in other societies as well. This is not surprising since Piaget, Selman, and Kohlberg have postulated that their cognitive, social perspective-taking, and moral developmental stages are universal stages applicable to all individuals in all cultures. Walzer’s descriptions of kinds of societies and views regarding toleration are similarly postulated to have universal application.

For many Western societies, the 17th and 18th centuries witnessed the end of the Stage 2 multinational empires, and the beginning of Stage 3 democratic institutions. The Glorious Revolution in England of 1688, the American Revolution of 1776, and the French Revolution of 1789, are examples of this. These revolutions exemplify this because Kohlberg’s Stage 3 is the first stage where democratic institutions are possible because a Stage 3 moral thinker recognizes that people make their own rules for themselves. At Stages 1 and 2, rules are merely imposed upon people from above, which conforms to the age of Emperors or Kings. In addition to the democratic revolutions listed above, one can also mention the Chinese Revolution of 1911 and the Russian Revolution of 1917.

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80 For reference to Jefferson’s first draft, and changes reflecting the final draft, see The People Shall Judge, Vol 1: Part 1, at 200-04 (Selected and Edited by The Staff, Social Sciences, The College of the University of Chicago; University of Chicago Press 1949, Phoenix ed. 1976).

81 See Text: Bush on Democracy in the Middle East (Nov. 6, 2003) (remarks delivered at the National Endowment of Democracy) (text from washingtonpost.com, search using terms in the title).
Of course, in some cases, the democratic revolution will not become fully consolidated, and the society will slip back into a Stage 2 society, headed by a different King, Emperor, or Dictator. For example, the French Revolution of 1789 did not end up yielding a stable democracy. Instead, King Louis XVI ended up being succeeded by an Emperor, Napoleon Bonaparte. When he fell in 1814, and was finally defeated at the Battle of Waterloo in 1815, there was a restoration of the Bourbon Monarchy under Louis XVIII. When his successor in 1824, Charles X, tried to restore monarchical control, the impact of Stage 3 democratic notions caused the French citizens to revolt, causing Charles’ abdication, and his replacement by Louis-Philippe, who governed without royal pretense and subject to the ideals of the Napoleonic Code. It was not until 1848 when a new democratic revolution swept through Europe that a more complete Stage 3 Republic came back to France.

In other cases, similar shifts between Kings and Dictators have occurred against the backdrop of professed democratic ideals. For example, Prince Sihanouk was replaced in Cambodia in the 1970s by the Dictatorship of the Proletariat, in the form of Pol Pot and the Khmer Rouge. As with the French Revolution of 1789, this revolution was followed by a period of “Terror,” as the new Stage 2 power elite used their dictatorial power to kill persons whom they perceived either as remnants of the old Stage 2 power elite or as threats to their new control. The self-centered nature of Stage 2 moral reasoning makes such pervasive killing easier to implement, particularly if carried out by uneducated adults or children who reason at Stage 2 levels. As with the French experience in 1815, when Pol Pot fell, there was a return of elements of the old monarchy, in the form of Prince Sihanouk, but with an understanding the society would move over time to building a truer, more democratic society.

After the initial Stage 3 democratic revolutions took place, the 19th and early 20th centuries saw the triumph in most Western societies of the development of true Stage 4 nation states. In addition to that development in the United States, England, France, and Russia following their democratic revolutions mentioned above, one can add to this list the consolidation and unification movements in Italy and Germany during the mid-to-late 19th century, and the development of the nation state mentality, for example, the German Rechtsstaat, soon after that. As has been noted, “[I]n Germany in the 1860s and 1870s . . . an attempt was made to translate into practice the long-cherished ideal of the Rechtsstaat, . . . the definite achievement of the rule of law.” Of course, under their own versions of “Manifest Destiny,” each of these Stage 4 nation states treated their colonies, as opposed to their own citizens, in a Stage 2 multinational empire fashion until well into the 20th century.

At the end of the 20th century, and beginning of the 21st century, the dominant societal change is the evolution of nation states into immigrant societies. The United States is a clear example of this phenomenon, but one sees the same pressures around the world, whether in England (with its Pakistani, Indian, and African populations), France (with its African Muslim population), Germany (with its Turkish population), Spain (with its Basque, Catalan, and other minority communities); South Africa (with its combination of blacks, mixed races, and Afrikaners), or Russia (with its various nationalities). In such societies there is the same tension between a “melting pot” versus “immigrant society” mentality. For example, the French authorities have struggled with whether to allow daughters of devout Muslim parents the ability to wear traditional Muslim headdresses.

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when they attend French public schools. Eastern European countries, the former Soviet Republics other than Russia, and many Latin American countries are also trying to build Stage 5 pluralistic democracies evolving from fascist or socialist Stage 4 nation states. In many of these societies, endorsement of diversity within immigrant communities has led to pressure for more federalist arrangements to devolve power from a national center to state and local communities.

In contrast to these examples, the break-up of Yugoslavia into Slovenia, Croatia, Serbia, and Bosnia is best understood as an example of the Stage 2 multinational empire of Tito not surviving as a Stage 3 consociation of communities, and thus independent Stage 4 nation states have been created, with the Albanian community in Kosovo ultimately likely to have its own nation state as well.

The Islamic world presents a different kind of problem. Most countries in the Islamic world have just passed through, or about to pass through, the transition from Stage 2 Kingdoms into Stage 3 fledgling democracies. As has been noted, “There is . . . underlying Stage 3 a naive assumption that all values are shared; in other words, it is assumed that all others would evaluate the self or any actor in the same way. . . . [Thus] there is no basis upon which to choose between the conflicting norms or values of different actors in a moral dilemma.” This fact may underlie the belief in many of these countries that one dominant ideology – Islamic fundamentalism – should form the basis of society. This is similar to the ethical natural law unity of colonial America where, as Professor Nelson noted, there was a period of ethical unity and community based norms where consensus “was promoted by the fact that nearly all members of society shared common ethical values and imposed those values on the occasional individual who refused to abide by them voluntarily.”

Within any one community, such a vision may be practical in the short run. A number of American colonies, and a few early American states, had formal state religions during the Stage 3 ethical natural law period of our Nation’s history. Uniting these local communities into a larger political unit, however, required first the stoicism of the consociation model, and then the curiosity toward diversity of the Stage 4 nation state model. This can only happen with some practical separation of church and state, either more formally, as under the United States Constitution, or in practice, as in countries like England, where there is a practical separation on a day-to-day basis despite the official state Church of England. Even in such societies, the concrete customs and traditions may permit a certain amount of discrimination, such as discrimination against Catholics and Jews by the Protestant majority in the United States during the 19th century and early 20th century. In Islamic countries today, tensions between Sunnis and Shiites, and anti-Semitism, represent a similar phenomenon.

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84 See generally Comparative Federalism in the Devolution Era (Neil C. McCabe ed. 2002).

85 Kuhn, Langer, Kohlberg & Hahn, supra note 55, at 139.

86 Nelson, supra note 50, at 3.
Building a pluralistic Stage 5 democracy, with greater respect for a range of immigrant communities in society, represents yet another evolution in societal understandings. The final evolution toward a Stage 6 society represents yet another advance in societal understandings. At that stage, intolerant attitudes of certain communities are not accepted as legitimate because all individuals should be protected from group domination. For example, a number of Western European countries, like England, France, Denmark, the Netherlands, and others are working on how to integrate Moslem immigrants into the tolerant fabric of their societies. In such countries, this social change has happened over many decades. For that change to happen with a decade or two in the Islamic world, such as integrating fully into society Kurdish, or Coptic Christian, or other minority groups, and protecting them from group domination, would pose a real challenge for those countries.

Of course, each country in the Islamic world poses its own set of problems and has its own unique history. Because of the impact of Kemal Ataturk, Turkey has long been a Stage 4 nation state looking at the present time to evolve into a Stage 5 pluralistic democracy with general respect for human rights. Other countries, such as Pakistan or Egypt, are closer to the Stage 4 nation state model. Still other countries, such as Iran, are in the first 20 years of becoming a Stage 3 democracy. Other countries still maintain the trappings of a Stage 2 Kingdom, while trying to nurture Stage 3 democratic impulses, such as Jordan or, to a lesser extent, Saudi Arabia. Under Saddam Hussein, Iraq was a Stage 4 nation state, though a sinister nation state like Hitler’s Germany or Stalin’s Soviet Union. Whether Iraq can evolve into a Stage 5 pluralistic democracy, as the Bush Administration hopes, or might regress into a Stage 3 fledgling democracy, with a consociation model of different ethnic groups, with community-based norms and Islamic ethical unity imposed, remains to be seen.87

Many African countries pose even greater problems from the perspective presented here. Following the end of the Stage 2 colonial era, the initial steps of many of these countries toward Stage 3 democracies were unsuccessful, and they regressed back into Stage 2 dictatorships of various kinds, with the associated Stage 2 “Terror” by the dominant tribal group. Even where the Stage 3 democratic impulses were stronger, the focus of Stage 3 on community, or tribal, based norms has meant continual ethnic and tribal strife, with associated Civil Wars between certain tribes seeking independence from the dominant tribe in the nation, not unlike the United States Civil War of 1861-65. Even more advanced African countries, like Nigeria, have progressed at best through such Civil Wars to develop a crony-capitalist kind of Stage 4 nation state.

For all of these societies, true advance toward Stage 5 pluralistic democracies, and eventually Stage 6 post-modern societies, will only come about when a critical mass of actors in society become sufficiently educated so that their greater advanced cognitive abilities will create in them sufficient pressure for the higher, associated level of moral reasoning to be reflected in society’s institutions. Given the current educational systems in Africa and the Middle East, most of those systems are a longer way off from producing such a pervasively educated citizenry than one would like. Such improved educational systems, though, are critical for moral growth. The framing and ratifying

87 For a look at the Islamic world, emphasizing the need for social and political change to bring those countries into the culture of modernity, see Bernard Lewis, What Went Wrong: Western Impact and Middle Eastern Response (2002). For discussion about modernity and democracy generally, see Lawrence M. Friedman, Roads to Democracy, 33 Syr. J. Int’l Law & Com. 51 (2005).
generation knew this well. As stated in the third article of the Northwest Ordinance of 1789, drafted by Thomas Jefferson, "Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." As Daniel Webster observed at the laying of the cornerstone of the Bunker Hill Monument on June 17, 1825, “Knowledge is the only fountain both of the love and the principles of human liberty.” To be as successful as possible, such education needs to be focused in part on developing citizens who will grant other individuals equal concern and respect, which is a significant challenge for many governments, as noted in Meira Levinson’s The Demands of Liberal Education (1999).

Pervasive poverty in many countries makes the challenge these countries face even more difficult. Individuals with few, if any, resources naturally have a tendency to focus more on Stage 1 egocentric obedience to rules to avoid punishment, or Stage 2 following self-interest, while acknowledging that others have the right to do the same, since their primary concern is day-to-day survival. As Bertolt Brecht wrote in his musical, The Three-Penny Opera, “First feed the face, and then talk right and wrong. For even saintly folk, may act like sinners, if they haven’t had, their customary dinners.” For these societies, it is only through a combination of addressing pervasive poverty; working to improve the educational system for both men and women, which will help, among other things, reduce religious strife by creating greater acceptance of diversity; and supporting the growth and stability of democracy, that will make the difference. As an example, this is the agenda of the Clinton Global Initiative, along with working to slow global warming.

An alternative to such internal development might be the imposition from outside of a Constitution and institutions reflecting a higher level of moral reasoning. Following the Civil War in America, the Northern States attempted to impose on the South a higher level of morality, which rejected the Stage 3 customs of the South regarding slavery and racial discrimination, in favor of Stage 4 equal citizenship rights. The difficulties associated with that enterprise, as represented by Ku Klux Klan resistance and bombings, and an 80-year legacy of Jim Crow laws following removal of Union troops in 1877 after a 12-year military occupation, indicates how difficult imposition is even given military occupation. The Bush Administration seems to be facing a similar difficulty in its military occupation of Iraq, following the toppling of Saddam Hussein in 2003, in terms of imposing in Iraq an advanced, pluralistic democratic society, rather than a Stage 3 fledgling democracy like Iran.

As discussed at § 16.1, a number of Western European countries and Canada are at the beginnings of a process of evolving from Stage 5 immigrant societies to Stage 6 post-modern societies. This is true even for a country like Belgium, which historically was best viewed as a Stage 3 consociation. Belgium has long since moved through a Stage 4 transition of being a true nation state to a Stage 5 pluralistic democracy. In contrast, Cyprus, with its Greek and Turkish sections, is probably still best viewed as a Stage 3 consociation. As societies with the highest level of educational achievement among their populace generally, it is not surprising that Western Europe and Canada are at the forefront of this movement. The values these countries represent are shared to a large extent by the so-called “Blue States” of the American North and West Coast. The precise content of Stage 6 moral principles is discussed at § 16.2. The history of the United States Supreme Court since 1954 imposing on recalcitrant states Stage 5, and more recently Stage 6, moral notions by striking down certain Stage 3 and Stage 4 practices as violations of equal protection or due process is discussed at § 16.3. A summary of the possible content of constitutional law at Stage 6 is discussed at § 16.4.
Two final general points are perhaps useful to make. Where societies are at early stages of social development, exploitation and discrimination are likely to be more prevalent, given that the Stage 6 principle of equal concern and respect for all individuals is not accepted as the basic moral principle of social order. This is particularly true for individuals focused on self-interest, as at Stages 1 and 2 of moral development, where punishment or rewards, either from parents, the government, or God, are prime motivators of action. To the extent the power elite can rely upon, or create, customs and traditions which ingrain discrimination against certain members of society, individuals or societies operating at a Stage 3 or 4 level can also reflect extreme kind of exploitative or discriminatory behavior. Naturally, children, and many teenagers, who have not yet developed the cognitive ability of formal operational thought to be Stage 5 or 6 thinkers, are particularly susceptible to being manipulated by such childish focus on self-interest or teenage peer group mentality thinking. As discussed at § 15.4.4 nn.100-02, the moral reasoning of some adults may also reflect some version of Stage 1-4 reasoning, despite greater cognitive reasoning capacities than children.

The worst kinds of genocide typically result from a combination of manipulation of Stage 1-4 moral reasoning notions. Such manipulation is easier among children and teenagers. Use of older children and teenagers to commit mass killings, by Pol Pot in Cambodia, or during the genocide in Rwanda, and the creation of institutions such as the Nazi Youth League in Nazi Germany, are examples of this. In each case, the genocide was supported by Stages 1-2 appeals to self-interest in protecting oneself from the “enemy,” and by Stages 3-4 peer group “gang street” mentality – the Brown Shirts in Germany, or Hutu street gangs in Rwanda, the cadres in Cambodia – who dehumanized the groups to be harmed by creating customs of viewing the groups to be harmed as less than human. Individuals who can truly see things from another’s perspective, the adult level of formal operational thought, are unlikely to enslave or murder fellow human beings in such a fashion.

To defeat such attitudes, and more generally to deal efficiently with individuals who commit crimes, a range of approaches are necessary. For Stage 1 and 2 individuals who engage in unlawful behavior, concrete punishment or rewards will be the most effective means of deterring and punishing activity until such individuals, through successful education, are rehabilitated into higher stages of moral reasoning. For such individuals, appeals to individual conscience, or shame at not conforming to societal expectations, will not likely be as effective motivators as threats of punishment, or promises of rewards for good behavior, from the state or from God.

At the same time, for Stage 3 and 4 individuals, more enlightened customs and traditions need to be infused into the society which reflect better the Stage 6 principle of equal concern and respect. For such individuals, shame at not conforming to secular or religious moral customs and traditions can be an effective motivator of action, in addition to threats of punishment or promises of rewards.

Commitment by the leaders of society to Stage 5 pluralist democratic principles, combined with commitment to Stage 6 respect for universal human rights, will also aid in the process of creating an enlightened society. For individuals who morally reason at the formal operational thought level of Stage 5 or Stage 6, appeals to individual conscience can be an effective motivator of behavior. The more individuals are successfully brought to Stage 5 or Stage 6 cognitive and moral developmental levels of reasoning, the less criminal activity there likely will be, and reduced chances will exist for genocidal or mass terrorist activity.
In educationally more backward societies, the chances are greater for various kinds of immoral behavior, such as some societies in Africa where isolated incidents of slavery still exist, or terrorist activities associated with individuals from societies with less successful educational systems. Of course, even in societies that are more educationally advanced, some individuals in that society will still engage in terrorist activity, either because the particular individual is not cognitively advanced, or has not applied the individual’s cognitive skills to moral reasoning issues, as discussed at § 15.4.4 nn.100-02. In educationally advanced societies, however, there will not be any significant support for slavery, terrorist, or genocidal activities.

§ 15.4.3 Modern Transitional Stages and the Eras of Societies

As noted at § 15.2 text following n.23, between each stage there is a transitional period. The transitional stage between Stages 5 and 6 is called in this Chapter Stage 5½. As with Stage 4½, this underlying transition involves some greater measure of ethical moral relativity, as the individual is between the more fixed moral ideals of the preceding and succeeding stages. At Stage 5½, this takes the form of the moral relativism or anti-foundational ethics associated with philosophers like Richard Rorty, who rejects the possibility of developing rational principles of justice, and who postulates that the best that can be done is some advanced version of pragmatic instrumentalism based on ethnocentric relativity where truth is relative to the standards and practices of any given political community.88 As discussed at § 13.1 nn.37-45, a number of modern critiques of instrumentalism share these premises, such as various versions of critical legal studies, law and economics as developed by Richard Posner, or modern political natural law, as in the writings of Ronald Dworkin in Law’s Empire. Kohlberg, of course, rejected such relativism as the underlying epistomological stance, but other moral developmental psychologists have embraced it.89

Some commentators have also alleged that Kohlberg was mistaken in postulating a Stage 6 of universal principles of justice, and that the highest stage of moral reasoning is some version of Stage 5 utilitarianism, with rational individuals adopting a form of rule utilitarianism to deal with the uncertainty posed by a pure act utilitarian calculation being required in every case.90 The difference between rule utilitarianism and act utilitarianism is discussed at § 11.3.4.1. As discussed at § 16.2, there can also be different attempts to define what are the rational principles of justice that should emerge at Stage 6, and a number of false starts have been made. Indeed, given the fact that most individuals do not apply in any systematized manner the logic of well-developed formal operational thought to all questions of moral choice, it is no surprise that in cross-cultural studies Kohlberg was unable to demonstrate any critical mass of social actors in societies generally reasoning at a Stage


6 level of moral reasoning. Nevertheless, as discussed at § 16.2, development of such Stage 6 universal rational principles of justice can be done.

Because each of the various versions of Stage $5\frac{1}{2}$ moral reasoning are temporary transitional approaches between Stages 5 and 6, any more detailed categorization of their various differences is not of long-lasting practical significance. Indeed, it is less important than trying to unpack all the particularized variations of Stages 3 and $3\frac{1}{2}$ of the 17th and 18th centuries. For those theories, the concrete differences among the more secular English, Scottish, and French Enlightenment traditions, along with the civic Republican tradition of Harrington and others, versus the differences among the various more religious Christian natural law traditions, including the writings of Blackstone and Burke, made some difference in terms of the concrete practices adopted at Stage 3 and $3\frac{1}{2}$ that got formalized at Stage 4. Because Stage 6 moral reasoning is no longer based even in part on traditional customs, but rather on the uniform demands of reason, Stage 6 will embody Dworkin’s concept of “one right answer,” noted at § 2.2.2.4 n.18, but that answer will not be based on Dworkin’s political natural law concept in Law’s Empire of “the best theory” to explain existing customs, laws, and doctrine, noted at § 13.1 n.38, but instead will be based upon reason itself.

From a Kohlbergian perspective, the approach to moral and constitutional reasoning advanced by the many contemporary proponents of “deliberative democracy” represent a Stage $5\frac{1}{2}$ approach to the nature of law and society. Such proponents, such as Professors Amy Gutmann and Dennis Thompson in Democracy and Disagreement, reject a procedurally-focused interest-group or bargaining model of democracy. That model of self-interested bargaining in a procedurally defensible, pluralistic social contract conception of democracy is reflective of Kohlberg’s Stage 5 of moral reasoning, as discussed at § 15.4.1 nn.72-76. Such proponents also reject a view of “constitutional democracy,” at least where the underlying principles of that democracy reflect only the concrete customs and traditions of the members of society. Professors Gutmann and Thompson noted, “Constitutionalists [must] decide what form of majority rule is the most justifiable,” and that form will not be merely the customs and traditions of the dominant forces in society. As discussed at § 15.4.1 nn.50-66, such a constitutional democracy is based on constitutional arrangements where members of society, in practice the leaders and elites, design institutions, divide offices, and strike a political bargain that protects their divergent interests. This is based either on the Stage 3 customs of local communities or states in that society, or the Stage 4 traditions of society in general.

On the other hand, proponents of “deliberative democracy” do not adopt the Stage 6 view that rational principles of justice can be determined on their own, separate from a political process of deliberation by members in society. Reflecting the foundational Stage 6 premise, discussed at § 16.2, that rational thought is not self-centered or egotistic, and thus individuals in society are entitled to equal concern and respect, under “deliberative democracy” each citizen must reject egocentric self-interest in favor of deliberating in a good faith manner based on trying to achieve the common good for society in general, and every member of society is entitled to participate equally in that
debate. However, reflecting Richard Rorty’s Stage $5^{1/2}$ embrace of ultimate value relativity, the proponents of “deliberative democracy” require each individual to reason in a way that justifications for actions could be accepted by individuals having different value beliefs, which are viewed as equally appropriate for individuals to have. As stated by Professors Amy Gutmann and Dennis Thompson, “We do not begin with a common morality, a substantial set of the principles or values that we assume we share, and then apply it to decisions and policies. Nor, for that matter, do we end with such a morality. Rather, the principles and values with which we live are provisional, formed and continually revised in the process of making and responding to moral claims in public life.”

It has been noted by Professor Miriam Galston that legal scholars as diverse as Bruce Ackerman, Mark Tushnet, Robin West, Frank Michelman, Suzanna Sherry, and Cass Sunstein all share an interest in deliberative accounts of public constitutional decisionmaking, as do Professors Christopher Eisgruber and James Fleming.

As Professors Gutmann and Thompson indicated in the quotation just cited, it is likely that persons engaged in a process of deliberative democracy, with the constraints imposed by non-egocentric, good faith deliberation, can reach conclusions on some matters, but that consensus on many ultimate issues may not emerge from such a deliberative process. Without a “common morality” at the “end” of such a process, resolution of moral issues will ultimate have to come from adopting either the customs and traditions approach of Stages 3 and 4, or the rational principles of justice of Stage 6, assuming one rejects the view that whatever emerges from a special interest, bargaining model of Stage 5 is moral, and also rejects, as is typical for a democracy, the pre-democratic moral reasoning stages of Kohlberg’s Stages 1 and 2. The tension between approaches to moral reasoning adopting customs and traditions versus rational principles of justice is discussed at §§ 16.1-16.2.

Of course, as a matter of constitutional law, consideration of constitutional text, context, history, practice, and precedent may preempt the ability of the Court to decide any particular case consistent with background principles of moral reasoning, just as the Court in the pre-Civil War era could not decide cases consistent with the background moral principle of the immorality of slavery. On the other hand, given the natural law commitment to reason in both the Enlightenment and classic/Christian natural law traditions, discussed at §§ 16.2.2-16.2.3, and the views of both Madison and Burke supporting an evolving or living Constitution, as discussed at § 12.3.3 nn.119-28, it can be expected in the context of a post-modern Stage 6 society that broad terms in the Constitution, like those involving liberty or equal protection in the 14th Amendment, will be interpreted by the Court in Stage 6 fashion where leeways exist in the law, even though they were originally adopted in the context of Stage 3 and 3½ democracies. As discussed at § 12.3.3 nn.119, “No great political theory, including Locke’s, is the last word on its own best interpretation, and critical advances in political theory may enable us better to understand and interpret the permanent truths implicit in the theory

94  *Id.* at 12-21, 24-26.

95  *Id.* at 26.

and to distinguish these from its lapsing untruths.” Justice Kennedy reflected the same point in 2003 in *Lawrence v. Texas*, when he noted, “As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.”

To the extent the framers and ratifiers believed in a theory of social and moral progress over time through the application of reason, interpreting their natural law ideals in Stage 6 fashion today would be consistent with the original intent of how the framers and ratifiers would have expected judges to behave, although those ideals were initially interpreted in Stage 3 fashion, given the concrete reality of the times. As discussed at § 6.2.3.2 n.94, this point was made by Justice Ginsburg during her confirmation hearing when she noted that the concept of equality in the Declaration of Independence and the Equal Protection Clause is broad enough to embody a principle of equal rights for women, despite the fact that the concrete views of Thomas Jefferson and others in the 18th and 19th century were not ready for women to be equal participants in public life. Justice Ginsburg stated that she presumed Jefferson would agree with equal rights for women if he were alive today.

Of course, as noted at § 7.1 nn.15-18, Jefferson’s more formalist theory of constitutional interpretation would no doubt have preferred heightened scrutiny for gender discrimination to have been the result of the successful formal constitutional amendment, such as ratification of the Equal Rights Amendment (ERA) during the 1970s, rather than by Court decisions in the same decade. However, the Court decisions of the 1970s that increased scrutiny in gender discrimination cases without regard to the lack of ratification of the ERA, discussed at § 26.3.1.2, are consistent with the natural law theory of interpretation of Madison, Hamilton, and Marshall. In addition, as with Jefferson’s acquiescence in the Louisiana Purchase in 1803, despite no formal constitutional amendment granting him that authority as president, discussed at § 7.1 n.18, Jefferson would likely acquiesce in the Court’s heightened scrutiny in gender discrimination cases if he were alive today.

As a final point, implicit in any discussion regarding moral reasoning and supra-majority rights placed in a Constitution is the question of what role the courts should have in protecting these rights versus these rights being protected by the legislative branch, the executive branch, or the people in general. As noted at § 5.2.2.2, there are a wide range of options, including no judicial review, to the “minimalist” vision of judicial review of Thayer embraced by extreme Holmesians, to an intermediate view of “reasonable construction” based either on formalist or natural law models of interpretation, to a “strong” view of judicial review embraced by extreme instrumentalists. These other options are addressed in the context of a discussion about judicial review at § 17.1.4.

**§ 15.4.4 Critiques of Kohlberg’s Theory of Moral Reasoning Stages**

It must be noted that some commentators, including most prominently Professor Carol Gilligan, have argued that Kohlberg’s stages of moral development are gender-biased and do not reflect a feminine voice in morality. This feminine voice is held to focus more heavily on an “ethic of care” that is more responsive to the “emotional nature of morality” and “the role of empathy” in moral

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reasoning, rather than Kohlberg’s focus on “a cognitive approach that emphasizes individual commitment to abstract right.” This concern is similar to the 17th- and 18th-century Scottish Enlightenment philosophers, noted at § 16.2.1 nn.9-11, who rejected reason in favor of a “moral sense” philosophy, based on a concern that abstract reason would lead to results favoring too much narrow self-interest.

If the connections stated at § 15.3 between Piaget’s stages of cognitive development and Kohlberg’s stages of moral development are true, then, as a theoretical matter, Professor Gilligan would have to be wrong. Piaget’s stages of cognitive development are based on individuals becoming progressively more advanced in their thinking through their interaction with the environment. That environment, and our scientific, or cognitive, understanding of it, is gender neutral. There is no male and female principles of physics, or male and female principles of chemistry; there are just principles of physics and chemistry. Similarly, there are just progressive stages of cognitive development, and thus progressive stages of moral reasoning.

An alternative view could conclude that the stages of moral development, while perhaps related to stages of cognitive development, are independent stages that have their own internal logic independent of cognitive developmental advances. To defend such an approach persuasively, it would be necessary to postulate some biological mechanism in the brain that would be responsible for an independent sequence of social perspective-taking and moral reasoning stages in each individual. That biological mechanism might be different in men and women, leading to different moral reasoning stages for men and women. What that biological mechanism might be, however, is unclear.

In contrast, the mechanism by which individuals, through their interaction with the environment, become progressively better at cognitive reasoning is clear. This is just the basic progress of scientific understanding of the world around us, and that understanding, as noted above, is gender neutral. Since Kohlberg’s moral reasoning stages, and Selman’s social perspective-taking stages, are directly related to Piaget’s cognitive developmental stages, the moral reasoning stages are similarly gender neutral. As discussed at § 15.3, each succeeding stage of moral reasoning development reflects application of succeeding stages of cognitive development, and thus succeeding stages of social perspective-taking, being applied more completely to moral reasoning questions.

Of course, at any particular time, any individual may not have completely applied increased cognitive developmental skills to that individual’s understanding of moral reasoning. Thus, an individual may be able to engage in advanced cognitive developmental tasks, but still apply moral reasoning concepts related to earlier stages of cognitive development. Kohlberg phrased this point at follows:

To summarize, there is a one-to-one parallelism or isomorphism between cognitive and moral stages, but this correspondence does not mean high or perfect empirical correlation between the two. This is because a person at a given cognitive stage may be one or more stages lower in

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99 Huhn, supra note 90, at 334-35, discussing Carol Gilligan, In a Different Voice (1982).
morality. Our theory predicts that all children at a given moral stage will pass the equivalent-stage cognitive task, but not all children at the given cognitive stage will pass the equivalent moral task. . . .

These findings support what we all know: you have to be cognitive mature to reason morally [at advanced stage levels], but you can be smart and never reason morally [except at low stage levels].

Studies support the notion that societies with better educational systems tend to produce students reasoning at higher levels of moral reasoning on average than societies with weaker educational systems. Even in advanced Western industrialized democracies, however, a significant percentage of presumably reasonably well-educated college students reason at the Stage 3 and 4 level of concrete customary and traditional secular or religious moral notions. As discussed at §§ 16.1-16.2, for them, customary or traditional ways of thinking form the basis for justification for right action, rather than reasoning based on formal operational thought’s requirement of seeing things fully from other individuals’ perspectives, in addition to one’s own, and thus having a greater respect for diversity of views and requiring equal concern and respect for all individuals in society.

A good example of the difference between Stage 6 and Stages 3-4 moral reasoning occurred in Lawrence v. Texas. As discussed at § 16.2.4 nn.63-70, Justice Kennedy’s majority opinion in Lawrence adopted a Stage 6 perspective in focusing on universal human rights of dignity and autonomy for all individuals in society, including gay and lesbian individuals, not to have their personal lives “demeaned.” In contrast, Justice Scalia’s dissent in Lawrence focused more on concrete customs and traditional majority views “deeply rooted in this Nation’s history” regarding sodomy, reflecting a Stage 3 or Stage 4 approach. No doubt Justice Scalia is just as cognitively smart as Justice Kennedy. Their two opinions, however, reflected resort to different levels of moral reasoning. To the extent the framers and ratifiers of the 14th Amendment believed in a formalist theory of interpretation, Justice Scalia was faithful to a formalist notion of a static Constitution and the Stage 3 and 4 view that concrete customs and traditions disapproving some act are sufficient grounds to conclude that act is immoral. On the other hand, to the extent that the framers and ratifiers of the 14th Amendment believed in a natural law approach to interpretation, then interpreting their aspirations in the 14th Amendment in a more enlightened manner today, such as reflecting Kohlberg’s Stage 6 level of moral reasoning, is exactly what a judge committed to a natural law approach should do, as discussed generally at § 12.2.2, and specifically at § 12.3.3 nn.115-28. That is what Justice Kennedy did in his majority opinion in Lawrence.

100 Kohlberg, supra note 16, at 138.

101 Id. at 23-26.

102 See, e.g., Wangerin, supra note 89, at 1274-75 (“[S]tandardized tests of moral development, of which several exist, indicate that most college age students fall somewhere between Kohlberg's stages three and four.”).

103 539 U.S. 558, 574-75 (2003) (Kennedy, J., opinion, for the Court); id. at 602-04 (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., dissenting).
Despite the conclusion that there is just one gender-neutral set of cognitive developmental stages, and thus one set of gender-neutral moral developmental stages, as an empirical matter it is likely true, as Professor Carol Gilligan has noted, that a greater percentage of women in many societies reason at the level of Stage 3 community-based norms, which are more focused on interpersonal relationships among family, friends, and neighbors, while more men in many societies adopt the Stage 4 “rules are rules” mentality.104 This may be in part a cultural phenomenon, with the morality of home life more centered on Stage 3 notions, the morality of business and the workplace more centered on Stage 4 notions, and the traditional culture relegation of women more to the home, and men to business.105 Perhaps there are even some gender-based predispositions in brain biology. Increased levels of testosterone during fetal development and thereafter seem to be associated more with developing potentialities in the right side of the brain, which is more associated with abstract analytic skills, which can be seen as related more to the Stage 4 “rules are rules” mentality, while reduced levels of testosterone are more associated with developing the left side of the brain or equal coordination between the two, which is more associated with language skills and empathy, which can be seen as related more to the interpersonal nature of Stage 3 moral reasoning.106

In any event, as discussed at § 15.3 nn.37-43, both Stage 3 and Stage 4 levels of moral reasoning are limited moral visions applying only concrete operational thought to derive their premises. Stage 6 moral reasoning, as the second-order operation of both, transcends each. As indicated at §§ 16.2.2 nn.21-24 & 16.2.3 text following n.37, Stage 6 moral reasoning, as the second-order universalization of Stage 3's concrete Golden Rule, adopts a fully-developed Golden Rule of “love of neighbor as oneself” or “equal concern and respect” applied to all individuals in society at all times. This Stage 6 moral reasoning is consistent with the equal concern and respect for other individuals that one associates with Carol Gilligan’s “ethic of care” concerns. As discussed at § 16.2.2 text following n.21, the similar Scottish Enlightenment rejection of rational thought as determinative of moral reasoning, and adoption of a “moral sense” philosophy, is unnecessary from a Stage 6 perspective since rational thought is not self-interested, but focused on equal concern and respect.

For this reason, the actual Stage 6 principles are more reflective of the principles advanced in Carol Gilligan’s feminine voice than the principles she defines as the male principles in Kohlberg’s work. Stage 6 is different than the concrete practices of morality of American society during both its Stage 3 and Stage 4 eras. Stage 6 moral reasoning transcends the concrete prejudices, stereotypes, and discrimination practiced in those eras, whether those prejudices derived from customs in local communities, as at Stage 3, or were system-wide prejudices reflected in enacted law, as at Stage 4. This tension between customs and traditions versus Stage 6 principles of universal human rights is discussed at §§ 16.1-16.2.

104 See Huhn, supra note 90, at 335-39.


<table>
<thead>
<tr>
<th>Kohlberg’s Stages of Moral Reasoning</th>
<th>Walzer’s Kind of Societies</th>
<th>Walzer’s Approaches Toward Diversity</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Egocentric, except for Punishment</td>
<td>Individual Nations in International Society</td>
<td>Resignation</td>
</tr>
<tr>
<td>2. Egocentric, but Principle of Equal Exchange</td>
<td>Multinational Empire</td>
<td>Indifference</td>
</tr>
<tr>
<td>3. Community Mores</td>
<td>Consociation</td>
<td>Stoicism</td>
</tr>
<tr>
<td>4. Follow Society’s Rules: Rule of Law</td>
<td>Nation State</td>
<td>Curiosity</td>
</tr>
<tr>
<td>5. Societal Contract Theory: Values Relative to One’s Group</td>
<td>Immigrant Society</td>
<td>Enthusiastic Endorsement</td>
</tr>
<tr>
<td>6. Universal Ethical Principles Based Upon Reason: Equal Respect and Dignity for All Individuals</td>
<td>Postmodern Society*</td>
<td>Understanding of Diversity and Tolerance Based Upon Rational Reasoning*</td>
</tr>
</tbody>
</table>

*As discussed at § 15.2, n.23, Walzer does not describe this sixth kind of society or a sixth approach toward diversity. Their inclusion here is based on an extension of Walzer’s typography to describe a sixth kind of society consistent with Kohlberg’s sixth stage of moral reasoning.
Table 15.2
Walzer’s Societies and Toleration With Each Society

<table>
<thead>
<tr>
<th>Walzer’s Societies</th>
<th>Individual’s Life and Toleration</th>
<th>Cross-Community Toleration</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Individual Nations In International Society</td>
<td>No Necessary Toleration</td>
<td>None, except by Resignation</td>
</tr>
<tr>
<td>2. Multinational Empire</td>
<td>No Necessary Toleration</td>
<td>Some Imposed on Principle of Equal Treatment</td>
</tr>
<tr>
<td>3. Consociation</td>
<td>Some Minimal Toleration Bred of Stoicism</td>
<td>Some Toleration Bred of Stoicism</td>
</tr>
<tr>
<td>4. Nation State</td>
<td>Greater Toleration Based Upon Some Equal Rights of Citizenship</td>
<td>Toleration Enhanced by Curiosity</td>
</tr>
<tr>
<td>5. Immigrant Society</td>
<td>Great Toleration Based Upon Larger Number of Equal Citizenship Rights in the Social Contract</td>
<td>Toleration Enhanced by Endorsement of Immigrant Communities</td>
</tr>
<tr>
<td>6. Postmodern Society*</td>
<td>Greatest Toleration of All Based Upon Equal Respect and Dignity Accorded All Individuals</td>
<td>Toleration for Groups That Do Not Share This Vision Limited to Isolated Groups or Ineffective Practices</td>
</tr>
</tbody>
</table>

*As discussed at § 15.2, n.23, Walzer does not describe this sixth kind of society or a sixth approach toward diversity. Their inclusion here is based on an extension of Walzer’s typography to describe a sixth kind of society consistent with Kohlberg’s sixth stage of moral reasoning.
### Table 15.3


<table>
<thead>
<tr>
<th>Piaget’s Stages</th>
<th>Selman’s Stages</th>
<th>Kohlberg’s Stages</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sensori-Motor</td>
<td>Level 0, A-B</td>
<td>Stage 1</td>
</tr>
<tr>
<td>Pre-operative</td>
<td>Level 0, C-D</td>
<td>Stage 1½</td>
</tr>
<tr>
<td>Thought</td>
<td>Level 1</td>
<td>“punishment and obedience”</td>
</tr>
<tr>
<td></td>
<td>Level 2</td>
<td>“one’s immediate interest”</td>
</tr>
<tr>
<td></td>
<td>Stage 2</td>
<td>“one’s interest, let others do same”</td>
</tr>
<tr>
<td></td>
<td>Stage 2½</td>
<td>“what is fair is an equal exchange”</td>
</tr>
</tbody>
</table>

As discussed at § 15.4.1 nn.48-49, prior to Stage 3, there is no real concept of a judiciary independent from the Emperor or King. Thus, there is no well-developed judicial decisionmaking style independent of the executive branch for these stages.

<table>
<thead>
<tr>
<th>Concrete Operational Thought</th>
<th>Judicial Decisionmaking</th>
</tr>
</thead>
<tbody>
<tr>
<td>Level 3</td>
<td>Traditional Natural Law</td>
</tr>
<tr>
<td>Stage 3</td>
<td>“community norms”</td>
</tr>
<tr>
<td>Stage 3½</td>
<td>political natural law</td>
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<tr>
<td></td>
<td>economic natural law</td>
</tr>
<tr>
<td>Level 4</td>
<td>Formalism</td>
</tr>
<tr>
<td>Stage 4</td>
<td>“society’s rules”</td>
</tr>
<tr>
<td>Formal Operational Thought</td>
<td>Holmesian</td>
</tr>
<tr>
<td>Level 5</td>
<td>Stage 4½</td>
</tr>
<tr>
<td>Stage 5</td>
<td>“values personal and arbitrary”</td>
</tr>
<tr>
<td>“social contract”</td>
<td>Instrumentalism</td>
</tr>
<tr>
<td>Stage 5½</td>
<td>instrumentalist critique, incl. critical perspectives; economic natural law; political natural law, incl. deliberative democracy</td>
</tr>
</tbody>
</table>

Stage 6

“rational principles” Modern Natural Law
### Table 15.4
Piaget’s Cognitive Operations and Kohlberg’s Moral Reasoning Stages

<table>
<thead>
<tr>
<th></th>
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</thead>
<tbody>
<tr>
<td>Sensori-Motor Stage</td>
<td>Stage 1</td>
<td>Stage 4½</td>
</tr>
<tr>
<td>Preoperational Thought</td>
<td>Stage 2</td>
<td>Stage 5</td>
</tr>
<tr>
<td>Concrete Operational Thought</td>
<td>Stage 3 &amp; Stage 4</td>
<td>Stage 6</td>
</tr>
</tbody>
</table>

As discussed at § 15.3, because formal operational thought involves the ability to engage in abstract reasoning, a perspective can be adopted that goes beyond the confines of any given society in which one happens to find oneself. Given this fact, as discussed at the end of § 15.3 and at § 15.4.1, one way to understand Stages 4½, 5, and 6 is to note that applying formal operational thought to the basic question of the justification for moral rules would cause the adoption of the Stage 4½ view that moral choice is personal and subjective, and that whatever values are adopted are merely the product of the dominant forces in that given society. Applying formal operational thought to the question of the means by which social ends are advanced would support development of rational procedures to implement whatever values are the product of social contract choice, Kohlberg’s Stage 5. Applying formal operational thought to basic ends would cause adoption of Kohlberg’s Stage 6, which is based upon adoption of abstract rational principles about which all rational individuals can agree.

Another way to understand Stages 4½, 5, and 6, as noted at § 15.4.1, is based on the observation that initially, at early stages of cognitive development, the individual is only able to make judgments of fact. From this perspective, rules are given to the individual as facts to follow, the preconventional level of moral reasoning Stages 1 and 2. The individual then becomes capable at concrete operational thought of making judgments about facts, that is, the individual becomes aware that norms or rules are the product of individual judgment, the conventional level of moral reasoning Stages 3 and 4. Only at the level of formal operational thought does the individual become capable of second-order operations: judgments about judgments. From this perspective, Stage 4½ reflects second-order, self-conscious adoption of Stage 1’s premise of following rules in order to avoid punishment by the dominant forces in society. Stage 5 involves second-order, self-conscious adoption of Stage 2’s principle of self-interested instrumental exchange, reflecting the pluralistic, interest group bargaining of Stage 5’s social contract. Stage 6 involves the concept of the equal dignity of each individual, the so-called “concrete Golden Rule,” that emerges at Stage 3 and transcending the concrete, that is, customary or traditional, limitations that exist at Stage 3, and that form the substantive basis for the system-morality of Stage 4. These connections are noted at § 15.4.1 at the following links: Stage 4½, Stage 5, and Stage 6.
CHAPTER 16: FINAL CAUSES AND THE FIVE ERAS OF AMERICAN LAW

§ 16.1 Material Base of Moral Reasoning: Faith in Custom or Reason

Moral reasoning refers to an effort to identify through reasoning how persons ought to behave and what ought to be. Sometimes in philosophy this has been referred to as a search for “the good.” As discussed in Chapter 15, ideas on what is good have differed from one society to another and have changed from time to time within individual societies. The concern in this Chapter is what has been, is, and will be considered the good in American society, to the extent that it becomes reflected in constitutional law. Thus, the central question addressed in this Chapter is what universal principles of justice are likely to emerge for guiding the social, culture, and legal system of the United States, particularly its constitutional law, as the United States evolves from a modern Stage 5 immigrant society into a post-modern Stage 6 society, as can be predicted based upon the analysis in Chapter 15 of Piaget, Selman, Kohlberg, and Walzer. Dealing with this question is relevant for a book on the path of constitutional law because the predominant style of constitutional interpretation and, indeed, constitutional doctrine, has been moving ever closer to what could be expected in a post-modern Stage 6 society.

Of course, decisions on American constitutional law do not begin with an analysis of universal principles of justice. Decisions usually begin with text and then consider context, history, practice, and precedent. However, relevant sources also include prudential consideration of consequences, and the perception of consequences will be influenced by what is going on in society with respect to moral reasoning. Of course, any judge’s vision of what is ideal may undergo change in response to economic developments, developments in science and technology, ideas produced by the culture, and interaction with other societies in the world, as well as be influenced by the personal experiences of the judge. Nevertheless, to the extent that Piaget’s, Selman’s, and Kohlberg’s cognitive, social perspective-taking, and moral developmental stages are universal stages applicable to all individuals in all cultures, these causes of social and moral development should push all societies in generally the same direction. Particularly for natural law or instrumentalist judges, the meaning attributed to general terms in a constitution, such as “liberty” or “equality” in the 14th Amendment of the United States Constitution, will tend to reflect enduring themes in moral reasoning about human rights viewed from that society’s moral reasoning perspective. For example, in Justice Kennedy’s majority opinion in Lawrence v. Texas, he wrote, “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 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.”

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1 The classic use of this terminology is by Plato, who defined “the good as the highest object of knowledge,” in The Republic of Plato, Chapter XXIII, and by Aristotle, who defined “the good as the aim of action” in his Nicomachean Ethics, Book I.

Under Kohlberg’s theory of moral reasoning stages, any “existing” perspective will necessarily be built on a base of “traditional” views regarding moral reasoning of earlier moral reasoning stages. Contemporary and future searches for the “good” will thus inevitably be influenced by what has been traditional with respect to moral reasoning in the past. As discussed at § 8.4.1, at the time of our Nation’s founding, there were two main Western traditions of moral reasoning about human rights: the Enlightenment natural law tradition and the classic/Christian natural law tradition. These two traditions competed 200 years ago as our society emerged from being ruled by the English multinational empire to forming our own democratic base. The historical fact of these two traditions of moral reasoning about human rights means that it is likely that both traditions will have their own versions of Stage 6 principles. Because Stage 6 moral reasoning is based upon rational principles of justice, however, the universal principles from both traditions should end up looking the same because, as discussed at § 16.2, “reason” is the same whether “God-given” or not.

Many commentators have phrased the contemporary debates over values, the so-called “Culture Wars,” as a debate between religious and secular ideologies. Based upon the discussion in Chapter 15, this is not an accurate way to describe the debate. The real debate is between traditional ideologies, whether religious or secular, which reflect Stage 3 or 4 concrete customary or traditional norms, versus progressive ideology, whether religious or secular, which reflect a Stage 6 understanding of morality based upon reason. For example, as discussed at § 8.4.1 nn.72-76, slavery was supported by the traditional view of Aristotle, the traditional view of the Catholic Church, and the traditional view of many Protestant denominations in pre-Civil War America, particularly in the South, as reflected in the quotes of Jefferson Davis and Reverend Furman, cited at § 25.1 n.4. As noted at § 8.4.1 n.77-80, the progressive ideology of the Enlightenment tradition, coupled with the progressive views of “radical dissenting Protestantism,” supported the abolitionist movement.

The debate over slavery was thus not a religious versus secular debate, but was a debate among various traditional views upholding the long-standing practice of slavery versus progressive views rejecting the morality of slavery. The traditional religious view, of course, focused on the many passages in the Bible which refer without unfavorable comment to the then-existing historical practice of slavery. The progressive interpretation of the Bible focused on the general statements of Jesus and St. Paul concerning love, the equality of all persons, and the reasoned logic of the Golden Rule of treating one’s fellow human as one expects to be treated by others. As phrased in Galatians 3:28, “There is neither Jew nor Greek, there is neither bond nor free, there is neither male nor female: for ye are all one in Jesus Christ.”

The same dynamic applied during the 20th century to the issues of segregation and bans on interracial marriage. The traditional view supported such institutions based on a traditional reading of the Bible, as reflected in the state court opinion in Loving v. Virginia, which stated, “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.” The progressive Enlightenment view, as well as the progressive Christian view, rejected this justification for racial discrimination as immoral. From the progressive Enlightenment viewpoint, long-standing tradition

3 388 U.S. 1, 3 (1967) (quoting the state trial judge opinion in Loving).
does not make a particular practice moral that denies individuals their “unalienable rights [to] life, liberty, and the pursuit of happiness.” As Justice Kennedy noted in *Lawrence v. Texas*, quoting Justice Stevens’ dissent in *Bowers v. Hardwick*, “[T]he fact that a governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack.” From the progressive Christian viewpoint, the Galatians passage that we are “all one in Jesus Christ” also makes such racial discrimination immoral.

Many examples of the same dynamic throughout world history can be given. For example, the traditional Christian view opposed Galileo’s contention that the earth moved around the sun. The Enlightenment faith in science, and the modern Christian view, accept Galileo’s scientific findings as accurate. Passages in the Bible regarding the earth not moving and the sun revolving around the earth are viewed from the modern perspective as mere reference to certain historical views existing in the ancient world that are not authoritative.

In each of these cases, even those who originally held the traditional view have come to acknowledge that the progressive view is just. On these issues, no major religious or secular tradition today attempts to defend the concrete Stage 3 or 4 practices of the past supporting slavery, or segregation, or anti-miscegenation laws, or opposition to the cosmology of Copernicus, Galileo, and Newton. On the other hand, on some issues, like the ordination of women, there is still a split among major religious traditions, with the Catholic Church still clinging to the historical refusal to ordain women, while Protestant religions have long-since moved to the progressive view of Galatians that “there is neither male nor female: for ye are all one in Jesus Christ,” which supports the ordination of women. The Catholic Church has sometimes used the concrete fact that all of the 12 disciples were men to support the refusal to ordain women. But the fact is that all the disciples were of Middle Eastern descent, and yet that has never stopped there being priests of other ethnicities. Further, both race and gender were stated by Christ to be irrelevant, since “there is neither Jew nor Greek, there is neither bond nor free, there is neither male nor female: for ye are all one in Jesus Christ.”

In general, the secular tradition of the Enlightenment seems predisposed to adopt the progressive view on most moral issues. The Enlightenment view is based on faith in man’s progress through reason. Thus, persons approaching natural law from the Enlightenment tradition are typically more willing to discard concrete practices of Stage 3 or 4 societies in favor of principles derived directly from reason at Stage 6. Religious traditions tend to be more predisposed to rely on tradition. This is particularly true for religions with a greater centralized bureaucracy, like the Catholic Church. Thus, it is not surprising that the Catholic Church would cling longer to historical practices like the refusal to ordain women, or the celibacy of priests, than Protestant traditions.

However, as the examples of slavery, segregation, and anti-miscegenation laws indicate, religious natural law is not synonymous with tradition. The pervasiveness of anti-Semitism among traditional Christian doctrine, but its rejection today, is another such example. On each of these issues, there

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is a progressive Stage 6 interpretation of the Bible based on reasoning from the general precepts in the Bible regarding love, the Golden Rule, and the Galatians precept that “we are all one in Jesus Christ,” which transcends the reliance on either (1) the concrete customs of the past, the Stage 3 interpretation of the Bible, or (2) a formalist reading of the literal passages in the Bible, a Stage 4 interpretation of the Bible. Contemporary debates on social issues are therefore best understood as debates among Stage 3 and 4 moral reasoning traditions versus progressive Stage 6 moral ideals, rather than a debate between religious versus secular perspectives. However, secular perspectives tend to be more predisposed to embrace the Stage 6 moral ideals based on rational thought. In the fullness of time, however, most religious traditions also end up embracing Stage 6 ideology.

As suggested by the discussion above, and elaborated in § 16.2, two main reasons account for the differences between many traditional versus progressive moral ideals. The first reason is an inadequate understanding and embrace of scientific truths, like the Catholic Church’s original demand that Galileo recant his scientific findings. The second reason is the failure of individuals at Stages 3 and 4, which are based on concrete operational thought, to take fully into account other individual’s different perspectives, as can be done by formal operational thought’s more advanced abstract reasoning skills, as discussed at § 15.3 nn.37-46. Because of this, individuals at Stage 3 take the perspective of their local community, which may be predominantly one race, one religion, or dominated in terms of societal power structures by one sex, typically the male. From that perspective, racial, or religious, or gender discrimination against less powerful groups in society may follow naturally. If such discrimination is held in enough communities, it may become part of the Stage 4 moral beliefs of the nation state. For persons at Stage 6, however, who take other person’s perspectives fully into account, such racial, or religious, or gender discrimination is always immoral.

As discussed at § 16.2, these differences between Stages 3 and 4, and Stage 6, have played out on at least 10 different issues over the last 600 years. Organized by whether the predominant flaw in Stage 3 or 4 reasoning was an inadequate embrace of scientific truth, or a failure to see things fully from another’s perspective, and numbered in order from the earliest issue when the Stage 6 value became mainstream, to latter issues where the Stage 6 value is just emerging, these ten issues are:

<table>
<thead>
<tr>
<th>Inadequate Embrace of Scientific Truths</th>
<th>Don’t See Things From Other’s Perspectives</th>
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</thead>
<tbody>
<tr>
<td>(1) Galileo v. Recantation</td>
<td>(4) Slavery/Apartheid</td>
</tr>
<tr>
<td>(2) Flawed Economics, e.g., Money By Nature Barren &amp; Anti-Semitism</td>
<td>(5) Segregation/Anti-Miscegenation Laws</td>
</tr>
<tr>
<td>(3) Left-Handed v. Right-Handed Discrimination</td>
<td>(6) Limited Women’s Rights</td>
</tr>
<tr>
<td>(9) Existence/Creation of “Human Soul” Birth Control Stem-Cell Research Abortion</td>
<td></td>
</tr>
<tr>
<td>(10) Sexual Orientation v. Preference &amp; Anti-Gay Rights</td>
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</table>

Of course, for many of these issues, both reasons combined to some extent to justify the discrimination. For example, inadequate understanding of racial genetics helped support the view that slavery against African-Americans was moral, based on the view of their genetic inferiority. Predominantly, though, slavery was based on a failure to view the status of enslaved African-
Americans from the same perspective as the status of free whites. The Stage 6 response to this, seeing things from the other person’s perspective in addition to one’s own, was Abraham Lincoln’s famous oft-quoted observation, “As I would not be a slave, so I would not be a master.”

Similarly, part of the discrimination against persons based on sexual orientation is a product of the majority of straight persons in any community failing to take into account, and see things from, the perspective of gay persons. Historically, the predominant justification for the discrimination, however, seems to have been an inadequate scientific understanding that being gay is predominantly the product of a naturally occurring genetic variation, like being left-handed or right-handed, rather than an abnormal sexual preference lifestyle choice. Aspects of this are discussed at § 16.2.4.

On balance, on all 10 of these issues, Western European societies and Canada, with their more educated populace, have moved, or are in the process of moving, to the Stage 6 perspective on these issues. Even with respect to gay rights, all of these countries allow gays to serve openly in the military, and the Netherlands, Belgium, Spain, and Canada have officially adopted gay marriage statutes, with other Western European countries having some extensive form of civil unions. Societies with much weaker educational systems, and thus a greater percentage of individuals at less advanced stages of moral reasoning, like in Africa and the Middle East, still reflect traditional attitudes on many of these issues, including limited rights for women; religious discrimination, including anti-Semitism; and pervasive discrimination based upon sexual orientation. As discussed with respect to America at § 16.3 nn. 79-80, the “Blue States” are closer to the Western European and Canadian model on all these issues; the “Midwest, Plains, and Western Red States” are next in line; and the “Deep South Red States,” have usually had to be brought along. This has occurred either by the Civil War, with respect to slavery, or by Supreme Court decisions since 1954, with respect to segregation; anti-miscegenation laws; more equal rights for women, which were blocked when the “Deep South Red States” refused in mass to ratify the Equal Rights Amendment during the 1970s; abortion rights; and, increasingly, issues of equal civil rights for gays and lesbians.

The recent example of Spain and the issue of gay marriage helps make it clear that these issues are best conceived not as religious versus secular debates, but rather traditional Stage 3 and 4 views versus Stage 6 views. Spain is one of the most Catholic nations on earth, and most Spaniards are devout Catholics. Nevertheless, the majority of Spaniards now support equal rights for gays to marry based on giving gay persons “equal concern and respect” and not treating them as “second-class citizens.” As discussed at §§ 16.2.1-16.2.2, that is exactly the basic moral premise underlying Stage 6 moral reasoning. This decision does not make Spaniards any less religious. It just means that like rejecting the traditional Catholic doctrine that supported slavery during the Middle Ages, or called for Galileo’s recantation, or was pervasively anti-Semitic, or limits birth control options and use of contraceptives even today, the majority of Spaniards have moved to a more progressive understanding of religion and the message of Christ. While over the last 600 years Popes have brought the Catholic Church into the progressive era on slavery, and Galileo, and anti-Semitism, they have not yet done that on theories of evolution versus intelligent design, or birth control, stem-cell research, and abortion, as discussed at § 16.2.3, or the issue of gay rights, discussed at § 16.2.4.

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§ 16.2 The Form or Shape of Emerging Stage 6 Moral Reasoning: “Equal Concern and Respect” or “Love of Neighbor as Oneself”

§ 16.2.1 The Philosophic Base of Stage 6 Natural Law Reasoning

The question of the morality of “egotism” or “self-interest” is, of course, central to moral discourse. Some moral philosophers have taken the position that egotism or self-interest is rational, and have built their moral systems on self-interest. Thomas Hobbes in the 17th century,6 Friedrich Nietzsche in the 19th century,7 and Robert Nozick in the 20th century,8 are examples of this. Most moral philosophers, however, reject this view. By various ways, or “prisms” as they can be called, these philosophers banish egocentrism from their account of proper moral reason.

For example, the Scottish Enlightenment philosophers in the 18th century, like David Hume, Frances Hutcheson, and Adam Smith, rejected Hobbes’ rational self-interest in favor of “moral sense” reasoning.9 As Adam Smith stated in The Theory of Moral Sentiments,10 an individual ought to act like an “impartial spectator,” giving equal weight to others’ interests as well as one’s own. This is a version of the basic biblical principle of “love of neighbor as oneself.” Adam Smith stated:

In the same manner, to 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

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6 See 1 Encyclopedia of Ethics 546 (Becker & Becker eds. 1992) (“[Hobbes’] argument is concerned to persuade people to institute and maintain a sovereign. Given Hobbes’ psychological theory, people will do this only if they believe it is in their self-interest. Hence, self-interest is all that can yield obedience to the laws of nature and political obedience to the sovereign.”), discussing Thomas Hobbes, Leviathan (1651).

7 See 2 Encyclopedia of Ethics 906 (Becker & Becker eds. 1992) (“The morality of an abundant, creative, and egoistic power that Nietzsche describes as the origin of human evolution ultimately becomes the norm of his own ethics.”), discussing Friedrich Nietzsche, Beyond Good and Evil (1886).

8 Robert Nozick, Anarchy, State & Utopia 302 (1974) (“The model is designed to let you choose what you will, with the sole constraint being that others may do the same for themselves and refuse to stay in the world you have imagined.”).

9 See, e.g., Garry Wills, Inventing America: Jefferson’s Declaration of Independence 193-201 (1978), discussing, inter alia, David Hume, An Inquiry Concerning the Human Understanding (1748); David Hume, An Inquiry Concerning the Principles of Morals (1751); Adam Smith, The Theory of Moral Sentiments (1759).

person who has no particular connection with either, and who judges impartially between us. 

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.11

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” also rejects egotism, and thus is in direct contrast to Nietzsche’s egocentricism.12 Likewise, John Rawls’ principle that justice derives from individuals agreeing upon rules from “an original position” where no individual will be favored rejects Nozick’s egocentric approach.13 A similar such enterprise is John Finnis’ account of basic human goods, like knowledge and friendship, leading to a rejection of egotism in favor of loving one’s neighbor as oneself as part of “integral human fulfillment.” 14 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, represents a similar rejection of egocentric thought.15

The problem with all of the above accounts occurs when the authors do not stop their moral reasoning with the basic principle upon which they all agree – the principle of “love of neighbor as oneself,” that is, give “equal concern and respect” to others by behaving like an “impartial spectator.” Instead, the authors filter through whichever prism they have constructed for affirming this central moral principle a host of other moral dilemmas from which they derive a host of collateral moral principles unrelated to “love of neighbor as oneself.” Because each prism filters these other problems differently, the authors disagree on these other dilemmas. Each author then attempts to convince the reader that the author’s prism is the right one, relying in part on the fact that the author’s prism handled in an intuitively attractive way the rejection of egocentric self-interest.

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11 Id. at 221, 223, cited in Kelso & Kelso, supra note 10, at 517-18.

12 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)).


14 See generally John Finnis, Natural Law and Natural Rights 59-99 (1980).

15 Ronald Dworkin, Taking Rights Seriously 272-73 (1977) (“Government must not only treat people with concern and respect, but with equal concern and respect.”).
For example, because Dworkin derives his principle of “equal concern and respect” from “the best justification available for the doctrines and devices of law as a whole,” he is logically committed to affirming certain doctrines that are part of that “best justification” that may not be compatible with the generic principle of equal concern and respect. To this extent, Dworkin’s ultimate justification of moral norms is dependent, in part, on the Stage 3 and 4 concrete practices still reflected in existing doctrine, which is why his approach is ultimately a version of political natural law, based on existing political and legal doctrine, not a pure ethical natural law theory, as discussed at § 13.1 n.38.

John Rawls derives his rejection of egocentric self-interest from placing self-interested parties in a hypothetical “original position” and then derives from this a “difference principle” that allows social and economic inequalities only when they benefit the least advantaged individual in society. This “difference principle” is a product of the hypothetical “original position.” Without regard to whether the “difference principle” is rationally derivable from the reasoning of self-interested parties in an “original position,” neither the difference principle nor the original position have anything to do with straightforward moral reasoning about the non-egotistic practice of giving other individuals equal concern and respect.

In like manner, John Finnis’ prism involves postulating seven basic human goods and nine aspects of “practical reasonableness” by which to balance these goods. This postulating of goods, however, is the product of Finnis’ intuitions about what would seem reasonable to him and others, and is not based on any rational derivation from first principles. At the end of the day, his seven basic goods do not embody a straightforward rational analysis about the non-egotistic practice of giving other individuals equal concern and respect.

Similarly, Kant’s principle of “universalizability,” that is, self-interested parties should act “only in accordance with a principle that one could will to be a universal law,” is an artificial device that is not synonymous with a straightforward analysis of non-egotistic thought. Indeed, as Philosopher R.M. Hare noted, the principle of “universalizability” is as consistent with an act utilitarian or rule utilitarian moral philosophy as it is with Kantian moral philosophy.

16 Ronald Dworkin, Law’s Empire 400 (1986) (“The actual, present law, for Hercules, consists in the principles that provide the best justification available for the doctrines and devices of law as a whole.”).

17 Rawls, supra note 13, at 17-22.


19 Finnis, supra note 14, at 59-126.

§ 16.2.2  The Enlightenment Form or Shape of Stage 6 Natural Law Reasoning

Two things need to be said about all the previous attempts discussed in § 16.2.1 at trying to provide non-egocentric principles of moral judgment. First, given our contemporary understanding of modern physics, no prism is necessary to affirm the central principle that rational behavior is not self-centered, but must conform to the logic of the “impartial spectator.” Reason, or rational thought, is that thought which conforms to physical reality. For example, it is rational to believe that 2 + 2 = 4 because that is what physical reality confirms. Unlike a Newtonian understanding of physics, where self-centered measurement and reflection was thought to be adequate to comprehend accurately physical reality, in an Einsteinian universe of relativity, it is necessary to give equal concern and respect to others’ frames of reference in addition to one’s own in order to give an adequate account of the physical universe. To be rational in an Einsteinian universe, therefore, requires rejection of an egotistic preference for one’s own frame of reference.21

Children, who do not have the cognitive abilities yet to see things from others’ frames of reference, as indicated at § 15.3 nn.26-36, naturally cannot internalize this principle on their own. Moral philosophers during the 17th-19th century Age of Enlightenment, operating in a Newtonian world, also typically began their analysis with the initial assumption that rational thought was self-interested. They then either affirmed that assumption as a principle of morality, like Hobbes and Nietzsche, or created a prism to alter that principle. This was done either by rejecting pure reason as a moral guide, like the moral sense philosophers of the Scottish Enlightenment, or altering an understanding of pure reason, like Immanuel Kant’s principle of reason willing only that which can be made a universal law. Today, however, given an Einsteinian understanding of rationality, no prism is necessary to affirm the central principle that rational thought is not self-interested.

This principle, that rational thought is non-egocentric, combined with the assertion that moral thought should be rational, supports as moral the foundational principle of most moral traditions: the principle of love of neighbor as oneself, or equal concern and respect for others, or behave according to the logic of the impartial spectator. Moral conclusions directly derivable from this principle are also rational. These include such widely-shared principles such as not taking innocent life, respecting other persons’ bodily integrity and personal property, and not lying to other people for one’s personal gain. More generally, love of neighbor as oneself supports “liberty” of the individual self, but “equality” toward others, and thus “fraternity” with them, the phrasing used during the French Revolution. This view naturally rejects the Stage 2 concept of self-interested “possessive individualism,” as well as the opposite extreme of self-sacrifice or “altruism.” Such pure “altruism” is analytically supported only by the conflation of individual self and others that occurs at early Stage 1. That conflation is discussed at § 15.3 nn.26-27. Instead, Stage 6 supports the impartial spectator’s view of equal concern and respect for both oneself (and thus not self-sacrifice) and others (and thus not possessive individualism).22 In modern terminology, this view supports “five faces of freedom” defined as “self-individuating liberalism” of personal development

21 This point is developed in R. Randall Kelso, Godel, Escher, Bach: More Darkness or Day for Night, 1981 Wis. L. Rev. 822, 847-52 (1981).

22 On this point regarding “possessive individualism” and “altruism,” see id. at 852-55.
and expression, combined with “homeostatic communitarian ideals” of similar rights to development and expression in others, combined with “positive” freedoms to take part equally in government and “negative” freedom from unwarranted government restraint, and a “progressive” agenda.\(^{23}\) For a Stage 6 thinker, these “positive” and “negative” freedoms are not rights in and of themselves, and thus in conflict with the other aspects of freedom, as they might be if used unrestrained for one’s self-interested gains. Those freedoms are instead derivative of equal concern and respect, and thus must be used consistent with equal concern and respect, a view with roots in a Madisonian concept of democracy grounded in the civic republican tradition.\(^{24}\) This view that all these “freedoms” are consistent with one another is similar to the observation made by Pope John Paul II, discussed at § 16.2.3 n.37, that the commandments in the second half of the Decalogue (Commandments 6 -10) are not independent, but merely more detailed elaboration of the principle of love of neighbor as oneself.

It is important to note that this derivation of moral principles from “reason” alone is different than traditional natural law theories that tried to derive moral principles based on an understanding of the “nature of human beings and the world in which they live.”\(^{25}\) Focus on such a supposed “concrete human nature” is predictable for Stage 3 natural law based on “concrete operational thought.” However, a Stage 6 focus on reason will be based on the demands of rational thought alone, and will understand that while reality, and thus rational thought, is the same for all individuals, there is not a fixed “human nature” applicable to all individuals equally given each individual’s unique combination of DNA. Further, while one could try to develop a theory of “adult” human nature based on Piaget’s adult “formal operational thought” that would reign in self-centered desires of childhood, and one of the authors of this book tried just that more than twenty years ago,\(^{26}\) the better approach is to derive rational moral principles directly from reason, rather than trying to argue there is an “adult” human nature that is rational and that should trump irrational emotions and desires. There is no fixed “human nature,” and even if there were, an attempt to isolate aspects of that nature and argue that certain aspects, like advanced cognitive thought, are more “human” than other aspects, like baser emotions or desires, is not ultimately capable of rational justification.

The second point to be made about the attempts discussed in § 16.2.1 at providing non-egocentric principles of morality is the related to this point. To be persuasive in the unnecessary resort to some moral prism in order to banish egotism from rational thought, the philosopher has to defend why that philosopher’s particular prism, though going beyond the rational principle of love of neighbor as oneself, is nonetheless valid. Despite much energy devoted to this problem over centuries of


philosophy, this also cannot be done. An example may help make the point. In ancient times, much
energy was given to the problem of “squaring the circle.” This meant finding a way mathematically,
using fractional algebra, to construct a square, the area of which is equal to the area of a given circle.
Eventually it was shown that there could be no solution to this problem, since the area inside a circle
was a multiple of “pi,” which is an irrational number not capable of fractional representation.27

In the 20th century, Godel’s Theorem has provided the corresponding mathematical proof of the
impossibility of rationally justifying any particular moral prism. Godel’s Theorem proves that no
system of propositions can prove the validity of its own starting premises. Thus, no system of
“moral oughts” can be proven valid based upon other “moral oughts,” since those “moral oughts”
are not a priori valid either. Godel’s Theorem thus confirms that there is no way to make a
“category” jump from an “is” to an “ought,” because that violates the internal logic of the system,
and there are no a priori “oughts” on which to base other “oughts” either. Therefore, despite
elaborate attempts at appealing to “reason” or to “widely-held moral intuitions,” no philosophical
prism is ultimately capable of analytic defense. In short, Hume’s insight from two centuries ago that
there is no way to bridge the gap between “is” and “ought” is confirmed by Godel’s Theorem.28

Despite the view of some to the contrary, Godel’s Theorem does not prove that agreements on what
thought is rational is impossible. It is possible to determine the contours of rational thought, that is,
thought which conforms to physical reality, once an assumption is made that reality exists and
life is not a Kafkaesque dream. Godel’s Theorem does caution, however, that it is impossible to
prove that rational thought is moral. The most one can say is that any moral system different than
the one imposed by rational thought is necessarily irrational. Further, because of Godel’s Theorem,
the only moral system that rationally can be shown to transcend individual preferences, and thus
which can serve as a basis for all persons to agree through informed dialogue, rather than through
force (either military force, psychological conditioning, or social pressure), is the morality of
rational thought.29

In sum, one can say that a rational person would follow the principle of love of neighbor as oneself,
but that any other moral principles not rationally derivable from this principle are not capable of
rational defense. They represent only individual preferences or desires that each individual should
feel free to adopt or not, as long as those principles do not conflict with the principle of love of
neighbor as oneself. This view thus mandates tolerance of other individuals’ practices to the extent


28 See Kelso, supra note 21, at 832 (“What Godel’s theorem cautions is that it is impossible to
choose between functions which go from the level of physical existence [”is”] to the level of self-
referential, metaphysical statement [”ought”].); R. M. Hare, Moral Thinking: Its Levels, Method and
Point 16 (1981) (“Hume’s Law ( ‘ No “ought” from an “is”’), discussing David Hume, A Treatise
on Human Nature (1739). For two entertaining descriptions of this problem, see Louis M. Seidman,
This Essay is Brilliant/This Essay is Stupid: Positive and Negative Self-Reference in Constitutional
Practice and Theory, 46 UCLA L. Rev. 501, 502-06, 538-75 (1998); Arthur Leff, Unspeakable

29 See generally Kelso, supra note 21, at 831-34.
they do not violate the principle of love of neighbor as oneself, but intolerance of individuals who violate this principle by attempting to impose their non-rationally based moral prisms on others. This is similar to Einstein’s theory of relativity, which states as a non-negotiable, absolute truth that one must give equal concern and respect to others’ frames of reference in addition to one’s own to give an adequate account of the physical universe. European countries, therefore, like England, France, Denmark, or the Netherlands, that are moving to express intolerance toward individuals who wish to impose their non-rationally based religious views on others, reflect this Stage 6 insight.

Several examples may help make all of this analysis more concrete. Some members of the Jewish religion feel very strongly in the morality of maintaining a kosher diet. Maintaining a kosher diet is part of their religious tradition – their moral prism – by which they get to the principle of love of neighbor as oneself. Because maintaining a kosher diet does not seem to be plausibly connected to the principle of love of neighbor as oneself, that principle is merely a collateral moral principle of the Jewish prism that other individuals should feel free to accept or reject. Such preference is perfectly fine so long as no attempt is made to impose that principle of a kosher diet on others.

While this example may seem self-evident, a possibly more controversial, but analytically equivalent, example would be the attempt of some individuals to impose on other individuals what is kosher in matters of sexuality. Of course, some coercive sexual practices, like other forms of coercive behavior, will violate the principle of equal concern and respect and loving one’s neighbor as oneself. Some kinds of exploitative sexual practices, even if not directly coercive, would violate this principle as well. Such practices should not be tolerated. However, despite this observation, there are a wide range of sexual practices between competent consenting adults, both heterosexual and homosexual, that do not appear to violate the principle of equal concern and respect.

John Finnis’ prism, as well the prisms of many religious traditions, through which they get to the principle of love of neighbor as oneself, make immoral some of these practices. For example, Finnis has concluded that homosexual acts “on a moral analysis are always objectively wrong, like other essentially masturbatory acts” because in his view of morality a sense of “equal worth and human dignity” requires outlawing such conduct “on the ground that it expresses a serious misconception of, and actually degrades, human worth and dignity, and thus degrades their own personal worth and dignity.” Finnis’ argument, however, has been rightly criticized as being based not on a principled extension of equal concern and respect for others, but as reflecting traditionally held biases implicit in Finnis’ account of basic human goods. To the extent that individuals succeed in imposing on others these collateral biases of their moral prisms, they are not acting in a rationally justifiable manner, and, from the perspective of reason, are not advancing the common good of society.

Of course, some persons, and some religious traditions, argue against homosexuality, or masturbation, or the use of contraceptives, based on the belief that the “purpose” of sexual activity

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is procreation. Thus, any sexual activity that does not carry the possibility of procreation is immoral. Unless such reasoning can be plausibly derived from the rational principle of equal concern and respect, such a view would be just another prism of collateral moral beliefs that individuals should feel free to adopt or not. It is unclear what that plausible rational derivation would be. “Activities” do not have “purposes.” Only people have purposes that people, themselves, define. If any particular individual’s collateral moral belief is that sexual activity should only be for procreation, that would be fine for that individual, but that view should not be imposed on others. This is true even if that collateral moral belief is embedded in a moral theory or religious doctrine whose foundational principle is the rational principle of love of neighbor as oneself.

With respect to this point, it is true that Aristotle’s view was that objects, in addition to people, have purposes. Through acceptance of this Aristotelian notion in St. Thomas Aquinas’ natural law theory, this view still forms part of much modern Catholic natural law today. Aristotle’s famous example of his thesis on objects was that “an acorn” has a purpose “to grow into an oak tree.” Aristotle stated this as part of his thesis that every phenomena can be understood in light of his four causes, including a final cause, or purpose. For Aristotle, “in the case of non-human nature, the final cause of things is simply its formal cause (that is, its shape, or substance, or essence).” In contrast, human beings “exercise a different kind of final causation that is directed to purposes beyond their own form or shape.” As applied to the actions of individuals, Aristotle is right that individuals do have purposes for which they act. However, from the perspective of science, “acorns,” being non-conscious entities, do not have purposes. Although some “acorns” will grow into “oaks” under the regular order of events, it represents an anthropomorphic fallacy to state that they have a purpose to do so. Pathetic or anthropomorphic fallacy has been defined as “[i]ncorrectly projecting (attributing) human emotions, feeling, intentions, thoughts, traits upon events or objects which do not possess the capacity for such qualities.” Aristotle is wrong in concluding that the two kinds of causation, conscious and non-conscious, are similar and that events or objects have purposes.

Regarding the procreative purpose that conscious individuals may attribute to sexual activity some of the time – as opposed to the irrational view that the non-conscious activity itself has some purpose – it is nevertheless true that sometimes, between consenting adults, the purpose of sexual activity may not be procreative, but may be merely to exercise an inalienable right to “life, liberty, and the pursuit of happiness.” From the perspective of Stage 6 thought, there is nothing immoral about that, because that activity does not appear to deny either party equal concern and respect. The fact that some persons, based on Stage 3 or 4 moral reasoning, may disagree with this analysis because of their customary or traditional views, does not affect this conclusion from a Stage 6 perspective.

§ 16.2.3 The Religious Form or Shape of Stage 6 Natural Law Reasoning

As with secular natural law traditions, religious understanding of moral principles can also been seen to reflect Kohlberg’s various stages of moral reasoning. Thus, there is a Stage 1 child-like

32 Brian Cubbage, Aristotle 2 (www.personal.psu.edu/users/n/b/nbc104/HSAAITIA.html).

understanding of the Bible as God the Father to be obediently followed or else one will be punished. There is a Stage 2 period where some authority figure, like the Pope, similar to the Emperor or King for secular society under the Stage 2 “divine right of Kings,” is viewed as the authoritative interpreter of the Bible. There is the Stage 3 period of the Reformation where interpretations of the community of the faithful, such as in the Baptist, Anabaptists, and others denominations, become more critical, rather than blind adherence to papal interpretations. Many of these denominations end up adopting very literal, or formalist, interpretations of the Bible, which conforms to a Stage 4 interpretation. The spirit of fuller participation by the community of the faithful represented by Vatican II during the 1960s is best viewed as related to procedurally-focused Stage 5. Pope John Paul II’s emphasis on deriving religious principles from reason and truth in his 1993 encyclical *Veritatis Splendor* (The Splendor of Truth) represents a Stage 6 version of biblical interpretation.

Two points are important to note from *Veritatis Splendor*. The first point, as Pope John Paul II stated, is that the Christian natural law tradition is concerned with truth and reason, as is the Enlightenment tradition.34 It is for this reason that John Paul II supported a reconciliation between faith and reason, including drafting an apology for the Church’s forced recantation of Galileo’s scientific insights, and indicating his belief that evolution is “more than just a hypothesis.”35 Pope Gregory XVI has continued papal emphasis on the value of a faith in God built on reason.

With respect to the particular issue of Darwinian evolution, Pope John Paul II’s views supported Catholic schools teaching Darwinian evolution as part of their science curriculum. In contrast, Pope Gregory XVI has supported an influential cardinal, Christoph Schonborn, questioning the accuracy of the Darwinian explanation of evolution, and supporting an alternative view, typically called Intelligent Design. Cardinal Schonbron wrote, “Evolution in the sense of common ancestry might be true, but evolution in the neo-Darwinian sense – an unguided, unplanned process of random variation and natural selection – is not. Any system of thought that denies or seeks to explain away the overwhelming evidence for design in biology is ideology, not science.”36 From a Stage 6 perspective, resolution of this issue should turn on whether in fact there is “overwhelming evidence for design in biology.” To that extent, the test proposed by Cardinal Schonborn is consistent with the Stage 6 view that science should be the ultimate determining guide. Contrary to the Cardinal’s assertions, however, from the perspective of science and reason, it is unclear there is any real evidence to support Intelligent Design, much less “overwhelming evidence.”

The second important point from *Veritatis Splendor* is the connection between the specific principles of morality stated in the Bible and the general moral command of “love of neighbor as oneself.” In *Veritatis Splendor*, Pope John Paul II stated:

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[T]he commandments belonging to the so-called “second tablet” of the Decalogue, the summary and foundation of which is “the commandment of love of neighbor.” In these commandment[s] we find a precise expression of “the singular dignity of the human person,” “the only creature that God has wanted for its own sake.” The different commandments of the Decalogue are really only so many reflections on the one commandment about the good of the person, at the level of the many different goods which characterize his identity as a spiritual and bodily being in relationship with God.37

The view implicit in this passage is that one should understand biblical commandments based upon their consistency with being derivable from the background principle of “love of neighbor,” and not as independent principles separate from that concept. For example, during the Stage 3 period of American history, many religious Southerners resorted to text in the Bible to support the morality of the institution of slavery, as discussed at § 25.1 nn.3-6. To rebut such pro-slavery proponents’ citation of independent biblical passages alleged to condone slavery, the abolitionist movement emphasized Jesus’ and St. Paul’s general statements concerning “love of neighbor as oneself,” the equality of all persons, and the “Golden Rule” of treating one’s fellow human beings as one expects to be treated by others, that is, giving them equal concern and respect.

Such use of the Golden Rule rejected the stage 3 version of the Golden Rule, what Kohlberg called the “concrete Golden Rule,” as noted at § 15.2 nn.19-20, which is limited by the concrete beliefs of individuals at any one time. Under that view, persons might end up with different moral principles, since those principles would be dependent on the concrete variations in how different individuals might wish in fact to be treated by others, based on any egocentric desires or prejudices any individual may have that would affect how they would want to be treated in practice. Instead, the abolitionists adopted a Stage 6 understanding of deriving moral principles from an understanding of the logical implications of the principle of “equality of all persons” and “love of neighbor as oneself.” It is this derivation of moral principles from the basic principle of “love of neighbor as oneself” that is supported by Pope John Paul II in the passage from *Veritatis Splendor* quoted above. Under this derivation, all rational persons will agree on basic moral principles, since these principles are not dependent upon concrete variations in how different individuals might wish to be treated by others, including any egocentric desires any particular individual may have, but rather are based upon the logical implications of treating persons equally, logic being the same for all individuals.

When such a Stage 6 understanding of the Bible is placed alongside a Stage 6 understanding of the Enlightenment tradition, the disparities in moral judgment between the two should collapse, as both will reject the concretely, fixed prejudices of individuals in the past. At the end of the day, such a Stage 6 society will have the greatest toleration for individuals, both within and cross-community. Indeed, Stage 6 moral reasoning allows for little difference between the two kinds of toleration, since rights are based upon reason, not upon agreement within some group, as for Kohlberg’s moral reasoning Stages 3-5. Kohlberg’s moral reasoning Stages 3-5 all involve rules derived from group discussion: either the community of Stage 3, the rules of the system of Stage 4, or the social contract of Stage 5. Kohlberg’s Stage 6 differs, however, in that principles to which a rational person has become committed are universal principles of justice not dependent on any group.

This conclusion is a necessary corollary of the fact that these Stage 6 moral rights involve the equality of human rights and respect for the dignity of human beings as individuals, a dignity which no society, or community within society, should be permitted to infringe. Thus, customary or traditional practices that violate the dignity of human beings as individuals, such as slavery in colonial and pre-Civil War America, or female circumcision in some societies today, are inconsistent with Stage 6 moral reasoning, even if a society at Stage 3 would tolerate them as part of the customs of the community, or at Stage 4 if they are part of the rules of society, or at Stage 5 if part of the society’s social contract.

Some differences between traditional Christian doctrine and progressive Stage 6 doctrine reflect both these points from *Veritatis Splendor* regarding truth and deriving moral principles from the principle of “love of neighbor as oneself.” For example, during the Middle Ages, the traditional Christian doctrine was that charging interest on loaned money was immoral, based on the Aristotelian analysis that “money by its nature is barren.” From a modern perspective, this analysis is flawed, since there is a “time value” to having money for investment purposes that supports a reasonable interest rate being charged on money loaned.38 The flawed understanding was used during the Middle Ages to support anti-Semitism against Jews who charged interest rates on money loaned. In addition, during the Middle Ages, anti-Semitism was supported by reference to isolated passages in the Bible concerning the role of Jews in the death of Jesus, and the belief of Jews that Jesus is not the son of God. These customary and traditional anti-Semitic attitudes are contrary, of course, to the generic principle of “love of neighbor as oneself” as applied in a rational manner. Rational thought would not blame individual Jews today for actions taken 2000 years ago by Jews and Romans, nor would it blame Jews because their religious prism does not view Christ as the son of God, while the Catholic and Protestant religious prisms do view Christ in that way.

It is unquestionably true that individuals who view moral reasoning through the lens of Stage 3 customs of the community, or Stage 4 traditions of society, think it moral to impose on other individuals customary or traditional views, and think persons who do not share those views are immoral. While that view reflects adolescent peer group mentality, as discussed at § 15.3 n.40, that view does not reflect mature, adult Stage 6 reasoning. Merely because Jews are not the majority in most communities, and they have views different on some matters than the majority of Christians, or Moslems in predominantly Islamic societies, does not make their views immoral. As long as all individuals behave in a manner consistent with the principle of “love of neighbor as oneself,” any collateral view about the divinity of Christ, or any other matter, is not a matter of a moral imperative. Based on this more enlightened view regarding moral derivation of principles from “love of neighbor as oneself,” Pope John Paul II apologized in 1998 to Jews for the Catholic Church’s historic attitudes and centuries of discrimination against persons of the Jewish faith, including the Catholic Church’s less than vigorous role in opposing Nazi atrocities before and during the Holocaust.39

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The difference between traditional Christian doctrine regarding birth control, stem-cell research, and abortion, and progressive Stage 6 doctrine, reflects the same dynamic at work. For example, on the issue of birth control, traditional Christian disapproval of birth control is based principally on the flawed Aristotelian analysis that “acts” have “purposes” and that the “purpose” of sexual activity is “procreation.” As discussed at § 16.2.2 nn.32-33, “acts” do not have “purposes”; people have “purposes” which people, themselves, define. Once that flawed Aristotelian analysis is rejected, there is nothing from the perspective of giving individuals equal concern and respect that prevents any individual from responsible use of birth control in the context of consensual, non-exploitative, non-coercive sexual relationships. Thus, from the perspective of Stage 6 reasoning, such views regarding birth control should no more be imposed on individuals who do not share those views than the view that it is moral to maintain a kosher diet should be imposed on individuals who do not share that view, as discussed at § 16.2.2 text following n.29. The parable of Onan in Genesis 38, who practiced coitus interruptus with his brother’s widow, provides no support for the immorality of masturbation or birth control in general, because his sin was refusal to follow ancient Jewish custom and provide an “heir” for his dead brother, a custom no major religious tradition supports today.

Of course, to the extent that some forms of “morning-after” birth control, or stem-cell research, or abortions rights are viewed as the destruction of individual human life, the Stage 6 principle of equal concern and respect for all individuals would counsel a very different approach, since individual human life would be at stake. For most forms of birth control, however, those considerations are inapposite. Customary or traditional attitudes sensibly do not view a woman’s unfertilized egg or a male’s sperm as individual human life. Thus, no major religious tradition requires women to try to get pregnant each month on the grounds that if the woman did not try to get pregnant, and merely permitted menstruation to occur, that is the purposeful destruction of human life, or, from the Christian tradition, violates a biblical command to “be fruitful and multiply.” Similarly, no major religious tradition requires men to try to implant every bit of their sperm before the life-span of that sperm dies. By the same reasoning, male vasectomies, or use of spermatoicide contraceptives, pose no moral issues in terms of the destruction of individual human life.

After conception takes place, however, an issue arises when a fertilized egg, and the developing embryo and fetus, deserves to be considered individual human life. From the perspective of scientific reason, that point would be when an individual actually exists, that is, the point of viability, roughly the 24th week of pregnancy today. Prior to viability, there is not biologically an individual to protect. There is only a potential individual, though a greater potentiality than in an unfertilized egg or sperm, and increasingly certain attributes of individuality as the pregnancy continues. At viability, however, the fetus becomes an independent life, since it is capable of meaningful life apart from its mother through natural or artificial support. Although some have argued to the contrary,40 the fact that the fetus contains a complete genetic set of human DNA is not critical, since all cells in any individual’s body contain DNA, and yet each cell does not have any individual right to exist. After viability, however, regulation of abortion is justified. As discussed at § 27.3.4.1 nn.249-52, where continuing pregnancy after viability would compromise the mother’s life or substantial health, a balance between the rights of the mother and fetus must be done.

For many individuals, however, the point at which individual human life deserves protection is when the “soul” enters the body. As noted in Roe v. Wade, the traditional doctrine of the Catholic Church until the 19th century was that the soul entered at the point of “quickening,” that is when the fetus first kicked, roughly at the 16th-18th week of pregnancy. Thus, abortions after that time were viewed as immoral. Once scientific understanding advanced to the point where “quickening” was no longer viewed as a critical point in fetal development, the modern Catholic and fundamentalist Protestant doctrine became that the soul enters at conception. Thus, any prevention of the fertilized egg from developing into a viable life, whether by use of a “morning-after” pill, or use of embryos for stem-cell research, or abortion, is viewed as the purposeful destruction of human life.

From the perspective of Stage 6 reasoning, there is no scientific evidence to support the claim that a “soul” exists in the religious sense, much less when the soul enters the body. From the perspective of reason, any point chosen is ultimately arbitrary. No passages in the Bible directly address this question either. Based on a Stage 6 commitment to reason, a Stage 6 religious approach would likely take the view, consistent with the secular view regarding individual life, that an “individual soul” enters the fetus once there is a fully-functioning “individual body” to enter, that is, at the point of viability, rather than entering at the stage of a 2-cell, or 4-cell, or 8-cell developing embryo.

Of course, from a Stage 6 perspective, it is always unfortunate if a women finds herself in a position of having an unwanted pregnancy. Ideally, through a combination of responsible sexual choices, including abstinence, where appropriate, and use of effective birth control methods, unwanted pregnancies would not occur. However, sometimes individuals are not always responsible, and other times birth control methods fail. And sometimes the pregnancy results from coercive or exploitative sexual practices, like rape or incest. In such situations, from a Stage 6 perspective, the individual should have the option, if the individual wishes, to have access to “morning-after” pills or an abortion prior to the development of individual human life at the point of viability.

From this Stage 6 perspective, the views of those who wish to impose on others their customary or traditional views on when the “soul” enters the fetus is not as much “pro-life,” as they view it, but rather “pro-slavery,” trying to “enslave” women against their will to continue pregnancies they do not want to continue by denying them choice regarding use of “morning-after” pills or abortions, or “enslave” persons with debilitating mental diseases from being freed from those conditions through the promise of stem-cell research. It is as offensive to Stage 6 reasoning as the other aspects of traditional Christian doctrine, which was used by similar groups of fundamentalists in American history – particularly “Deep South Red State” fundamentalists – to support slavery, segregation, anti-miscegenation laws, denial of equal rights for women, anti-Semitism, rejection of Darwinian evolution, and, as discussed next, denial of equal rights to gays and lesbians, at § 16.2.4.

§ 16.2.4 The Issue of Sexual Orientation as an Example of Stage 6 Reasoning from Both an Enlightenment and Religious Natural Law Perspective

One important example of the convergence of Enlightenment and religious natural law doctrine at Stage 6 involves the issue of gay rights. Like the issues of slavery, segregation, and anti-
miscegenation laws discussed at § 16.1, properly understood the debate regarding sexual orientation is not a debate between religious and secular moral traditions, but rather a debate among traditional and progressive views, both secular and religious. In every such debate during the 2000 years of Christendom, the progressive view has ultimately been viewed as just, even by those who originally held the traditional view. In each case, an important key to the triumph of the progressive view was the acknowledgment that the literal text of the Bible did not contain authoritative passages that spoke directly to the issue. This permitted a progressive interpretation of the Bible gradually to emerge that reinforced the progressive view held by most of those in the secular Enlightenment tradition.

This will likely be true for the issue of gay rights as well. Regarding the question of the literal text of the Bible, it is important to note that the individuals in ancient society had no awareness of sexual orientation. For them, the term “man” meant “heterosexual man,” since the ancients presumed that all individuals, no matter what their behavior, were heterosexual. It has been noted, “The Jewish and Christian scriptures say nothing whatsoever about homosexuality. Homosexuality and heterosexuality are modern concepts coined in German psychiatric practice in 1870. . . . [T]he concept of sexual orientation is totally absent in the ancient Mediterranean world.” Of course, the ancients were aware that some individuals engaged in homosexual acts. This typically occurred, however, as in ancient Greece, in the context of a married couple, with the husband also having homosexual relations with a younger boy, as with Socrates and Alcibiades, or a married woman, like the famous poet Sappho, of the island of Lesbos, enjoying the company of other women. The ancients viewed these acts, therefore, as aberrations from the individual’s usual pattern of heterosexual sexual activity. It was only in the late 19th century, following the beginnings of the modern science of genetics, that scientists began to understand that some individuals have a naturally occurring genetic predisposition towards same-sex sexual attraction.


43 See, e.g., Antares, Buggery & Skullduggery (www.kakiseni.com/articles/reviews/MDA1NQ) (“Socrates, himself, while married to Xantippe, had a passionate affair with an athletic and youthful male disciple named Alcibiades.”); Jennifer Goodall Powers, Ancient Weddings (www.ablemedia.com/ctcweb/consortium/ancientweddings12) (“Sappho encourages girls to look forward to marriage [but did not] necessarily suggest that the girls give up the love of other women, as shown in Sappho’s own ability as a married woman to write about her love for women.”).

44 See, e.g., Male Love in Ancient Greece (www.androphile.org/S/Culture/Greece) (“The term ‘homosexuality’ as it is used and understood today is not applicable to Greek antiquity . . . The Greek male was not only expected to marry and to raise children, but also to be available for friendship and love with worthy youths, not to the exclusion of marriage, but as its necessary complement . . . [P]assion and erotic love between two adult men . . . was generally considered unusual and held up to ridicule.”).

45 See, e.g., Homosexuality: Its Genetic Basis & Evolutionary Benefit 1 (www.danaanpress.com/alib/hsex) (“homosexuality is a product of genetics, . . . evidenced, among other things, in differences in brain structure and . . . responses to hormones.”).
Given these facts, it is clear that the Bible never addresses the morality of homosexuality as such, and could not, as the ancients had no concept of homosexuality to address. Because ancient linguistic use presumed that all “men” were “heterosexual,” biblical passages condemning homosexual acts by “men” can only properly be understood as being addressed to practices like the Greek practice of heterosexuals engaging in homosexual conduct. As has been stated, “No doubt Paul was unaware of the distinction between sexual orientation, over which one has apparently very little choice, and sexual behavior, over which one does. He seemed to assume that those who he condemns are heterosexual, and are acting contrary to nature, ‘leaving,’ ‘giving up,’ or ‘exchanging’ their regular sexual orientation. . . . Paul really thought that those whose behavior he condemned were ‘straight,’ and that they were behaving in ways that were unnatural to them.”

Such conduct may well be condemned by the Bible. Passages like those in Leviticus 18 which state that you shall not “have sexual relations with your kinsman’s wife” nor “lie with a male as with a woman,” underscore that the biblical passages were addressed to the morality of acts by men who “lied” with a woman, that is, heterosexuals. The most faithful reading of the Bible, thus, is that it does condemn homosexual acts when committed by heterosexuals, and well as condemning hedonism and exploitative sexual relationships, as in the parable of Sodom and Gomorrah, and condemning prostitution. Nothing in the Bible, however, explicitly addresses the morality of homosexual conduct by homosexuals.

Some commentators have gone farther to suggest that the Bible does not necessarily condemn any homosexual act done between consenting, adult partners in the context of loving, committed relationships, but only condemns homosexual acts done as part of prostitution, promiscuity, seducing children and other such acts. Contrary to this view, the position suggested here is that the most faithful reading of the Bible is that the Bible does condemn all homosexual acts between persons as they were understood to be by the Bible, that is, between heterosexuals, whether adult or children, consenting or not. Under this view, the Bible does condemn homosexual acts by the roughly 95% of the populace who are heterosexual. Thus, only with respect to the roughly 5% of the populace who are not heterosexual would current biblical understandings need to be changed.

Even though the Bible states nothing explicitly about homosexuals engaging in homosexual conduct, related biblical passages support the morality of homosexuals engaging in homosexual conduct in the context of loving, committed relationships. One of the 10 Commandments states that one “shall not bear false witness against thy neighbor.” Depending on whether one is Roman Catholic or

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46 Walter Wink, Homosexuality and the Bible 2 (www.glsengreensboro.org/new_page_6).
47 The passages cited here from Leviticus 18, as well as passages in Leviticus 20, and other parts of the Bible dealing with homosexual acts, are collected for easy reference at Loren L. Johns, Homosexuality and the Bible (www.ambs.edu/L.Johns/Homosexuality).
49 See generally Support for Gay and Lesbian Equality on the Rise, NGLTF Policy Institute Study Shows 1-2 (Dec. 6, 1999) (hereinafter NGLTF Policy Study) (noting that between 4-5% of the electorate indicated they were gay, lesbian, or bisexual in election exit polls in 1996 and 1998).
Protestant, this may be either the 8th or 9th Commandment. 50 The corollary to this proposition is the proposition that one shalt not lie. 51 Jesus told his disciples to live in “the spirit of truth.” 52 Applying this proposition to sexual conduct, it would be argued by those supporting gay rights that while heterosexuals should engage in heterosexual sexual conduct, homosexuals should remain true to their nature and engage in homosexual sexual conduct. Supporters of gay rights can argue that to encourage contrary behavior would be to encourage living a lie and not living in the spirit of truth.

A less controversial example, which makes the same point, involves the treatment of right-handedness and left-handedness. Just as the ancients had no accurate concept of sexual orientation, they had no accurate knowledge regarding right-handedness or left-handedness. For most of the 20th century, it has been recognized that being left-handed is merely a naturally occurring genetic variation to which no moral significance should attach. 53 To the ancients, however, the fact that less than 10% of the populace seemed to have a predisposition towards left-handedness meant that such individuals, being “not the norm,” were weak and sinister, and thus targets for discrimination.

For example, it has been noted that the word “left” comes from an Old English word meaning “weak” or “worthless,” and that our word “dextrous” comes from the Roman word “dexter,” which in turns meant “right.” The Roman word for “left” is “sinister.” Prejudices against left-handers abound, “for throughout history, lefties have been considered inferior. Centuries ago, the Catholic Church declared left-handed people to be servants of the Devil. For generations, left-handers who attended Catholic schools were forced to become right-handed.” 54 In paintings and other art work, the devil was typically shown as holding his scepter in his left-hand, while Popes were shown as being right-handed. The left side of anything “has long been considered a bad omen, unlucky, evil and dirty. Ancient tarot cards and pictures have often portrayed a left-handed Satan.” 55

50 See generally Ten Commandments (www.therain.org/studies/ten) (listing different biblical versions of the Ten Commandments).

51 See The Preacher’s Files, Lying Lips Are Abomination To The Lord (www.preachersfiles.com/sermon_outlines/sermonsund/lying); Psalms 101 (www.bju.edu/bible/pas/101) (“He that worketh deceit shall not dwell within my house: he that telleth lies shall not tarry in my sight.”).

52 See, e.g., Article 8 – The 8th Commandment (www.christusrex.org/www1/CDHN/eightnim) (“To follow Jesus is to live in ‘the Spirit of truth,’ whom the Father sends in his name and who leads ‘into all the truth.’ To his disciples Jesus teaches the unconditional love of truth: ‘Let what you say be simply ‘Yes or No.’”)

53 See, e.g., Parallels: A Comparison of Social Perceptions Toward Both Left-Handed and Homosexual People 8-9 (www.traceyourhand.org/cosmos/LGBTleft/left) (discussing, inter alia, the work of W. Franklin Jones, Ph.D., A Study of Handedness (1918)) (hereinafter, Parallels).


Other religious traditions also associated left-handedness with morally suspect behavior based on the fact that left-handedness is not the norm. For example, “Only a few decades ago in Japan, left-handedness in a wife was sufficient grounds for divorce. . . . In Arab nations, the right hand is used to touch parts of the body above the waist, while the left hand is used for below the naval. . . . Maori women weave ceremonial cloth with the right hand, because to use the left hand would profane and curse the cloth . . . . African tribes along the Niger river do not allow their women to prepare food with the left hand for fear of poisonous sorcery.”

While some of these views have sensible historical explanations, like the Islamic view that one should use one hand for touching above the waist and eating, while for hygienic reasons a different hand should be used for touching below the naval, particularly wiping oneself after using the restroom, which hand does which, right or left, is not a matter of moral choice. Many of these other views have no rational explanation and are based solely on the view that merely because most people are right-handed, left-handed acts are suspect.

Today, of course, no major Christian denomination holds that being left-handed is morally suspect. Even the practice in some public and Catholic schools in the first half of the 20th century of encouraging students to write right-handed, even if their natural tendency was to be left-handed, has fallen into non-use over the last 25 years. No serious biblical scholar today takes the view that the Bible, either explicitly or implicitly, holds that left-handed acts are immoral, whether writing, throwing, playing golf, tennis, bowling, or any other act. Indeed, in the 1992 Presidential election, all three major candidates, President George H.W. Bush, Governor Bill Clinton, and Ross Perot, were left-handed, and this did not provoke any religious consternation at all. Throughout history a number of “geniuses and icons” have been left-handed, including “Albert Einstein, . . . Issac Newton, Joan of Arc, Ben Franklin, Mark Twain, Julius Caesar, Napoleon and Henry Ford . . . . Of 42 American presidents, seven have been lefties.”

This is true despite the existence of some “language” and “metaphors” in the Bible that could be read to support right-handedness, such as where Jesus is reported to have said discussing charitable acts that one should “not let thy left hand know what thy right hand doeth,” or, regarding Judgment Day, that God “shall set the sheep on His right hand, but the goats on the left.” One author has noted, “One can see the similarities between the evolution of social attitudes towards left-handedness and homosexuality. . . . In each case, the initial set of doctors failed to find an exact cause, and . . . failed to prove anything conclusive. However, again in both cases, the respective doctors ultimately conceded that the condition is not a willful act, nor is it a mental disease, and that

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56 See Left-handedness, supra note 54, at 1-2.

57 See, e.g., Parallels, supra note 53, at 9 (discussing attitudes in the 20th century that “parents must do everything in their power to influence the child towards the use of the right hand. . . . [M]any of today’s left-handed adults can remember being forcibly trained to use their right-hand.”).

58 Left out? (www.teenlink.com/Past/2001/October/Pride/LeftOut) (available through any standard internet search engine using the terms “left out?, geniuses, and icons”). A number of web sites promoting self-esteem by left-handers can be accessed by any standard internet search engine using terms like “famous, left-handers, and self-esteem.”

59 See Left-Handedness, supra note 54, at 2.
the groups ought to be treated with respect and dignity, and ought not to be forced to ‘go the other way.’

An additional argument sometimes used to claim homosexuality is immoral is based on a version of Kant’s categorical imperative of “universalizability,” discussed at § 16.2.1 n.12, that individuals should “act only in accordance with a principle that one could will to be a universal law.” Under this argument, if everyone were consistently homosexual, that would be the end of the human race, and thus being homosexual must be immoral. Of course, if everyone were a man, or everyone were a woman, that would be the end of the human race also. So that argument proves nothing. In addition, as noted at § 16.2.1 n.20, Kant’s principle of universalizability is not the same as giving all individuals equal concern and respect, since the universalizability principle can be manipulated in different ways. Further, one could will as a universal law that everyone behave according to their own biological nature, and that would support the morality of gay rights anyway.

This conclusion regarding the morality of gays and lesbians engaging in homosexual relationships is independent, of course, of whether within the context of those relationships any particular gay or lesbian couple, or single gay or lesbian individual, would wish to take on the responsibilities of parenthood. Most human beings appear to have an inclination towards parenthood. Since the concept of homosexuality was unknown in the ancient world, it is not surprising that there are no explicit passages in the Bible dealing with the morality of homosexuals taking on parental responsibilities. Based on the general biblical imperatives of “love” and “the equality of all persons,” that desire to take on parental responsibility should not be denied to any human being.

Under this reasoning, homosexuals taking on parental responsibilities, either through temporary engagement in heterosexual activities, sperm donation, in vitro fertilization, or adoption, should be permitted, as long as that behavior is consistent with other moral principles, including concern for “the best interest of the child.” For most children, the best environment is to have loving parents, knowledgeable enough to challenge their developing intellects, with sufficient economic means to give them a rich environment in which to grow up. While some conservative groups have alleged that gays and lesbians cannot be good parents, and it cannot be in the best interest of the child to be raised in such a household, there is no sound evidence to support that assertion, and most mainstream organizations support gay adoptions and gay parentage for those gays wishing to be parents.

A number of Protestant denominations have already revised their understandings on the morality of homosexuals engaging in homosexual sexual activity, while other Protestant denominations are currently involved in a process of revisiting their views regarding the morality of loving, committed, homosexual relationships. The greater administrative inertia associated with the Catholic church

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60 See, e.g., Parallels, supra note 53, at 10-11.


may mean that the Catholic church will be the last denomination to revise formally their doctrine regarding homosexuality, just as the Catholic church has lagged regarding their views on celibacy and the ordination of women. As this change comes about, from the religious natural law perspective, Jesus’ message of love and respect for all of God’s creations – whether man or women; white, black, brown, yellow, or red; right-handed, left-handed, or ambidextrous; straight, gay, bisexual, or transgendered; disabled or not – will be actualized better on earth. Even though the Catholic Church disagreed at the time, it is apparent today that Galileo was doing God’s work in the 17th century. Despite opposition from many Christians at the time, particularly in the South, it is apparent that the abolitionists in 19th-century America were doing God’s work in opposing slavery, as were the Lovings when they challenged Virginia’s anti-miscegenation law during the 1960s. By the same token, from a Stage 6 understanding of religious doctrine, supporters of gay rights are doing God’s work today.

In short, a Stage 6 understanding of this issue would adopt the view that Jesus supported the equal dignity of all human beings, and would not adopt the prejudice against homosexuals that is part of most societies’ earlier Stage 3 or Stage 4 reliance on concrete customs or traditions, or even Stage 5's embrace of participatory, pluralistic democracy. As noted at § 15.4.1 nn.77-81, under a Stage 6 moral vision, the protection of individual rights to liberty and equality are paramount. At Stage 6, a pluralistic democratic society is viewed not as an end-in-itself, as it is at Stage 5, but rather as the best means by which to ensure that society protects and advances the set of Stage 6 universal principles of justice. In short, the protection of liberty and equality for all individuals, and not necessarily any outcome of a democratic process, is what is critical.

This understanding of Stage 6 moral reasoning is consistent with the Stage 6 message of Pope John Paul II in *Veritatis Splendor*, discussed at § 16.2.3 nn.34-39. This is true even though on the particular issue of gay rights, like on the issues of birth control, stem-cell research, and abortion, John Paul II personally adopted a view based upon Stage 3 or Stage 4 reliance on concrete customs or traditions. This is similar to Thomas Jefferson’s view, discussed at § 6.2.3.2 n.94, that he was not prepared for women to be equal participants in public life, despite the message of Jefferson’s Declaration of Independence that proclaimed the equality of all individuals.

In this regard it is instructive to compare the majority and dissenting opinions in the 2003 Supreme Court decision in *Lawrence v. Texas*. Adopting a Stage 6 understanding of the term “liberty” in the 14th Amendment, Justice Kennedy wrote for the majority, “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. . . . 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 private spheres. . . . [This] demeans the lives of homosexual persons.” Adopting a greater focus on the concrete customs and traditions of American society at Stages 3 and 4, Justice Scalia observed for the dissent, “[A]n ‘emerging awareness’ is by definition not ‘deeply rooted in this Nation’s history and tradition[s].’ . . . Many Americans [still] 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.”

As discussed at § 27.1.1 nn.9-31, there are two branches to determining what rights are part of the substantive due process liberty analysis. As stated by Chief Justice Rehnquist in Washington v. Glucksberg, the two branches 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.” As noted at § 27.1.1 nn.10-14, judges adopting a Stage 4 formalist theory of decisionmaking tend to focus on the first branch of this analysis, those activities deeply rooted in our “history and traditions.”

This is represented by Justice Scalia’s dissent in Lawrence v. Texas. From a Stage 4 perspective, moral reasoning is based on concrete operational thought and the concrete customs and traditions of society. Because Stage 4 moral reasoning is not based on more advanced formal operational thought, and its ability to make “judgments about judgments,” as discussed at § 15.4.1 nn.60-70, there is no perspective at Stage 4 from which to criticize the morality of any custom or tradition. Customs and traditions are moral merely because they are customs and traditions, and if customs and traditions are deemed not sufficient by themselves to justify the morality of action, then there are no moral restraints whatsoever. As Justice Scalia stated in Lawrence v. Texas, “State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are likewise sustainable only in light of Bowers’ validation of laws based on moral choices. Every single one of these laws is called into question by today’s decision.”

Moral reasoning based on formal operational thought – Stages 4½, 5, and 6 – is able to make “judgments about judgments.” Even Justice Holmes noted in 1897, from a Stage 4½ Holmesian perspective, “It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV.” For Holmes, however, even though customs and traditions are not necessarily moral, as they would be for a Stage 4 formalist, the role of the judge is to defer to the

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64 Id. at 598, 602 (Scalia, J., joined by Rehnquist, C.J. and Thomas, J., dissenting).
66 539 U.S. at 590 (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., dissenting).
67 Oliver Wendell Holmes, Jr., The Path of the Law, 10 Harv. L. Rev. 457, 469 (1897).
dominant forces in society, Hobbes’ “Leviathan.” Thus, to the extent customs and traditions of society are reflected in legislation and executive enforcement, judges should defer to those customs and traditions until the democratic process moves society in a more morally enlightened direction. For this reason, a Holmesian, like Chief Justice Rehnquist, would be predicted to join Justice Scalia’s dissent in Lawrence v. Texas, as he did.

From a Stage 6 natural law perspective, the demands of rational thought and giving each individual equal concern and respect can be used to critique the morality of societal customs and traditions, with prejudice or animus toward individuals, even if customary, an illegitimate reason for action, as for cases involving animus toward persons in interracial marriages, the mentally disabled, “hippie” communes, or gay and lesbian individuals, as discussed at § 26.1.1.1 nn.17-21. Such reasoning focuses on the second branch of substantive due process analysis, whether a right is “fundamental to our concept of constitutionally ordered liberty.” Under a natural law style of interpretation, judges can take background moral principles into account when rendering decisions. One of these background principles, discussed § 7.2.3 n.6, is that “arbitrary coercion is wrong.” As noted at § 16.2.2 text following n.29, coercive sexual practices, as well as exploitative sexual practices, even if not directly coercive, violate the principle of equal concern and respect.

These kinds of principles make it possible to draw distinctions among Justice Scalia’s “parade of horribles” listed 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” also raise clear issues of exploitative sexual activity. Bigamy 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. 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 prostitution, bigamy, and incest, and a majority banning bestiality, is different than only 13 states banning sodomy at the time of the Court’s decision in Lawrence.

On the other hand, it may well be true that from a Stage 6 perspective any attempt to regulate masturbation or 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” – the question would arise whether this morality is a matter for state regulation or for private individual response, such as filing for divorce. With respect to the history and tradition branch of substantive due process, few states have criminal laws against adultery still on their books, only a dozen or so states still have civil actions for alienation of affection. Such laws are almost never enforced, with very modest penalties when enforced.

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With regard to the issue of same-sex marriage, in 2003 the Massachusetts Supreme Court ruled 4-3 in *Goodridge v. Department of Public Health*, discussed at § 26.4.6 nn.477-80, that gay and lesbian couples must be given equal rights to marry under the Massachusetts Constitution’s Equal Protection Clause. This holding reflects a Stage 6 understanding of equal protection, rather than equal protection defined by the concrete practices and prejudices of Stages 3 and 4. Formalist judges, who believe in a static Constitution that would enshrine in constitutional doctrine traditional views at the time of enactment, and Holmesian judges, with a predisposition to defer to legislative and executive action, would predictably dissent from such a ruling. For non-radical natural law and instrumentalist judges, the question faced in the case would be whether the Stage 6 moral understanding of equality, which supports the decision, has become sufficiently embedded in background moral principles in Massachusetts that judges can rely upon it, even though the decision would not be supported by the specific historical intent of the framers and ratifiers of the Massachusetts Constitution, legislative and executive practice in Massachusetts, and the core holdings of Massachusetts precedent.

As American society is just in the process of evolving from a Stage 5 immigrant society into a Stage 6 post-modern society, as discussed at § 15.4.1 nn.77-81, this would be a difficult call if applied to America generally. The precise question in *Goodridge*, of course, involves evolution within Massachusetts and the background moral principles applicable to their state Constitution. As Massachusetts is among the more progressive states in the Nation, it is possible, though not certain, that the majority got the balance right. Of course, if the legislature and citizens in Massachusetts vote to amend the Massachusetts Constitution to enshrine the traditional view rejecting the concept of gay marriage, then it will be clear that the majority got the background moral principles in Massachusetts wrong at the current time. It appears, however, such amendment will not happen. In the fullness of time, the progressive view would likely prevail anyway, as it will for each issue discussed in this Chapter, as it already has for slavery, segregation, and anti-miscegenation laws.

§ 16.3  Stage 6 Moral Reasoning as an Efficient Cause in Constitutional Law

The Constitution’s text grants Congress sufficient legislative power under the Commerce Clause and other enumerated powers that Congress can seek directly to implement moral reasoning on most issues of human rights. Of course, under *Lopez* and *Morrison*, discussed at §§ 12.3.2 nn.87-104 & 18.2.5 nn.100-18, Congress may not regulate non-economic criminal or non-economic civil rights conduct under the Commerce Clause. Since Congress has no generic criminal or civil rights power, Congress is limited in this area unless the legislative power is tied to some other enumerated power in Article I, § 8, like tax fraud under the taxing power, or bribery as a “necessary and proper” aspect of the spending power, or counterfeiting laws under the power to coin money, or mail fraud under the Post Office power, or patent infringement under the Patent and Copyright power, discussed at §§ 18.3.1-18.3.5; or tied to some other power outside of Article I, § 8, like the 13th Amendment power to ban slavery and involuntary servitude, discussed at § 25.1, or Congress’ 14th Amendment power to enforce equal protection and due process rights against the states, discussed at § 28.3.

In contrast to this power granted to the legislative branch, the Constitution does not expressly grant any general power to the judiciary to impose moral notions on society, and the Court has never

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70 798 N.E.2d 941, 949 (Mass. 2003).
claimed even an implied power to proceed entirely on the basis of moral principles alone. Indeed, the Court has not built on the one provision in the Constitution that most clearly could be used for that purpose, the Ninth Amendment, which provides, “The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.” The judicial reasoning coming closest to using the Ninth Amendment as a basis for restraining government in the name of moral principles occurred in Justice Goldberg’s concurring opinion in *Griswold v. Connecticut*.

Joined by Chief Justice Warren and Justice Brennan, Justice Goldberg wrote, “The Ninth Amendment to the Constitution may be regarded by some as a recent discovery 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.”

Justice Goldberg suggested a general test for determining when an alleged human right should be considered protected by the Ninth Amendment. He said, “The entire fabric of the Constitution and the purposes that clearly underlie its specific guarantees demonstrate that the rights to marital privacy and to marry and raise a family are of similar order and magnitude as the fundamental rights specifically protected.”

This “similar order and magnitude” test might have been used by the Court to protect a number of alleged rights. In fact, the Court has not used the Ninth Amendment as a source of alleged rights in this way. A majority of the Court has never held that any particular right is a personal right “retained by the people” within the meaning of the Ninth Amendment.” The Ninth Amendment is discussed in greater depth in Chapter 24.

Courts have adopted, however, Justice Goldberg’s alternative characterization of the Ninth Amendment in *Griswold v. Connecticut*. Justice Goldberg stated, “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.” This rationale supports the Supreme Court’s development of that branch of substantive due process doctrine dealing with so-called “unenumerated fundamental rights,” discussed at § 27.3. Under this approach, new fundamental rights can be identified if they are of “similar order and magnitude” to fundamental rights already acknowledged in Supreme Court precedents. For example, in 1942, in *Skinner v. Oklahoma*, the Court held that there was a fundamental right to procreate, just as there was a pre-existing fundamental right to marry acknowledged in the 1923 case of *Meyer v. Nebraska*, because both “[m]arriage and procreation are fundamental to the very existence and survival of the race.”

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72 *Id.* at 495.

73 *Id.* at 493.

74 316 U.S. 535, 541 (1942).

75 262 U.S. 390, 399 (1923).
The Court has recently used aspects of moral reasoning in another way in their decisions. Historically, reflecting a Stage 3 or Stage 4 view of moral reasoning that rights derive from community or system-wide customs and traditions, the Court deferred to such customs and traditions in determining whether any particular governmental interests were legitimate. For example, in *Plessy v. Ferguson*,
76 noted at § 26.2.1.1.B nn.10-13, the Court noted, “In determining the question of reasonableness, it [the state] is at liberty to act with reference to the established usages, customs, and traditions of the people.” In modern times, however, focused more on a Stage 5 respect for diversity in an immigrant society, or a Stage 6 view of moral reasoning as embodying rational principles of justice, the Court has been willing to call illegitimate some governmental interests that are based on societal customs or traditions where those customs or traditions reflect irrational prejudice or irrational stereotypical thinking about individuals.

For example, in applying rational basis scrutiny under the Equal Protection Clause, the Court held in 1973 that prejudice against “hippies” and “hippie communes” was illegitimate. In 1984, the Court held that prejudice against interracial marriage was illegitimate. In 1985, the Court held that prejudice against the mentally impaired was illegitimate. Finally, in 1996, the Court held that animus toward homosexuals as a group was illegitimate. In this latter case, *Romer v. Evans*,
77 Justice Kennedy quoted language from the 1973 case, *United States Department of Agriculture v. Moreno*, saying: “[I]f the constitutional concept of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.” In *Lawrence v. Texas*,
79 Justice Kennedy made it clear that the recognition in constitutional law of principles based upon moral reasoning such as this may change over time our understanding of the Constitution, noting, “As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.”

In deciding in individual cases whether to rule unconstitutional some Stage 3 or Stage 4 custom and tradition, based on its inconsistency with Stage 5 respect for immigrant diversity, or Stage 6 concern with equal concern and respect, the Court has balanced arguments of historical customs and legislative and executive traditions with natural law respect for a reasoned elaboration of precedent and instrumentalist sound social policy decisionmaking. The Court’s experience with societal resistance after 1954 to implementing *Brown v. Board of Education*, discussed at § 26.2.1.3, has cautioned the Court not to get too far out in front of society in implementing Stage 5 or Stage 6 moral notions. In America, it has typically been the “Blue States” of the North and West Coast that are closer to the moral reasoning of Stage 5’s respect for immigrant diversity and Stage 6’s principle of equal concern and respect for all individuals. The “Western, Plains, and Midwest Red States”

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76 163 U.S. 537, 550 (1896).


are typically next in line, and the “Deep South Red States” usually have the strongest affinity for traditional and customary prejudices. For example, most Blue States never had anti-miscegenation laws, or repealed them during the formalist or Holmesian eras. Most Midwest, Plains, and Western Red States got rid of their anti-miscegenation laws during the first part of the instrumentalist era. The laws of the Deep South Red States against miscegenation were ruled unconstitutional in 1967, discussed at § 26.2.1.1.D n.132. Similarly, the Deep South Red States refused in mass to ratify the Equal Rights Amendment, along with Arizona, Nevada, Oklahoma, Utah, and, surprisingly, Illinois, noted at § 26.3.1.1 n.360. Thus, the Court created intermediate scrutiny for gender discrimination on its own during the 1970s. As discussed at § 27.3.4.2, although all states had laws against sodomy in 1960, only 24 states had such laws in 1986, and only 13 states, predominantly Deep South Red States, still had such laws in 2003 when the Court ruled them unconstitutional. As discussed at § 23.2.1.4, it was only when less than 20 states, a majority of those in the Deep South, still applied the death penalty to mentally retarded individuals and/or juveniles that the Supreme Court ruled those unconstitutional after 2000.

The experience with slavery before the Civil War, and the experience with segregation after the Civil War until Brown v. Board of Education, suggests that waiting for the customs and traditions of states to evolve on their own absent imposition is not a strategy for success. Individuals who do not think in moral terms based on reason, but rather based on customs and traditions, cannot be reasoned with by definition. Metaphorically, one can talk with such individuals until one is literally “Blue in the face” and they will stay with their “Red State” traditions. In contrast, if one imposes a new tradition on those states, a generation or so later the new tradition will be accepted by most individuals whose morality is determined by customs and traditions.

This has occurred in the United States either by military occupation, as after the Civil War with respect to slavery, or by Supreme Court decisions since 1954, with respect to segregation, anti-miscegenation laws, access to contraception, and equal rights for women. From a consequentialist perspective, such instrumentalist and natural law decisionmaking, as opposed to static/formalist or Holmesian deference to existing customs and traditions, has made for a more just society. Whether the issues of abortion rights and equal civil rights for gays and lesbians will become accepted at the current time, or whether on those issues the Court had gotten too far out in front of American society, remains to be determined. In the fullness of time, however, the Stage 6 moral vision is likely to be represented by the law in American society, just as it is increasingly the dominant moral vision in Western Europe and Canada. Hard-right conservative parties, grounded in historical customary and traditional prejudices, as the Tory Party became under Margaret Thatcher in England, or Jean-Marie Le Pen and his National Front Party are in France, have little chance of long-term electoral success in societies with an educated populace.

Of course, since those “Red State” individuals’ commitment to these Stage 6 moral notions is not based on Stage 6 reasoning, but only based on newly-imposed developing traditions, their commitment is not as likely to be as vigorous or complete an acceptance of those moral notions as individuals who reason at a Stage 6 level of moral reasoning. But the acceptance may be good enough. For example, many white conservative Southerners in the 1920s would have opposed Clarence Thomas for wishing to marry a person of a different race, and their laws before 1967 would have made it illegal for Justice Thomas to marry his wife in Virginia. A generation or so after the Supreme Court declared Virginia’s anti-miscegenation law unconstitutional in Loving v. Virginia,
Justice Thomas is one of the favorite Justices among white Southern conservatives and is able to live comfortably in Virginia despite being in an interracial marriage. Similarly, the issue of gay marriage may not be as controversial an issue as it is today a generation or so after it becomes more prevalent.

Certainly, not every individual in a Blue State reasons at a higher Stage 5 or 6 level, and not every individual in a Deep South Red State reasons at a Stage 3 or 4 level. Further, as noted at § 15.4.4 nn.100-03, some individuals who are cognitively bright do not apply that higher level of cognitive reasoning to moral or legal reasoning tasks. This can be because of a refusal to adopt advanced cognitive reasoning and its principle of “equal concern and respect” based on “love of neighbor as oneself” as a guide; or an unthinking adherence to traditional attitudes by not considering the demands of advanced cognitive reasoning, sometimes accompanied by blind adherence to traditional religious doctrine that cannot be defended based on a reasoned elaboration of “love of neighbor as oneself”; or a pathological rejection of reason; or just a sinister decision to behave less morally. For young children who do not have the capacity yet for formal operational thought, and thus have the “original sin” of being self-centered as an initial matter, as discussed at § 15.3 nn.28-32, or for older children whose educational progress is limited because of mental disability, environmental, or lack of individual effort factors, reasoning at lower levels of moral reasoning would be the best they can do until increased educational success brings such individuals along into more advanced stages of cognitive reasoning.

Historically stronger educational systems in the North have generally meant that a larger percentage of individuals in those states reason at higher levels of moral reasoning. Therefore, the customs and traditions of those states better reflect such higher levels of moral reasoning. Thus, even individuals reasoning in Blue States at the level of customs and traditions tend to follow customs and traditions reflecting Stage 5 and Stage 6 moral reasoning results. Similarly, progressive religious traditions can help individuals who reason at Stages 1-5 to adopt Stage 6 principles, based on Stage 1 obedience to progressive religious doctrine, or Stage 2 embrace of self-interest of a Judgment Day judged by progressive values, or supporting Stage 3 or 4 progressive customs and traditions for society, or helping to create a progressive society based upon Stage 5 social contract notions.

In contrast, the customs and traditions in the Deep South Red States tend to reflect more traditional attitudes based on an inadequate embrace of scientific truths and inadequate taking other persons’ perspectives into account. It is those customs and traditions, including “that old-time religion” that is “good enough for me,” that needs changing from the perspective of Stage 6 moral reasoning. Historically, such attitudes were prevalent among the Dixiecrat wing of the Democratic Party. Based upon the long-term results of President Nixon’s “Southern strategy” of the 1960s and 1970s, noted at § 14.2.5, these attitudes dominate the Republican Party, with the Republican Party the majority party in Congress, as of October, 2006, because it includes not only this perspective, but also sufficient numbers of fiscally conservative, but socially liberal legislators elected from “Blue States.”

These “Blue State” Republicans, who represent more Stage 5 and Stage 6 values, are connected to the older Republican Party that had a stronger “East Coast Establishment” or “Rockefeller Republican” wing. While a larger number of Dixiecrat Democrats have left the Democratic Party over the past 40 years, only a few such Republicans, such as Senator Jim Jeffords of Vermont, have left the Republican Party. Thus, the Republican Party has the “bigger tent.” To the extent the
Republican Party commits more completely to the traditional “Dixiecrat” view of social policy based on Stage 3 and 4 moral values, more “Rockefeller Republicans,” who hold more Stage 5 and Stage 6 values, may choose to vote Democratic, returning the parties to more equal competitive balance.

In the long run, the more cognitively advanced kind of moral reasoning is likely to prevail in America, just as it is tending to prevail in Western European countries and Canada. Over time, the demands of logic and rational thought have tended to drive societies with stronger educational systems. For societies with weaker educational systems, like those in Africa and the Middle East, evolution towards Stage 5 and 6 democracies will be more problematic, as noted at § 15.4.2.

In the American experience, it is perhaps no surprise that those states with historically stronger educational systems have typically adopted higher levels of moral reasoning at any particular time. For example, it has been noted about the 19th century in America, “Despite the controversy over enacting constitutional provisions and legislative statutes requiring individuals to pay taxes to support a public school system, public support for state-operated schools was gradually obtained. This process began with the New England states in the first few decades of the nineteenth century, spread to the mid-Atlantic and mid-western states in the decadespreceding the Civil War, and finally, came to the southern states in the war's aftermath.”80 Even after the Civil War, of course, the economic consequences of that War on the South resulted in educational systems that lagged behind the North for many decades. This educational disparity explains, in part, the South’s traditional stronger embrace of the inadequate kind of Stage 3 and 4 reasoning that supported slavery, segregation, anti-miscegenation laws, anti-Semitism, and a greater reluctance to embrace Darwinian evolution and other modern scientific findings, than occurred in the North. It has also meant that overcoming these kinds of attitudes have been more difficult in the South because of these customs and traditions, which often have been reinforced by traditional religious schooling and indoctrination, despite their inconsistency with the principle of “love of neighbor as oneself.”

Of course, it is important to note that many individuals at Stages 1-5 of moral reasoning have “a good heart.” It is nonetheless true that throughout human history individuals with “good hearts” have nonetheless embraced doctrines that are not moral from the perspective of Stage 6's concern with giving individuals “equal concern and respect.” At the time, such individuals may believe they are behaving morally, and if religious, may believe they are doing God’s work. From the perspective of Stage 6 reasoning, however, that would not be true. Actions are ultimately what count from a Stage 6 perspective, not intent. Similarly, from a Stage 6 understanding of the Bible, the message of Christ is not that having a “good heart” is enough to be a “good person.” The relevant biblical passages in this regard are “by their fruits, you shall know them” and “the truth shall set you free.”

It is important to note that at earlier stages there can be benign and invidious versions of each stage depending on background social conditions in society. For example, there can be relatively benign Stage 2 Monarchies, such as King Hussein of Jordan, while there can be invidious Stage 4 Nation States, such as Hitler’s Germany. Thus, it is not certain than evolving from a Stage 2 society to a

Stage 4 society necessarily will yield a more moral society. As discussed at §§ 16.2.2-16.2.3, all persons, both secular and religious, will agree on moral principles at Stage 6, since there is just one reason, and thus one set of purely rational principles. Once can thus measure the relatively benign or invidious nature of any Stage 1 - Stage 5 society by how far its basic moral principles depart from the principles a person would adopt at Stage 6 of giving each individual “equal concern and respect.”

This analysis can also be applied to individuals. For example, there are no doubt some individuals whose weaker educational level, and thus less cognitively advanced moral reasoning, reflects more the Stage 1 level of obedience to rules merely to avoid punishment, or, more likely, Stage 2 moral reasoning of self-interest. For a number of such minority individuals, the choice in voting would be between a Republican Party dominated today by the Stage 3 and Stage 4 customs and traditions of whites living in “Red States,” or support for a Democratic Party whose ideals reflect Stage 5 embrace of immigrant diversity and Stage 6 support for equal concern and respect. Given that choice, their natural self-interest is to vote Democratic. For many minorities operating at a Stage 3 or Stage 4 level, protecting the customs and traditions of their minority communities may also suggest voting for a Democratic Party more willing to embrace diversity and belief in equal concern and respect.

For a number of whites operating at the level of Stage 2 moral reasoning, their economic self-interest may lie with the Democratic Party, but their views on social issues may be more consistent with the Stage 3 and Stage 4 customs and traditions of whites living in “Red States.” Indeed, to the extent they view the Democratic Party as pandering too much to the economic self-interest of Stage 2 minority voters, through forms of welfare, affirmative action, and other such programs, they may view their economic self-interest as connected more to the Republican Party as well. Further, to the extent that such whites live in rural or suburban communities, without the direct, day-to-day, concrete experience of dealing with the diversity of large city life, it is easier for such individuals to settle in their moral reasoning into the comfort of their Stage 3 community values (their so-called “nice little lives”), without having to deal with, or respond equitably to, the reality of diversity that might push their moral reasoning toward Stage 5 embrace of immigrant diversity.

At the end of the day, no matter what mechanism suggests to individuals at various levels of moral reasoning which political party to support, the perspective of Stage 6 reasoning would look to the actual policies adopted by any political party, and ask how close those policies are in practice to Stage 6 reasoning. In doing this, one has to look beyond slogans. For example, the French Revolution was carried out against the backdrop of the slogan “liberty, equality, fraternity,” which reflects, as a slogan, equal concern and respect. As discussed at § 15.4.2, however, the French Revolution was a failed attempt to replace a Stage 2 Monarchy with a Stage 3 fledgling democracy, which fell back into the Stage 2 Dictatorship of Napoleon. Given the general level of education at the time, such a Stage 2 result should not have been a surprise. Similarly, although Hobbes and Nietzsche reflected Stage 4½ dominant forces theorizing, Locke reflected a Stage 5 social contract, and Kant reflected an attempt at Stage 6 rational principles of justice, individuals as Stage 3 or 4 have sometimes used their rhetoric to justify support for their customary and traditional practices.

It is important to note that use of Stage 6 moral reasoning to advance Stage 6 moral concepts through the Equal Protection Clause, Due Process Clause, and others Clauses in the Constitution is
consistent with a natural law approach to constitutional interpretation, whether based on the traditional Stage 3 natural law of the 18th and 19th century, or modern Stage 6 natural law today. As discussed at § 12.3.3 nn.119-28, under any version of traditional natural law – Enlightenment, Burkean, or Augustinian – critical advances in thought can help us see better today the permanent aspirations and truths reflected in that tradition, as opposed to the immediate preferences of those who drafted and ratified particular language. Persons holding such natural law beliefs would wish later generations to give a more enlightened interpretation to those natural law principles, as those principles are thought to exist independent of the more limited understanding any individual may have of those principles at any point in time. As discussed at § 12.2.1.1 n.6, under traditional natural law interpretation, the intent of the Constitution is not the framers and ratifier’s specific subjective intent, but rather the objective intent gleaned from applying traditional modes and canons of construction to the document’s text. As noted at § 12.2.1.3 nn.33-39, that intent is not the specific policy goal that may have motivated a particular clause, but the broader, more generalized principle, or rule of law, that the clause established. Thus, although many of the framers and ratifiers may have been operating at a Stage 3 level of natural law, where reason and custom were conflated, as noted at § 15.4.1 nn.50-56, and thus they had flawed specific views regarding slavery, women’s rights, or other such matters, as well as greater attention to widely-shared Stage 3 community norms like property rights, rather than Stage 6 equal concern and respect for all individuals, including protection for minority rights, their interpretive methodology would support judges today reasoning at the advanced Stage 6 level of moral reasoning when interpreting the natural law concepts they placed into the Constitution.

Further, even if one rejects such a natural law “evolving” Constitution based on reasoned elaboration of the law, and follows a more Jeffersonian formalist “static” model of interpretation, the “original intent” of the Civil War Amendments, even from a formalist perspective, was to reflect “Blue State” values, imposed on the “Red States” of the South, as noted at § 28.1. And, of course, even from Jefferson’s own perspective, individuals should embrace liberty and freedom, not traditional Christian doctrine, to the extent that doctrine is flawed from the perspective of reason, as some aspects are, as discussed at §§ 16.1-16.2. Jefferson is famous for noting, “In every country and in every age, the Priest has been hostile to liberty. He is always in alliance with the despot, abetting his abuses in return for protection to his own.”

For those framers and ratifiers who may have been thinking in Stage 6 terms, resort to Stage 6 moral reasoning would be even more consistent with their interpretive methodology. Certainly many of the framers and ratifiers viewed moral duties toward society in light of Adam Smith’s principle of the “impartial spectator” and the Scottish Enlightenment’s related view of duties of “sympathy” toward one’s fellow citizens. Similarly, one way to understand Jesus’ message in the Bible is that


82 Letters from Thomas Jefferson to Horatio G. Stafford and Dr. Thomas Cooper, 1814.

Jesus was thinking of the principle of “love of neighbor” from a Stage 6 perspective of universal human rights based on giving equal concern and respect to all human beings. This perspective would support a Stage 6 understanding of biblical passages today, despite the fact that the gospels were written at a time when most individuals were operating in the context of Stage 1 or 2 societies of Emperors or Kings, and despite the fact that for many centuries the Catholic and Protestant traditions have read the Bible from the perspective of some version of Stages 1-4 moral reasoning.

For example, a Stage 6 perspective would not support the anti-Semitism of most Catholic and Protestant traditions until recent Stage 5 Vatican II modernization, even though that anti-Semitism was part of almost 2000 years of custom and tradition in the Christian faith. Similarly, a Stage 6 perspective would not support an interpretation of the Bible based upon a Stage 1, “Old Testament” God as punisher interpretation of the Bible, or a Stage 2 “Pope as dictatorial interpreter of the Bible,” or Stage 3 “community of the faithful” interpretation of the Bible, or Stage 4 literalist interpretation of the Bible, each of which was used for many centuries to support slavery, segregation, and anti-miscegenation laws, as discussed at §§ 16.1 & 16.2.3. When Stage 3 & 4 religious conservatives claim to be acting in Christ’s name, that is unlikely to be true. Christ did not walk through Galilee extolling the virtues of existing customs and traditions, based on an adolescent peer group mentality way of thinking. Christ’s message was a transformative message of “love of neighbor as oneself” for all individuals, the mature, adult, Stage 6 kind of moral reasoning. It is the “truth” that shall set you free, not, in the words of Stephen Colbert of Comedy Central’s The Colbert Report, “truthiness” – the mere desire for one’s customary or traditional “gut” prejudices to be true.

§ 16.4 Stage 6 Moral Reasoning as a Final Cause for Constitutional Law

The thesis of this section is that Stage 6 moral reasoning is likely to be found increasingly as a guide in American constitutional law, as well as in American society generally and in its legal system. Predicting this is a chancy venture, as may be seen by considering the difficulties of an attempt in 1953 to predict what constitutional law would include by 1986. A predictor in 1953 would probably not have found it likely that the Court would soon end segregation in public facilities, recognize a fundamental right to choose abortion, expand First Amendment protection to commercial speech, and provide a host of new protections for defendants in criminal cases. The problem is even more complex because the Court has been more cautious since 1986 with respect to identifying additional fundamental rights and has given increased weight to concerns of federalism and protecting state governments from lawsuits brought by citizens seeking to vindicate individual rights.

The project starts with certain assumptions. First, a Stage 6 society will deal with moral reasoning by the use of reason, rather than by customs or traditions. Second, rational thought is not egocentric, but supports the principle of love of neighbor as oneself, which can also be expressed as equal concern and respect for others, or behave according to the logic of an impartial spectator. Third, when attempting to put further content into moral reasoning, an effort should be made to avoid irrational perspectives or prisms, and only to infer principles directly derivable from the principle of love of neighbor as oneself, such as not taking innocent life, respecting other persons’ bodily integrity and personal property, and not lying to other people for one’s personal gain.

It is also necessary to remember that there is a distinction between what rational moral reasoning may dictate with regard to personal behavior and what it suggests regarding the discretionary power
of law makers and the provisions of a constitution designed to limit that power. In addition, although morality may call for providing adequate remedies for persons who have been oppressed, that would not automatically translate into a legislative duty or a fundamental constitutional right for the government to provide food, housing, and other needs for all individuals who are poor. Also, legislative provision for the poor or disabled may reduce any pressure felt by the Court to find in the Constitution some protections for those and similar groups.

Unless the Court adopts a radical, Platonic Guardian model of natural law, Court decisions will also be limited by the requirement to balance any arguments based upon background moral reasoning against the requirements of constitutional text, context, history, practice, and precedent. As noted at § 8.3, our constitutional tradition is based upon a model that constitutional rights are to protect individuals from governmental regulation, and to ensure individuals have an equal opportunity to compete. There is no tradition recognizing group rights in our constitutional history, and only with rare exceptions, like the Sixth Amendment right to counsel funded by the government for indigent defendants, does any concept of a right to funding, or right to equal results, come into play.

This tradition is consistent with a proper Stage 6 understanding of rights. On the issue of individual versus group rights, from the perspective of rational thought, only individuals exist. There can, of course, be a group of individuals. However, there is no such thing as a group that is independent of the individuals that make up the group. The term “group” is merely a short-hand reference for the individuals who are in that group. To the extent those individuals all have some right, then everyone in the group will have that right. But rights belong to individuals who are entitled, from a Stage 6 perspective, to equal concern and respect. From a logical standpoint, there is no such thing as a group that exists independent of its members; thus, groups cannot have natural rights.

This is true even if discrimination practiced upon some individuals is practiced because of their membership in a group. For example, historically African-Americans were discrimination against by Jim Crow legislation because of their membership in a racial group, being African-American. Such unjust treatment would entitle any individual African-American so discriminated against to an appropriate remedy. From a Stage 6 perspective, however, that discrimination against an individual based upon group membership would not entitle every member of that group, that is every African-American, to the same level of remedial treatment. For example, an African-American family living in a progressive community that never engaged in any discrimination against that family, and no direct discrimination against any of their ancestors, so that only a modest claim of some indirect intergenerational effects of discrimination could be made, would be entitled to only modest relief.

Even more so, discrimination against one racial minority group would not entitle members of a different racial minority group to a remedy on the basis that all racial minorities are members of the larger group of minorities generally, and thus discrimination against any part of that group is

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84 For a contrary argument that it is possible, and appropriate, to sometimes think of rights in “group right” terms, independent of the rights of individuals in the group, see, e.g., Ronald R. Garet, Community and Existence: The Rights of Groups, 56 S. Cal. L. Rev. 1001 (1983).
discrimination against all. As Justice O’Connor phrased this point in *Richmond v. J.A. Croson Co.*, “The foregoing analysis applies only 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.”

Equally, merely because a group may not be stigmatized by some action, that would not mean that individuals in that group harmed by discrimination should not have an appropriate remedy. For example, one might argue that affirmative action on behalf of minorities does not send a message of stigmatization to white persons as a group. Even if that were true, if individual white persons are harmed by the effects of some affirmative action program, they should be able to raise a complaint and have that complaint tested by strict scrutiny applicable to racial discrimination cases.

A Stage 6 understanding of a right to equal opportunity and autonomy versus a right to equal results or funding is more complex. The baseline issue is what are the demands of treating each individual with equal concern and respect. To the extent that individuals are viewed as having free will, individuals are charged with some responsibility for their actions. This would mean that not all individuals are entitled to equal results in all circumstances, because individuals engaging in different actions, for which they are responsible, will lead to different results. Such reasoning suggests viewing rights to equal concern and respect as rights to equal opportunity and autonomy.

On the other hand, all individuals have different genetic predispositions in certain areas with which they were born and which are not the product of their free will choice. In extreme circumstances, for example, some individuals are born with genetic mental or physical impairments that place them at a disadvantage to others. For such individuals, any rational concept of equal opportunity or equal autonomy will require some affirmative funding by the members of the rest of society to help equalize those disadvantages. Of course, as noted above, to the extent legislative provision is made for such individuals in statutes, like the Americans with Disabilities Act, which provides some response to issues of equal access and equal opportunities for the disabled, any pressure felt by the Supreme Court to find in the Constitution protections for such individuals will be reduced.

A final preliminary issue is important to consider. At discussed at § 2.3.1, in an exchange of articles in 1958, Professors Hart and Fuller disagreed over a positivist versus a normative theory of law. Professor Hart favored the positivist theory of law represented by his “rule of recognition” theory of legal obligation. Professor Fuller favored a version of a normative theory of law. From a Stage 6 perspective, grounded in rational thought, and aware of the limitations on ultimate reasoning about moral principles represented by Godel’s theorem, discussed at § 16.2.2, it is clear that no rational choice can be made concerning which of these two views on the nature of law is right, or more moral. From the perspective of Godel’s theorem, there are no “first principles” that are rationally defensible from which a choice can be made between these two approaches.


From an historical perspective, it is no surprise that societies operating at a Stage 1 or Stage 2 level of Emperors or Kings, or from a Stage 4 formalist or Stage 4½ Holmesian positivist theory of judicial review, would be likely to embrace Professor Hart’s positivist theory of law based upon his “rule of recognition.” It is no surprise that societies operating from a Stage 3 traditional natural law base, or an emerging Stage 6 modern natural law base, would tend to have a preference for Fuller’s normative theory of natural law. As discussed at § 15.4.1, for Stage 5 societies Kohlberg stated, “The ‘rights,’ or the general welfare consequences, insured by social contract procedures [at Stage 5] remain to some extent a derivative of these procedures rather than the purpose for their existence. Correlatively, then, the Stage 5 social contract conception yields something less than a set of universal, totally generated moral principles; it yields a universal set of procedural principles but not a universal set of moral oughts.”

Such a mixed set of procedural principles is reflected in Hart’s more advanced theory of his “rule of recognition,” where, in response to Professor Fuller’s critique in 1958, Professor Hart added in his 1961 book, *The Concept of Law*, what he called “a minimum content of natural law” based on the need for a minimum level of voluntary cooperation among individuals in society to ensure survival. Given that Professor Fuller’s natural law approach, as discussed at § 13.1, is a version of Stage 5½ political natural law, with its “internal morality of the law” also based on procedural regularity in cooperative rule-making and rule enforcement, there is not much difference between the final version of Hart’s Stage 5 minimum natural law and Fuller’s Stage 5½ political natural law. A similar Stage 5½ enterprise, resting legitimacy in procedures to ensure that the laws which are adopted be just, not merely social consent to any procedures, has been advanced by Professor Randy Barnett, and is consistent with Stage 5½ “deliberative democracy” theories, discussed at § 15.4.3.

As an historical matter, a fully-developed Stage 6 society is likely to adopt both Hart’s minimum natural law and Fuller’s internal morality of the law, as both require the government to be rational in its action, and to treat each of its citizens with some amount of equal concern and respect. A fully-developed Stage 6 society will go beyond both Hart and Fuller, however, in requiring a full measure of treatment of individuals with equal concern and respect, not only in the government procedures for rule adoption, or notice and hearings, but in the substantive principles of government itself. This will be done not because it can be proved this approach is more moral, which under Godel’s theory cannot be done, but because it is the approach adopted by a fully rational person who understands this is the only basis for rational agreement among members in society. Any other system, because ultimately based on irrational first principles, can obtain societal consensus only through force – either military force, psychological conditioning, or social pressure. It will also likely occur because history suggests that more educated people tend to adopt more cognitively advanced principles of morality, and for the religious among them, are able to revise their interpretation of religious texts to reflect those principles, given the language of, and inherent flexibility in, religious texts.

From the perspective of a Stage 6 thinker, a society that embodies to a substantial extent in its laws the Stage 6 principle of “equal concern and respect” deserves that individual’s obedience on “moral” grounds. Societies at earlier levels of morality deserve respect on “sociological” grounds to the extent working within the system is more likely to help that society evolve toward Stage 6 principles, rather than engaging in civil disobedience or civil revolution. From a Stage 6 perspective, “legal” grounds, while necessary from the perspective of “equal concern and respect” to legitimate a constitution do not provide sufficient legitimacy for law, as Stage 6 is a form of natural law, which rejects such “positivist” justification for obedience. Differences among “moral” versus “sociological” versus “legal” grounds for obedience toward law are reflected in recent writing about the duty to obey and law and constitutional legitimacy by Professor Richard Fallon.90

The core question at Stage 6 in terms of constitutional law is what principles are likely to be viewed as reflected in the Constitution based upon Stage 6 moral reasoning. How quickly this may happen, and with what level of success, will depend partially upon events in the political realm, including whom the President appoints and the Senate confirms to serve on the Supreme Court. In addition, any change in constitutional law depends in part on what cases or controversies get litigated, and are presented to the Court for decision. It can be predicted, however, that the Court will continue to grapple with such matters as separation of powers, federalism, affirmative action, freedom of speech, and the separation of church and state. All of these issues involve conflicts between majoritarian power and individual freedom, or between central and dispersed governmental power.

Dealing with this issue calls for a revision of perspective to viewing the Court’s role as promoting, within the limitations of a social contract natural law theory of constitutional interpretation, the Stage 6 vision of love of neighbor as oneself, or equal concern and respect, or behave according to the logic of the impartial spectator. An analogy to a similar revision in perspective was Justice Holmes’ insight in *Lochner v. New York* that the majority, which had found no sufficient relationship between a maximum hours work requirement and the health of bakery employees, was applying a particular economic theory. That allowed Holmes to utter words which later became orthodox theory, “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.”91

Just as Justice Holmes’ new perspective, initially uttered in dissent, changed constitutional law once it became adopted by a majority of Supreme Court Justices after 1937, the new Stage 6 perspective, although initially represented in a number of dissenting or concurring opinions, may gradually be emerging in majority opinions, typically by natural law Justices O’Connor, Kennedy, or Souter, or moderate instrumentalist Justice Stevens. The fundamental idea behind this Stage 6 perspective is that governmental action should be tested by whether its means and ends accord with the logic of Adam Smith’s impartial spectator, which requires giving each person equal concern and respect.

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Justice Stevens has made repeated use of the idea that government has a duty to govern impartially. For example, in *FCC v. Beach Communications, Inc.*[^92] the Court allowed federal cable television regulations to distinguish between facilities that served separately owned and managed buildings and those that served several buildings under common ownership or management. In his concurring opinion, Justice Stevens said that “it is reasonable to presume that Congress was motivated by an interest in allowing property owners to exercise freedom in the use of their own property. Legislation so motivated surely does not violate the sovereign’s duty to govern impartially.” Justice Stevens added, “[W]hen the actual rationale for the legislative classification is unclear, we should inquire whether the classification is rationally related to ‘a legitimate purpose that we may reasonably presume to have motivated an impartial legislature.’” This requirement of an “impartial legislature,” rather than deference to any conceivable legislative purpose, is reflected in the requirement, discussed at § 16.3 nn.77-79, that the legislature not advance irrational prejudices or irrational stereotypes, even if those prejudices or stereotypes are consistent with the customs and traditions of society.

In *Michael M. v. Superior Court*,[^93] the majority rejected an equal protection challenge to California’s statutory rape law which made men alone criminally liable for sexual intercourse with a female under the age of 18 years. Justice Stevens dissented. He said, “Even if . . . there actually is some speculative basis for treating equally guilty males and females differently, . . . any such speculative justification would be outweighed by the paramount interest in evenhanded enforcement of the law. A rule that authorizes punishment of only one of two equally guilty wrongdoers violates the essence of the constitutional requirement that the sovereign must govern impartially.”

An area in which government impartiality or neutrality has been expressly recognized by the Court as a significant factor is the Establishment Clause. For example, in *Rosenberger v. Rector and Visitors of the University of Virginia*,[^94] the Court held that the Establishment Clause did not compel a university to exclude an otherwise eligible student publication from participating in the student activities fund solely on the basis of its religious viewpoint. Justice Kennedy stated, “A central lesson of our decisions is that a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality toward religion.” The Court reached a similar result regarding charging students an activity fee used to facilitate extracurricular student speech that is viewpoint neutral in *Board of Regents of the University of Wisconsin System v. Southworth*.[^95]

Because a natural law style of interpretation adopts an analytic, normative approach toward judicial decisionmaking, a Stage 6 Court should consider fully the analytic goal of certainty and predictability in the law, which often suggests a categorical approach toward doctrine, versus the normative goal of fundamental fairness in each case, which often supports an inquiry into all the circumstances in the case. Justice Stevens’ opinion for the Court reflected this balance in *Tahoe-

[^92]: 508 U.S. 307, 311-13 (1993); *id.* at 323 & n.3 (Stevens, J., concurring in the judgment).

[^93]: 450 U.S. 464, 470-74 (1981); *id.* at 502 (Stevens, J., dissenting).


\textit{Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency},\textsuperscript{96} where the Court refused to create a categorical rule that a moratoria on building which lasted more than a year was a compensable taking. Justice Stevens explained that “the ultimate constitutional question is whether the concepts of ‘fairness and justice’ that underlie the Takings Clause will be better served by one of these categorical rules or by a Penn Central inquiry into all of the relevant circumstances in particular cases.”

From a Stage 6 perspective, an effort also should be made to avoid particular perspectives or prisms, at least when attempting to infer principles beyond those directly derivable from the foundational principle of love of neighbor as oneself. This perspective supports rejecting the instrumentalist use of background social policy, which places the Court in the position, in part, of making decisions for society reflecting a particular public policy prism. In contrast, a Stage 6 Court should restrict itself to protecting the core background principles of justice embedded in a Stage 6 understanding of constitutional concepts, including both “liberty” and “equality” in the 14\textsuperscript{th} Amendment.\textsuperscript{97}

For example, as noted at § 27.3.4.1 n.246, the instrumentalist opinions of Justices Stevens and Blackmun in \textit{Planned Parenthood v. Casey} followed \textit{Roe v. Wade} in its entirety, making every burden on abortion rights subject to strict scrutiny. This constitutionalized under a strict scrutiny approach all regulations on abortion, following Roe’s concern about specific harm if a pro-choice position were not adopted. This approach differed from the natural law approach of the joint opinion in \textit{Casey}, where the Court did not sit as a super-legislature regarding all aspects of abortion regulation. As discussed at § 27.3.4.1. nn.247-48, the importance of the undue burden analysis in the joint opinion in \textit{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, strict scrutiny analysis was restricted in the joint opinion in \textit{Casey} to protecting the core principle of liberty from undue burdens.

The Court has applied this undue burden analysis in other unenumerated fundamental rights cases. For example, as discussed at § 27.3.3.1.A, in cases involving the right to marry, the Court has applied strict scrutiny to the “significant” and “substantial” infringement at issue in \textit{Zablocki v. Redhail}, but only rational review to a burden on the right to marry of a prisoner in \textit{Turner v. Safley}.\textsuperscript{98} Similarly, as discussed at § 26.5.1, the Court has applied strict scrutiny to significant burdens on the right to travel, as in \textit{Shapiro v. Thompson} and \textit{Memorial Hospital v. Maricopa County}, while applying only rational review to other burdens on the right to travel, as in \textit{Zobel v. Williams} and \textit{Hooper v. Bernalillo County Assessor}.\textsuperscript{99} In cases involving the right to vote, discussed at § 26.5.3, the Court has applied strict scrutiny for more severe burdens on the right to vote, as in \textit{Kramer v.}

\textsuperscript{96} 535 U.S. 302, 334 (2002) (Stevens, J., for the Court).


Union Free School District No. 15, while only applying rational review to less severe burdens, such as restrictions on voting for a water reclamation district in Ball v. James, or limitations on the voting rights of prisoners, in O’Brien v. Skinner.100

This use of undue/substantial burden analysis is consistent with a Court adopting an impartial spectator approach, rather than sitting as a super-legislature. From a Stage 6 perspective, basic principles of liberty and equality must be protected, since every individual has an equal right not to have imposed upon them other individuals’ non-rationally supported moral prisms. However, once that protection is assured, there are a number of collateral decisions that any society must make in order to assure persons can live together in peace and harmony with equal concern and respect given to all. Given the institutional competencies of each branch of government, these collateral decisions are best made in most circumstances by democratically elected officials, rather than courts.

For this reason, it is likely that a Stage 6 Court will use this undue/substantial burdens versus lesser burdens analysis in an increasing number of areas of the law. In each of these cases, the Court will have to consider what form of rational review analysis should be applied. Although the Court has suggested it was applying minimum rational review in the cases cited above, the actual reasoning in the opinions suggests more the “second-order” factor balancing rational review approach discussed in § 7.2.1 and summarized in Table 7.2.101 A similar case involving “second-order” rational review for a less than severe burden on associational rights in case of ballot access is Timmons v. Twin Cities Area New Party.102 This issue of whether rational review adopted in these cases is minimum rational review or “second-order” rational review is discussed further at § 21.2.3.

This Stage 6 impartial spectator approach similarly supports an analysis permitting “play in the joints” for social policy decisions, rather than constitutionalizing value decisions not determined by the principle of equal concern and respect, or the logic of the impartial spectator. This is reflected in cases like Locke v. Davey,103 discussed at § 32.2.2.5 n.265, where the Court in 2004 read the Free Exercise Clause and Establishment Clause to permit the legislature sufficient “play in the joints” to make the policy decision whether to fund scholarships to be used for religious training.

Similar deference to policy decisions of others, consistent with a concern for giving all individuals equal concern and respect, is reflected in the Court upholding the University of Michigan Law


School’s use of race in its admission process. A particular circumstance given weight by the Court was the university’s judgment that diversity would produce educational benefits. Justice O’Connor said for the Court in in *Grutter v. Bollinger*, 104 “Our scrutiny of the interest asserted by the Law School is not 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.” In contrast, the Court decided in *Gratz v. Bollinger*105 that the rigid absolute point system preference of the University of Michigan undergraduate program was outside “constitutionally prescribed limits,” since it was not the least restrictive effective alternative that could be used to assure that the undergraduate program received the educational benefits flowing from a racially diverse student body. The Court’s opinions in *Grutter* and *Gratz*, and the law regarding affirmation in education generally, are discussed at § 26.2.1.4.D.

Generalizing from the topic of diversity in education, and from the concept of impartiality in law, a Stage 6 Court will be likely to uphold efforts to achieve diversity and will apply its standards of review to require governmental toleration of ever more diverse ideas and behavior. A Stage 6 Court will protect freedom of speech, except where in the circumstances the expression advocates illegal conduct, constitutes a “true threat” to others, or is actionable “hate speech,” as discussed at §§ 30.1.1.1-30.1.1.4. As noted at § 15.4.1 text following n.79, groups that do not embrace the Stage 6 vision of toleration will be tolerated by the government and the courts only to the extent that they are isolated or ineffective in their practices because at Stage 6 all individuals should be protected from group domination. Because of the perceived universality of these principles of moral judgment, this protection from domination would naturally extend not only to domestic law, but also to rooting out intolerant international groups of global reach.

With regard to federalism and separation of powers concerns, the notion of the impartial spectator should mean that the Court should not take sides in choices regarding federal versus state power, or legislative versus executive power, as long as those choices are within constitutional limits. As noted at §§ 6.2.2.3 & 6.2.2.4, in our history conservative judges have tended to favor states’ rights and the executive branch in these kind of cases, while liberal judges have tended to favor the federal government and the legislative branch. An impartial spectator would reject either kind of favoritism. Such an approach would acknowledge that, within broad limits concerned with preventing tyranny against individual citizens, yet assuring sufficient governmental efficiency, most issues of federalism and separation of powers, like the issue of whether or not to follow a kosher diet, discussed at § 16.2.2, merely represent differing choices particular countries around the world have made, with many of those countries, such as in Western Europe, Canada, or Australia, no matter what their precise systems, committed to cognitively advanced notions of human rights and human dignity. For these issues, therefore, without any background moral principles to help resolve particular issues, the considerations of text, context, history, and practice should become more prominent in the Court’s opinions.


105 539 U.S. 234, 270-72 (2003); id. at 276-80 (O’Connor, J., concurring).
As noted at § 12.3.3 nn.132-36, Justice Souter’s views on the 11th Amendment best represent the mature Enlightenment vision on issues of sovereign immunity. While a majority of 5 Justices on the modern Supreme Court have favored states in their interpretation of the 11th Amendment, an approach more consistent with constitutional text and history of the original Constitution and the 14th Amendment, and more consistent with the Court not imposing policy choices on society, but deferring to the legislature where those choices are not required by the Constitution, would permit Congress by statute to determine whether individuals should be permitted to sue states for violation of federal law, rather than the Court preempting that decision. In this regard, it is likely that a Stage 6 impartial spectator approach would adopt Justice Souter’s views regarding 11th Amendment issues.

This would require overruling the Court’s recent 11th Amendment jurisprudence on the ground that those decisions are substantially wrong as reflecting too great a conservative preference for states’ rights, a preference not adequately represented in constitutional text, context, history, and practice. This would mirror the Court’s rejection in 10th Amendment doctrine of the greater conservative preference for states’ rights represented in National League of Cities v. Usery, and its replacement by the more balanced and textually faithful analysis of the 10th Amendment in Garcia v. San Antonio Metropolitan Transit Authority, discussed at § 18.4.1 nn.220-32. Of course, even under Justice Souter’s view, the plain text of the 11th Amendment would remain, which prevents states from being sued in federal court under diversity jurisdiction. The 11th Amendment doctrine is discussed generally at §§ 17.2.4.1-17.2.4.3.

For separation of powers cases, the Court should similarly reject a conservative preference for the executive branch, and the liberal preference for the legislative branch, in favor of an impartial spectator approach toward executive versus legislative power issues in light of constitutional text, context, history, practice, precedent, and prudential considerations.

Further examples hinting at future development of Supreme Court decisionmaking appear in Chapters 17-32, which consider Supreme Court decisions under specific doctrines in greater depth from the perspective of the four decisionmaking styles. In contrast, the discussion in Chapters 13-16 has attempted to provide insight into the basic historical development of law and society generally, with special reference to the American context. As noted in Chapter 15, explanation for that historical development has been grounded in stages of cognitive development, social perspective-taking, and moral development. The thesis is that when a critical mass of actors attain a particular level of cognitive development, social-perspective taking, and moral reasoning development, then political and legal institutions will change to reflect that fact.

As this book is mostly about American constitutional law, the discussion in Chapters 13-16 has been, of necessity, quite summary. Nevertheless, by analogy, in studying the human body, it is necessary to understand the basic features of the human skeleton and basic milestones in human development, such as the loss of baby teeth and their replacement by adult teeth, or the basic changes associated with puberty. There is a lot more to the human body than that, but understanding the skeleton and basic developmental milestones is important. The discussion in these Chapters of the basic stages of individual, social, and legal development is an attempt to provide an understanding of the background skeletal features and milestones in individual, social, and legal development as a means to give some context to the treatment of the “meat and bones” of law and society topics by others.
PART IV: THE FINAL CAUSE OF CONSTITUTIONAL LAW

Part IV of this book discusses the final cause of constitutional law – its purpose and that towards which it is becoming. In one sense, the final cause, or purpose, of constitutional law is the resolution of disputes, and thus the creation of a body of decisions, by courts or other actors, that establish and apply constitutional doctrine. In a larger sense, the final cause is the beneficial result for society in having a legal system that provides for reasoned debate on fundamental issues and their authoritative resolution – resolutions that are final for the time being, but that are subject to change. Part IV explores and evaluates the changing substance of these many “final” resolutions, and their intended and actual effects in society.

Two kinds of issues exist in constitutional law. First, there are structural issues concerning the relationships among the branches of the federal government and between the federal government and state governments. These issues are discussed in Chapters 17-20. Second, there are issues that deal with the relationships between governments and individuals, or, for the 13th Amendment that outlawed slavery, create individual rights against other individuals as well as governments. These doctrines are dealt with in Chapters 21-32. One aspect of each doctrine is important to emphasize at the outset: for every issue, if the government has a valid reason to act, that reason makes the action constitutional, even if other reasons for the act are not constitutionally valid.

With respect to both structural and individual rights issues, the cases and the doctrines they establish and apply reflect the four judicial decisionmaking styles. These styles were introduced in Chapters 1-4; their use of text, purpose, context, history, legislative and executive practice, judicial precedents, and prudential considerations were discussed in Chapters 5-8; their specific manner of constitutional law decisionmaking were discussed in Chapters 9-12. The cases also reflect the perspectives characteristic of the various eras in American law described in Chapters 13-16: traditional natural law, formalism, Holmesian, instrumentalism, and modern natural law. In addition, the discussion in Part IV addresses the views of various commentators on the Constitution. This discussion includes classic commentary, such as by Alexander Hamilton and James Madison in The Federalist Papers in 1788, or Justice Story in his 1833 work, Commentaries on the Constitution of the United States. It also includes discussion of 20th-century and 21st-century commentators. Without giving an exhaustive list of commentators cited in Part IV, this discussion includes those who have supported a very strong federal government model, as in Professor William Crosskey’s 1953 treatise, Politics and the Constitution; to more moderate views of federal power, as in the various editions of the treatises of Professor Laurence Tribe’s American Constitutional Law or Professors John Nowak and Ronald Rotunda’s Constitutional Law; to a more limited view of federal power, as in Professor Randy Barnett’s 2004 book, Recovering the Lost Constitution.

The intent of this discussion is to provide at least an introduction to the various possible interpretations of the Constitution that could be adopted by different individuals. The discussion will address how each reflects, or does not reflect, aspects of text, purpose, context, history, legislative and executive practice, judicial precedents, and prudential considerations. The discussion in Chapters 17-32 will also compare these possible interpretations with what the majority of the Supreme Court has decided at any particular time, or may be likely to decide in the future, both in terms of specific doctrines and in terms of general issues likely to be prominent for Court resolution.
The text of the Constitution, drafted during the summer of 1787, and ratified in special state ratifying conventions in all of the original 13 states by 1789, discussed at § 18.4.5, grants powers, distributes them among the branches, and provides for limitations or prohibitions on the use of government power. Drafted consistent with the natural law style of interpretation, which focuses on both purpose and literal text, discussed at § 12.2.1.1, the initial text of the Constitution, the Preamble, announced the 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.” Inferences to be drawn from the Preamble are discussed at § 18.1.

Following the Preamble, the Constitution contains seven articles. Article I creates a national legislature, defines methods for selecting its members, enumerates legislative powers, and adds specific prohibitions on federal and state power. The powers granted to Congress are discussed at §§ 18.1.1-18.3.10. Specific limitations on federal power are noted at § 18.5, while limitations on state powers are noted at § 18.6.1, including the Contracts Clause, discussed at § 22.1. Regarding separation of powers issues, discussed generally at § 19.1, Congress’ ability to delegate power to the other branches of government is discussed at § 19.2. The methods of selecting members to Congress and the means of passing legislation are discussed at §§ 19.4.1-19.4.2 & 20.1.2.2. Issues of legislative immunities from suit are discussed at § 20.1.4.1. Implied limitations on state and federal power resulting from intergovernmental immunities doctrine are discussed at § 20.2. Implied limitations on state power under the dormant commerce clause doctrine are discussed at § 20.3.2.

Article II of the Constitution contains similar material on election, appointment, powers, and immunities for the executive branch. Matters of executive election, appointment, and powers are discussed at §§ 19.3, 19.4.3 -19.4.4 & 20.1.2.1. Executive immunities are discussed at § 20.1.4.2. The removal of executive officials through Congress’ impeachment power is discussed at § 20.1.3.

Article III defines judicial power. The nature and scope of federal judicial power under Article III is discussed in Chapter 17. Judicial immunities are discussed at § 20.1.4.3. The removal of judicial officials from office through impeachment is discussed at § 20.1.3.

Article IV deals with relationships among the states. Its provisions provide for: Admittance of New States, § 3, cl.1, discussed at § 18.6.2.1; Federal and State Power over Property, § 3, cl.2, discussed at § 18.6.2.2; Guarantee Clause, § 4, discussed at § 18.6.2.3; Privileges and Immunities Clause, § 2, cl.1, discussed at § 20.3.3; Full Faith and Credit Clause, § 1, discussed at § 23.1.4; Extradition Clause, § 2, cl.2, discussed at § 23.2.2.4; and Fugitive Slave Clause, § 2, cl.3, discussed at § 25.1.

Article V covers the process of Amending the Constitution. The process of amendment is discussed at § 20.1.1.3. The ban on depriving a state of equal suffrage in the Senate without consent is discussed at § 20.1.2.2. The limitations on amendments regarding slavery prior to 1808 are discussed at § 25.1.

Article VI contains three clauses. Article VI, cl. 1, commits the United States to pay debts contracted under the previous Articles of Confederation, as well as under this Constitution, noted at § 17.2.4.3. Article IV, cl.2, contains the Supremacy Clause making the Constitution, and laws
and treatises made pursuant thereto, the Supreme Law of the Land, discussed at § 20.3.1. Article VI, cl. 3 requires federal and state officials to be bound by “Oath or Affirmation” to support the Constitution, along with the requirement that “no religious Test shall ever be required as a Qualification to an Office or public trust under the United States,” a clause which is discussed at § 32.1.2.1.

Article VII provides for ratification of the Constitution in special state ratifying Conventions by nine of the then-existing 13 States, discussed at § 18.4.5.

To ensure ratification of the Constitution, the supporters promised the states that they would draft a Bill of Rights to limit certain kinds of governmental power. The first ten Amendments became this Bill of Rights. As noted in Chapter 23, the first eight of these Amendments provide for a range of civil liberties protections. These Amendments are discussed in Chapter 23, with the exception of the Fifth Amendment Takings Clause, discussed at § 22.2; the Fifth Amendment Due Process Clause applied to civil matters, discussed in Chapter 27; and the First Amendment. The First Amendment doctrines regarding “freedom of speech, or of the press,” are discussed in Chapter 29; exceptions to speech and press rights are discussed in Chapter 30; freedom of assembly and association are discussed in Chapter 31; the Establishment and Free Exercise Clauses are discussed in Chapter 32.

Regarding the final two of the first ten Amendments, the Ninth Amendment states that the “enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people,” and is discussed in Chapter 24. The 10th Amendment makes clear that 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 10th Amendment is discussed at § 18.4.

The remaining Constitutional amendments are addressed in this book at the following places:

11th Amendment, regarding state immunity from suit in federal courts, discussed at § 17.2.4;
12th, 20th, 22nd, and 25th Amendments, regarding Presidential selection, discussed at § 20.1.2.1;
13th Amendment, banning slavery or involuntary servitude, discussed at § 25.1;
14th Amendment Citizenship Clause, discussed at § 25.2;
14th Amendment Privileges or Immunities Clause, discussed at § 25.3;
14th Amendment Equal Protection Clause, discussed in Chapter 26;
14th Amendment Due Process Clause, discussed in Chapter 27;
15th Amendment, banning racial discrimination in voting, discussed at § 25.4;
16th Amendment, regarding federal income taxation, discussed at § 18.3.1;
17th Amendment, regarding aspects of direct election of Senators, discussed at § 20.1.2.2;
18th and 21st Amendments, regarding imposition, and repeal, of Prohibition, discussed at § 20.4;
19th, 23rd, 24th, and 26th Amendments, regarding rights to vote for women, residents of the District of Columbia, any person without having to pay a poll tax, and persons who are 18 years of age or older, discussed at § 20.1.2.2;
27th Amendment, regarding no law varying compensation of members of Congress taking effect until after the next congressional election, discussed at § 20.1.1.3.

The power of Congress to enforce certain of these Amendments (13th, 14th, 15th, 19th, 23rd, 24th, and 26th) by appropriate legislation is discussed in Chapter 28.
As noted at § 5.2.2.2, there are four main elements of constitutional structure: judicial review, federalism, separation of powers, and checks and balances. Judicial review will be discussed in Chapter 17. Federalism will be discussed in Chapter 18. Separation of powers will be discussed in Chapter 19. Additional issues regarding checks and balances will be discussed in Chapter 20. Taken together, these issues provide the governmental blueprint for our form of constitutional democracy.

Given the focus of this book on constitutional law, the discussion of judicial review in Chapter 17 concerns the rules and doctrines regarding judicial examination of whether actions by government officials or other individuals have violated the United States Constitution. Chapter 17 also discusses what limits exist on judicial review regarding the actions of government officials or others.

Federalism concerns the relationship of power between the federal government and the states. As discussed in Chapter 18, this involves issues of federal power versus state power, both in terms of the outer limits of expressly granted or implied federal power, and in terms of prohibitions on federal and state power. Determining the extent of this power involves considering constitutional text on federalism issues; arguments of context, particularly related provisions in the Constitution and theories of federalism which structured the Constitution; the history leading up to a constitutional provision’s ratification; legislative and executive practice under that provision; the Supreme Court’s precedents in interpreting that constitutional provision; and prudential considerations.

Separation of powers doctrine concerns principles regarding the balance of power between the legislative, executive, and judicial branches. As discussed in Chapter 19, the separation of powers doctrine underlying our constitutional democracy 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 authoritatively to declare what the law is and to order or 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.

Additional separation of powers concerns are discussed in Chapter 20. They involve such issues as immunities from judicial action for members of the legislative and executive branches; immunities for the federal government from state taxation or regulation and immunities for states from federal taxation or regulation; limitations on state action burdening interstate commerce, or protecting state residents from certain kinds of discrimination by other states; and the balance involved in finding limits on the power given states by the 21st Amendment over distribution of intoxicating liquors.

While other democracies in the world have differing blueprints for their forms of government, all share a concern with each of the various issues presented in Chapters 17-20. In each society, there has been a similar struggle among natural law, formalist, Holmesian, and instrumentalist kinds of decisionmaking styles, and each society is gradually moving, as discussed in Chapters 15-16, in the direction of modern natural law. While the focus in Chapters 17-20 is on the specific choices made in the context of American constitutional democracy, some comments regarding choices made by other countries are presented along the way, particularly regarding judicial review at § 17.1.4.
CHAPTER 17: JUDICIAL REVIEW

§ 17.1 Foundations of Judicial Review

§ 17.1.1 The Nature and Basis of Judicial Review

Judicial review has both a broad and a narrow meaning. In its broadest sense, judicial review encompasses all judicial inquiries into the legality of what has been done by lower courts, legislatures, administrative officials, or individuals pursuant to constitutional law, statutes, or the common law. However, in keeping with the focus of this book, the phrase is used here in its narrower sense to connote only judicial examination of whether actions by government officials or others have violated the United States Constitution.

With respect to judicial declarations of unconstitutionality, all courts in the United States, and most government officials and the American people, accept three basic principles rooted in the classic case of *Marbury v. Madison*,\(^1\) decided in 1803, and vigorously reaffirmed 155 years later in *Cooper v. Aaron*,\(^2\) the only Supreme Court opinion signed by all nine Justices. These three principles are:

1. The United States Constitution is our Nation’s basic law;
2. It is a judicial duty to say what the law is, and thus whether a federal or state law or its application has violated the Constitution; and
3. With respect to the judiciary in both state and federal courts, decisions by the Supreme Court of the United States are the final authority on the meaning of the Constitution.

The first of these three propositions is clearly supported by the Constitution’s text, particularly its Preamble ("We the People . . . do ordain and establish this Constitution") and the Supremacy Clause of Article VI, cl. 2 ("This Constitution . . . shall be the supreme Law of the Land"). Even the Virginia and Kentucky Resolutions of 1798-99, and the nullification movement in South Carolina and other Southern states in the 1830s and thereafter, discussed at § 25.3 nn.56-58, agreed with this proposition. They disagreed with the second and third propositions, specifically the view that federal courts could authoritatively pronounce on the Constitution’s meaning, instead of state courts or legislatures. In the words of the Kentucky Resolution of November 16, 1798, which was based on a draft by Thomas Jefferson, “That to this compact [the Constitution] each state acceded as a state, and is an integral party, its co-states forming, as to itself, the other party: that the government created by this compact was not made the exclusive or final judge of the extent of the powers delegated to itself; since that would have made its discretion, and not the Constitution, the measure of its powers, but that, as in all other cases of compact among parties having no common judge, each party has an equal right to judge for itself, as well of infractions as of the mode and measure of redress.”\(^3\)

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

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The second of these propositions is not so clearly supported by constitutional text. No literal text in the Constitution expressly establishes an authority in the Supreme Court or in any other court to decide that governmental acts are repugnant to the Constitution and, on that ground, to declare them void. Thus, the defense of judicial review has had to be based upon sources of constitutional interpretation other than literal text: purpose, context, history, practice, precedent, and prudential considerations. For example, regarding legislative practice on this issue, in response to the Kentucky and Virginia Resolutions of 1798, the Massachusetts legislature responded on February 9, 1799, “That this legislature [is] persuaded that the decision of all cases in law and equity arising under the Constitution of the United States, and the construction of all laws made in pursuance thereof, are exclusively vested by the people in the judicial courts of the United States.”

The New Hampshire legislature responded on June 4, 1799, “That the state legislatures are not the proper tribunals to determine the constitutionality of laws of the general government; that the duty of such decision is properly and exclusively confided to the judicial department.”

As discussed at § 17.1.2.1, the result in Marbury v. Madison, where the Supreme Court held that the judiciary has the power of judicial review, has been a foundation for the rule of law in the United States since 1803. Basing judicial review on an asserted judicial power to declare the law has the significant consequence that even lower courts can make declarations of unconstitutionality, and such decisions are binding for the jurisdiction covered by that court, unless set aside by a higher court. For example, under the general grant of judicial power to the federal courts in Article III of the Constitution, lower federal courts, as well as the United States Supreme Court, have the power to bind even state legislative and state executive officials regarding matters of federal law, as long as the court has jurisdiction to decide the case, as discussed at §§ 17.2.1-17.2.3, and state sovereign immunity does not exist, as discussed at § 17.2.4.

The third of these three propositions – that concerning both state and federal courts, decisions by the Supreme Court of the United States are the final authority – is supported by inferences from the text of the Supremacy Clause and Article III. As Justice Story wrote in 1816 in Martin v. Hunter’s Lessee, the federal judiciary, in actions brought in federal court, can impose federal law on state legislative and executive action because of the Supremacy Clause. The Supreme Court can also engage in appellate review of state court decisions because otherwise the Court would not have appellate review in "all other cases" involving "the Laws of the United States, and Treaties made, or which shall be made, under their Authority," as authorized by Article III. As discussed at §17.1.2.2, a full defense of proposition three also requires resort to arguments of purpose, context, history, practice, precedent, and prudential considerations.

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4 Id. at 441.
5 Id. at 442.
6 5 U.S. (1 Cranch) 137, 176-80 (1803).
7 14 U.S. (1 Wheat.) 304, 338-42 (1816).
8 Id. at 342.
§ 17.1.2 Judicial Review During the Original Natural Law Era: 1789-1873

§ 17.1.2.1 Marbury v. Madison versus the Tripartite Theory of Judicial Review

In 1803, the Supreme Court held in Marbury v. Madison⁹ that the Supreme Court is the authoritative interpreter of the constitutionality of legislative action and that courts are not bound by an unconstitutional legislative act. In support of this conclusion, Chief Justice Marshall resorted to arguments other than express constitutional text on point, since the text of the Constitution does not directly address the issue of judicial review. Regarding arguments of purpose, Marshall noted that there would be no purpose for a written Constitution with limited powers if those limits could be passed at any time by those intended to be restrained. If the Constitution is on a level with ordinary legislative acts, written constitutions are absurd attempts to limit governmental powers. Regarding separation of powers arguments, Marshall noted that under the American theory of separation of powers, “It is emphatically the province and duty of the judicial department to say what the law is.” Regarding arguments of history, Marshall noted that all those who have framed written constitutions contemplate them as forming the paramount law.

While the term “law,” as opposed “paramount law” or “supreme law,” was used in the 18th century to refer to statutory or common law, not constitutional law, and thus it could be argued that what “is emphatically the province and duty” of the judiciary is only to determine statutory or common law,¹⁰ Marshall stated in Marbury that “[i]f 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 . . . the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.” In these sentences, Marshall used “law” and “rules” to refer to statutory and constitutional provisions.

Justice Marshall also made use of related provisions in the Constitution to defend Marbury’s holding that courts are not bound by a void legislative act. Under the Constitution, the judicial power is extended to all cases arising under the Constitution. Marshall stated that this section implies that courts should examine the Constitution. Judges swear to support the Constitution, which indicates it is not closed to them. Certain constitutional provisions, like those dealing with two witness to convict for treason, or the Ex Post Facto Clause, clearly anticipate judicial implementation. Article VI, cl. 2 declares as supreme law the Constitution and laws made "in pursuance" of the Constitution.

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 the power and duty of courts 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.

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⁹ 5 U.S. (1 Cranch) 137, 176-80 (1803).

Professor William Winslow Crosskey contended in his massive 1953 treatise, *Politics and the Constitution*,\(^\text{11}\) 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,\(^\text{12}\) 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.\(^\text{13}\)

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 the Constitution is carried into effect through legislative action, the legislature must decide the constitutionality of its act. In enforcing the law, the judiciary does not adopt legislative acts as its own. For his own part, Justice Gibson retracted this view in 1845, and, consistent with a natural law style of interpretation, embraced judicial review based upon practice and precedent.\(^\text{14}\)

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.

As a general matter, the fact that a majority of the framers and ratifiers may have been operating under a Stage 3 belief in natural law theory, as discussed at § 15.4.1 nn.50-59, 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. . . .

[It] 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.15

Whether any particular society, operating at a Stage 3 level of concrete operational thought, will adopt some form of judicial review is ultimately dependent upon the concrete customs and traditions of that society. For societies like England and France, where the Stage 3 democratic revolutions against the authority of the King took place against a background of close connections between the King and the King’s courts, 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 concrete reality was different. In an article entitled The Origins of Judicial Review, which is an exhaustive treatment of judicial review in America during the post-Revolutionary War and ratification era, Professors Prahash & 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] created 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.16

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.17

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.

As discussed at § 17.2.2.1, 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


17 Id. at 933-81; Randy E. Barnett, The Original Meaning of Judicial Power, 12 Sup. Ct. Econ. Rev. 115 (2004).
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 1805, discussed at § 20.1.3 n.39. 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.”

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 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* and historical evidence supporting the principle of judicial review, 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.”

Perhaps fortunately for the Marshall Court, it did not again undertake to invalidate an important general act of Congress. During Marshall's tenure as Chief Justice, the only other case holding an act of Congress unconstitutional was *Hodgson v. Bowerbank* 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 description of cases to which the 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*. 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 on constitutional questions 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. He was concerned about the anti-democratic effects of attributing finality on the Constitution to an unelected Court. 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

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19 Prakash & Yoo, supra note 16, at 907.
20 9 U.S. (5 Cranch) 303 (1809).
...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.22

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. President Jackson vetoed the bill based in part 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 the 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 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.23

A more extreme view was stated in 1987 by Attorney General Ed Meese, but was later withdrawn. Under that view, as noted at § 5.3.3.3 n.101, 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.”24 Such a view, adopting a form of civil disobedience by government actors, is contrary to respect for Marbury’s principle of judicial review. Of course, an even more vigorous rejection of Marbury is reflected in President Jackson’s ignoring the Supreme Court’s decision in Worcester v. Georgia in 1832 regarding the Cherokee tribe in Georgia, where, as noted at § 6.4.2 n.135, President Jackson is “apocryphally” reported to have said, “John Marshall made his decision; now let him enforce it.”

After Dred Scott, the next case to invalidate an act of Congress was the Legal Tender Act, struck down in Hepburn v. Griswold in 1870. That case, however, was promptly overruled in 1871 in Knox v. Lee.25 In sum, the power of judicial review over acts of Congress, while stated in Marbury, and applied thereafter, was not cemented by frequent use from 1789 to 1873.

§ 17.1.2.2 Martin v. Hunter’s Lessee and Federal Court Supremacy

Narrowly viewed, the core holding in Marbury v. Madison only applied to Supreme Court supremacy over the legislative branch of the federal government. Similar reasoning, however,

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would make the Supreme Court’s interpretation of the Constitution supreme over the federal executive branch. Thus, *Marbury* has been viewed as answering fully the second proposition regarding judicial review stated in § 17.1.1, that is, the authority of the courts to be the authoritative interpreters of the Constitution.

The issue of Supreme Court supremacy over state courts, that is, the third proposition regarding judicial review stated in § 17.1.1, was addressed by the Court in 1816 in *Martin v. Hunter’s Lessee*.26 In *Hunter’s Lessee*, Justice Story wrote for the Court that the Constitution is to be given a reasonable construction so that a power granted in general terms is not to be restrained unless that restraint results from context, expressly or by necessary implication. Story then said that nothing in the Constitution limits the federal appellate jurisdiction that is given in broad terms by the grant in Article III of federal judicial power over all cases involving the Constitution, laws, or treaties of the United States. It was foreseen, he said, that many such cases would originate in state courts. To them the federal judicial power must extend by appellate review or not at all.

Justice Story added that such a power is not inconsistent with the purpose of the Constitution, with related provisions in the Constitution, or with prudential considerations.27 As Story noted, the Constitution is crowded with provisions that act directly on the states. Federal courts, exercising their original jurisdiction, can review state legislative and executive acts, and exercising the same right over state courts, by appellate review, is not a higher or more dangerous act. The final decision must rest somewhere, and common sense says the United States Supreme Court is the right place. Prudentially, it is important to have uniformity on matters within the purview of the Constitution, a motive for Court review “perfectly compatible with the most sincere respect for state tribunals.” Justice Story also noted that the Constitution “has presumed (whether rightly or wrong we do not inquire) that state attachments, state prejudices, state jealousies, and state interests, might some times obstruct, or control, or be supposed to obstruct or control, the regular administration of justice.” As a consequence, cases involving parties from different states, so-called diversity jurisdiction, discussed at § 17.2.2.1.B nn.108-11, are able to be heard in federal courts, rather than a state court which might favor its own citizens, even if the case only involves state law issues.

The holding in *Martin v. Hunter’s Lessee* was extended to appeals in state criminal cases by *Cohens v. Virginia*.28 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 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 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, would not originate in the Supreme Court. Marshall said that to bar jurisdiction over such an appeal would

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26 14 U.S. (1 Wheat) 304, 324-28 (1816).
27 Id. at 328-52.
28 19 U.S. (6 Wheat.) 264, 392-95 (1821).
destroy some purposes for which appellate power was conferred. Reflecting the natural law willingness to consider purpose as fully as text, which is distinguishable from the formalist greater reliance on literal text alone, Marshall stated that a negative should be implied from words granting original jurisdiction only where that promotes, and not where it 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,” noted at § 5.2.2.2.B, 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 meaning and 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. As discussed at § 17.2.2.3, 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 that the United States Constitution, and federal laws and treaties made pursuant thereto, are the supreme law of the land.

§ 17.1.3 Later Views on Judicial Review

§ 17.1.3.1 Judicial Review During the Formalist Era: 1873-1937

The core holdings of Marbury v. Madison and Martin v. Hunter’s Lessee established the modern doctrine of judicial review. Between 1873 and 1937, formalist-era courts had only to apply that


doctrine to the cases that came before them. Thus, decisions of the formalist-era Court striking
down various governmental actions, particularly economic regulations adopted by Congress or by
various state legislatures, were consistent with almost 100 years of judicial practice. Despite the
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,
discussed at § 9.2.2.2, judicial review had become “settled law.”

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.33 As discussed at § 27.3.2.1, during this Lochner era the Court was concerned
by what it saw 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.34

§ 17.1.3.2 Judicial Review During the Holmesian Era: 1937-1954

As discussed at § 27.3.3, 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, discussed at § 10.2.1.2, 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.35

At the extremes, 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

33 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
v. Dagenhart, 247 U.S. 251 (1918); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495
(1935); Carter v. Carter Coal Co., 298 U.S. 238 (1936) (Commerce Clause cases).

34 See, e.g., James B. Thayer, The Origin and Scope of the American Doctrine of
Constitutional Law, 7 Harv. L. Rev. 129, 144 (1893).

35 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”).
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.37

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 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. “When the validity of an act of the Congress is drawn in question, and 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.”38

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.39


§ 17.1.3.3 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.\(^4\) Of course, the Court also applied the *Marbury* principle of judicial review to executive branch action, including action of the President, and to action by states, including state legislatures and Governors. 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, discussed at § 11.2.1.2 nn. 17-20, which views the Court as a protector of the unempowered in society, with a special focus on civil liberties protections in the Constitution.

§ 17.1.3.4 Judicial Review During the Modern Natural Law Era: 1986-Today

The pace of invalidating federal laws has ebbed during the current 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, as discussed at § 17.2.4.2, 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. As discussed at § 18.2.5, the Court has found unconstitutional statutes held to exceed Congress’ Commerce Clause power.\(^4\)

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


\(^4\) *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).

\(^4\) *See, e.g.*, Brown v. Board of Educ., 347 U.S. 483 (1954) (state mandated segregated schools unconstitutional); Cooper v. Aaron, 358 U.S. 1 (1958) (the Governor of Arkansas must comply with *Brown v. Board of Education*).

avoid making unnecessarily broad constitutional judgments. This issue of “as applied” versus “facial” challenges is discussed at § 17.4.1.

Given the past 200 years of case decisions since *Marbury*, the possibility is remote of limiting the doctrine of judicial review to tripartite situations. Indeed, in 1990, that possibility was at least impliedly repudiated. In *United States v. Munoz-Flores*, the government contended, and Justices Stevens and O’Connor agreed, in accord with the tripartite theory, that the Court should not engage in judicial review of questions arising under the Origination Clause, which requires that all bills for raising revenue shall originate in the House of Representatives. They reasoned that the House could guard against Senate intrusion on its power by simply refusing to pass any revenue bill that originated in the Senate. However, the majority rejected even this remnant of tripartite theory. It held that judicial review should insure that a law complies with all relevant constitutional limits, including matters of procedure. Applying this theory, the majority held that the Origination Clause did not apply since the challenged law was not one for raising revenue. Concurring, Justice Scalia concluded that an enrolled bill's indication of the house of origin should be accepted, because a judicial inquiry would manifest lack of respect due a coordinate branch and produce uncertainty, a particular concern of formalist judges. Here there was no problem since the law was enrolled as H.J. Res. 648.

§ 17.1.4 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 contemporary 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, in such words as these:

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46 495 U.S. 386, 403-08 (1990) (Stevens, J., joined by O’Connor, J., concurring in judgment).
47 *Id.* at 401.
48 *Id.* at 408-10 (Scalia, J., concurring in the judgment).
49 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).
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.51

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 sound 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.52 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.53

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. 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.54 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 in the legislative chamber.

These kinds of considerations have a 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, discussed at §§ 17.2.4 & 18.4.5; cutting back on various forms of aggressive affirmative action, as in Richmond v. J.A. Croson Co. and Gratz v. Bollinger,


54 Dred Scott, 60 U.S. (19 How.) 393 (1857) (in dicta, Missouri Compromise of 1820 limiting slavery to the South unconstitutional, among other flaws), discussed § 25.1; Plessy, 163 U.S. 537 (1896) (racial segregation of railroad cars not a violation of equal protection), discussed § 26.2.1.1.B; Lochner, 198 U.S. 45 (1905) (limit on baker’s working hours invalid as an unreasonable restraint on liberty of contract), discussed § 27.3.2.1; Dagenhart, 247 U.S. 251 (1918) (Congress lacks the power to ban from interstate commerce products manufactured using child labor), discussed § 18.2.2.
discussed at § 26.2.1.4; and the 5-4 decision in *Bush v. Gore*, discussed § 26.5.3. Prominent among such commentators sharing this concern is Professor Mark Tushnet. Professor Tushnet has noted a number of alternative forms of judicial review to that of *Marbury v. Madison*, and has proposed moving away from *Marbury*’s “court-centered” approach in favor of “populist” interpretation by citizens and elected government officials.55 Other progressive commentators have also focused on this problem, as have the proponents of deliberative democracy.56

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 impediments to free speech, publication, and political association, and by striking down discrimination against certain classes of voters,57 as noted at §§ 10.2.1.2 & 10.3.2. However, given Holmesian deference, Court review should be limited. As Justice Frankfurter, citing 19th-century Harvard Law School Professor Thayer, noted in *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.58

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.”59 Professor Lino Graglia has similarly written that courts should not be public policy makers in society.60


58 319 U.S. 624, 669 (1943) (Frankfurter, J., dissenting), citing James Bradley Thayer, John Marshall 104-10 (1901).

59 Id. at 649, citing Missouri, Kansas & Texas R. Co. v. May, 194 U.S. 267, 270 (1904).

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 Marbury and what it says about judicial review. For example, Professor Michael Paulsen has stated that 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 Marbury stands for the tripartite theory of judicial review. Further, adopting the extreme formalist theoretical position that rejects the binding force of precedent, discussed at § 4.3.1, Professor Paulsen rejected the influence of 200 years of constitutional precedents since Marbury. Professor Paulsen also stated that Marbury implicitly supported a formalist, static, textualist model of constitutional interpretation.61

As discussed at §§ 8.4.1, 12.1 & 12.3.3, as an historical matter it is difficult to claim that the framers and ratifiers predominantly believed in a formalist theory of constitutional interpretation. This is true despite the fact that, as discussed at § 12.2.1.3 nn.25-30, Chief Justice Marshall’s opinions were more “textualist” than later natural law opinions, which involve more historical “originalism.” Given this reality, even if, as noted at § 17.1.2.1 text following n.17, Marbury could be read in the narrower sense of supporting a tripartite theory of judicial review, under a natural law theory of interpretation, as discussed at §§ 12.2.2.1-12.2.2.2, the 200 years of legislative, executive, and social practice and judicial precedent supporting the broader reading of Marbury fix the broader theory of judicial review 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.

From the perspective of the eras of societal development, discussed at § 15.4.1, the customs and traditions of any society at Stages 3 and 4 will determine whether that society has any form of judicial review. Given our Nation’s history, the customs and traditions have been more in favor of judicial review, although occasional attempts to limit, or alter, our form of 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.62 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.63 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.”

In contrast, societies based on the reasoned logic of formal operational thought, such as Stages 5 and 6, are more likely to evolve some form of robust judicial review. This is because, as Alexander Hamilton observed in The Federalist No. 78:

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.

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. 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

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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, discussed at § 17.3.2 nn.490-96.

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, however, which as of 2006 had never been used. 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 developing doctrines of judicial review.

Regarding the nature of adjudication in these countries, Professor Thomas Grey 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

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This Stage 6 style of natural law decisionmaking focused on universal principles of human rights has naturally been criticized by Stage 4 formalists, both on the static constitution model ground that at the founding Americans and Europeans had very different notions of constitutional democracy then, as Justice Scalia has noted, 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 Stage 6 society based on “laws and rules and transnational negotiation and cooperation,” but rather should advance a vision more in line with “power politics,” a Stage 4 vision reminiscent of the McKinley era of “Manifest Destiny,” as discussed at § 14.4 n.120.

Use of international norms in this Stage 6 way is different than traditional interactions between domestic courts and international legal bodies. Given increasing globalization of commerce and travel, these traditional interactions have increased greatly over the past 25 years. It has been noted:

Talk of globalization is everywhere, but it still comes as a surprise to many lawyers and scholars who do not specialize in international law to learn that there are now more than fifty international courts, tribunals, and quasi-judicial bodies, most of which have been established in the past twenty years. More legal professionals are aware, at least in some general way, that a large volume of disputes are resolved through binding international arbitration. National courts, too, are increasingly being called upon to apply international law and to interact with these international courts and with the courts of other nations.

Consider a handful of recent cases. 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. . . . Each case represents a facet of an emerging and interconnected international judicial system of trans substantive rules of process and procedure that govern relationships among courts involved in international adjudication.

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Prudentially, the practice of judicial review as it has evolved in most Stage 5 and 6 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.” 71 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, 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. 72

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, as the Court did with respect to President Nixon when it required him to turn over the Watergate tapes in United States v. Nixon, discussed at § 20.1.4.2. A threat of impeachment led the President to resign. Judicial review thus complemented 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 decisionmaking, a result consistent with a Stage 6 commitment to the elaboration of rational principles of justice through the rule of law.

§ 17.2 The Jurisdiction of the Federal Courts

To bring an action successfully in a federal court, certain conditions must exist. These include: (1) (a) a case or parties falling within the Constitution’s grant of federal judicial power, which is not

71 Paulsen, supra note 61, at 2742.

barred by the 11th Amendment principle of state sovereignty, or the Fifth Amendment requirement of due process, plus (b) a jurisdictional statute authorizing federal court jurisdiction, with the exception of the Supreme Court’s grant of original jurisdiction which requires no congressional authorization; (2) one of the plaintiffs having standing, plus no reason for the court to decline an exercise of jurisdiction, that is, the justiciability issues of ripeness, mootness, and the political questions doctrine; and (3) a valid cause of action. This first of these issues is explored in the remainder of § 17.2. The second issue is explored in § 17.3. The third issue is explored in § 17.4.

§ 17.2.1 Federal Jurisdiction: What Article III Provides

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.”

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

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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 book will use the word “cases” to include all the disputes listed as “cases” or “controversies” in Article III.

§ 17.2.2 Types of Cases for Which Federal Jurisdiction Exists

§ 17.2.2.1 Constitutional Litigation Initiated in Federal Courts

Article III provides for litigation initiated in the federal court in two kinds of cases. First, there are cases of original jurisdiction to bring the case initially in the Supreme Court. Second, and most often, there is jurisdiction to bring the case in the lower federal courts, with a statutory right to appeal to the Supreme Court.

A. Original Jurisdiction in the Supreme Court

Original jurisdiction is granted to the Supreme Court under Article III, § 2, cl. 2 in “all cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party.” The interpretation of this provision was at the heart of the constitutional issue addressed in Marbury v. Madison, where the doctrine of judicial review was established. The facts in Marbury v. Madison are relatively simple. As summarized by Professor Erwin 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. 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.74

74 Erwin Chemerinsky, Constitutional Law 1-2 (2d ed. 2005). Congress did provide for one Justice to hear procedural matters in August, 1802. That August Term was held each year until Congress abolished it in 1839. Ross E. Davies, A Certain Mongrel Court: Congress’s Past Power and Present Potential to Reinforce the Supreme Court, 90 Minn. L. Rev. 678, 688-705 (2006).
At the time, the relevant provision of the Judiciary Act, § 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.75

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, 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 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.”76

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

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76 Marbury v. Madison, 5 U.S. (1 Cranch.) 137, 147-48 (1803) (attorney’s argument); id. at 175-76 (Chief Justice Marshall’s response).
correctly state that *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 if mandamus were proper, Marshall was able to create a conflict between § 13, so interpreted, 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 was able to use *Marbury v. Madison* to establish the doctrine of judicial review, discussed at § 17.1.2.1. Given this result, it has always been a matter of some speculation whether *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 *Marbury v. Madison*, Marbury could have re-filed in that district court, which he refused to do. 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 *Marbury* that finding jurisdiction was not “necessary in a case such as this to enable the court to exercise its appellate jurisdiction.”

More generally, 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.” With respect to judicial matters, the Adams Administration, in its final days, had 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 and “ride circuit”; and reduced the size of the Court in the future from six to five, in order to limit opportunities by the incoming Jefferson Administration to fill any later vacant Supreme Court positions.

The Jefferson Administration repealed the Act 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. The Justices during 1802 had to decide whether to begin “riding circuit” again, or risk impeachment if they did not. Eventually, given the political realities, the Court members did agree to “ride circuit” again. At the time, this duty, while burdensome in terms of travel, would not have compromised the ability of Justices to decide cases before the Supreme Court, as the Supreme

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77 *Id.* at 176. Regarding these speculations about *Marbury*, see generally Susan Low Bloch, *The Marbury Mystery: Why Did William Marbury Sue in the Supreme Court?*, 18 Const. Comment. 607 (2001), and sources cited therein.
Court’s docket in the early years was often less than 10 cases each Term. 78 The constitutional challenge to repeal of the Act – principally that 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, 79 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 some Supreme Court response. 80

The Court’s opinion in Marbury is distinctive in at least three respects. First, Marshall used the first half 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. 81 This aspect of the opinion apparently infuriated 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, given the conclusion on jurisdiction, was clearly obiter dicta. 82 Second, the normal judicial practice is to read statutes, if possible, to avoid constitutional problems, rather than reach out, as in Marbury, to create a constitutional problem. 83 Finally, under contemporary standards of conflict of interest, 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. 84

Additional aspects of Marbury also deserve comment. First, 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


79 5 U.S. (1 Cranch.) 299, 308 (1803).


81 See, e.g., Louisville & N.R. Co. v. Mottley, 211 U.S. 149, 151-54 (1908).


83 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.”).

argument before the Supreme Court, suggesting that such a characterization of Madison was viewed as plausible by Marbury’s attorney.⁸⁵

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 which, as cited at § 17.2.2.1.A n.75, 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 encompasses 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.”⁸⁶ This example, however, underscores the dangers of a literal approach to interpretation, and the wisdom of considering a provision's purpose.

A second aspect of Marbury concerns an alternative interpretation of § 13 that might make Marshall’s interpretation of the section more plausible. This interpretation involves noting that the last two clauses of § 13 concern Supreme Court “power” to issues writs of prohibition and writs of mandamus, while the earlier provisions in § 13 speak to the Court’s “jurisdiction.” Under this view, the prohibition and mandamus provisions are not about jurisdiction, but merely confirm that the Court has the power to issue such writs whenever, from other sources of law, jurisdiction exists.⁸⁷

Under one variation of this argument, Marshall would still have misread § 13, as the earlier provisions in § 13 only give the Supreme Court original jurisdiction in cases involving ambassadors, other public ministers and consuls, and those in which a state shall be a party. Consistent with this view, Congress clarified this aspect of § 13 after Marbury, amending § 13 to provide that the Supreme Court’s mandamus power over executive officials only exists over “persons holding office under the authority of the United States, where a State, or embassador [sic], or other public minister, or consul or vice-consul is a party.”⁸⁸ For cases involving other executive officials, mandamus would have to issue from a lower court, with the Supreme Court policing that use by its appellate jurisdiction in § 13 “from the circuit courts and courts of the several states, in cases herein specially

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⁸⁵ Marbury, 5 U.S. at 152.


⁸⁷ See Akhil Reed Amar, Marbury, Section 13, and the Original Jurisdiction of the Supreme Court, 56 U. Chi. L. Rev. 443, 456-60 (1989).

⁸⁸ Id. at 456.
provided for” and its § 13 power to issue “writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed . . . under the authority of the United States.”

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. The doctrine of intergovernmental immunity is also reflected in § 13 which 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 the Court held in 1838, that district court could exercise mandamus jurisdiction over executive officials subject to their in personam jurisdiction over the District of Columbia. Since most top executive officials then, as now, had their offices in the District of Columbia, this one lower federal court had the power to issue writs of mandamus to federal officials to perform their ministerial acts required by law, subject to review by the Supreme Court under its grant of appellate jurisdiction.

This review was expanded by later congressional acts increasing federal district court jurisdiction and power. During the formalist era, as part of using the federal courts to advance the Republican economic agenda, discussed at § 14.2.2, Congress expanded in 1875 the jurisdiction of the district courts to include general federal question jurisdiction. During the Holmesian era, as part of the triumph of the New Deal administrative state, discussed at § 14.2.3, 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, discussed at § 14.2.4, Congress granted all federal district courts jurisdiction “in the nature of mandamus” to compel federal officials to perform their duties.

A second variation on the view that the writs of prohibition and mandamus provisions of § 13 involved grants of “power” to the Supreme Court, and not questions of “jurisdiction,” concludes that 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


90 Id. at 602-03.


be supported by noting that the Court, prior to Marbury, had considered a number of mandamus cases against federal officials without even raising the question whether original or appellate jurisdiction was involved in the case. 94 Under this view, Marshall and the Supreme Court, faced with Jeffersonian opposition, retreated from this established, broader reading of the Supreme Court’s supervisory power over executive action, in favor of locating mandamus power principally in lower federal courts, subject to congressional authorization, and thus to be used only when Congress joined with the district courts to authorize such mandamus power over executive action. 95 As has been noted, “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.” 96

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. 97 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, 98 with the Court holding that habeas jurisdiction must rest on congressional statutory authorization, and in 1812, when in United States v. Hudson & Goodwin, 99 the Supreme Court rejected any power to enforce a federal common law of crimes, resting federal criminal jurisdiction on statutory authorization alone.

94 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 Bloch & Maeva Marcus, John Marshall’s Selective Use of History in Marbury v. Madison, 1986 Wis. L. Rev. 301, 304-10 (1986), discussing, Yale Todd v. United States (1794) (unreported case).

95 Pfander, supra note 93, at 1592-98.

96 Merrill, supra note 92, at 511.

97 See McConnell, supra note 80, at 26-30.

98 See Pfander, supra note 93, 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 despite Ex Parte Bollman, the Constitution intended to give courts power to issue habeas independent of statutory authorization).

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 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.\(^{100}\)

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 any case by or against a consul or vice-consul to be brought in a district court also makes geographic sense. Given less of a 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.” The only cases today that must be brought originally in the Supreme Court are states suing states.

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 by taking cases that could otherwise be brought in local courts and transferring them to the Court. 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.\(^{101}\) 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,\(^{102}\) 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.\(^{103}\)

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

\(^{100}\) See generally Pfander, *supra* note 93, at 1762-63.

\(^{101}\) *Id.* at 1763-67.


\(^{103}\) See McConnell, *supra* note 80, at 26-28.
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.\textsuperscript{104} As a basis for justifying refusals to hear such cases, the Court cited in \textit{Texas v. New Mexico}\textsuperscript{105} 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 \textit{Massachusetts v. Missouri}\textsuperscript{106} 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. Indeed, 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.\textsuperscript{107}

Criminal cases involving state prosecution of individuals have been held to be not 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 \textit{Cohens v. Virginia}, discussed at § 17.1.2.2, 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, discussed at § 17.2.2.2.

\section*{B. Original Jurisdiction in Lower Federal Courts}

Original jurisdiction in the lower federal courts, whether federal district courts or special courts, such as the Tax Court or Patent Court, discussed at § 17.2.3.1 nn.159-62, has always been held to depend upon congressional action, based on the language in Article III, § 1 granting Congress the power to “establish” lower federal courts and in Article III, § 2, cl.2 to make “Exceptions” and “Regulations” regarding appealing such cases to the Supreme Court. Original jurisdiction in all civil actions arising under the Constitution, laws, or treaties of the United States, so-called “federal question” jurisdiction, has been granted to federal district courts since 1875 by 28 U.S.C. § 1331. With respect to actions against state officials, 42 U.S.C. § 1983 creates a cause of action for conduct

\begin{footnotes}
\item 104 Carstens, supra note 102, at 640.
\item 105 462 U.S. 554, 570 (1983).
\item 106 308 U.S. 1, 19 (1939).
\item 107 \textit{See} California v. Arizona, 440 U.S. 59, 65 (1979), and cases cited therein.
\end{footnotes}
under color of state law that deprives any person of a federal right, and 28 U.S.C. § 1343(3) gives federal district courts jurisdiction to hear such cases concurrently with state courts. Attorneys’ fees are granted to prevailing parties in a number of civil rights cases, including § 1983 actions, by 42 U.S.C. § 1988.

The Judicial Code also gives federal district courts jurisdiction in many other cases, such as between parties of different states that involve more than $75,000, the diversity statute of 28 U.S.C. § 1332; admiralty and maritime cases, where there is exclusive federal jurisdiction, 28 U.S.C. § 1333; and cases where the United States is a party, 28 U.S.C. §§ 1345-46. The “amount-in-controversy” requirement to trigger diversity jurisdiction has changed over time, from $500 in the original Judiciary Act of 1789; to $400 in the Judiciary Act of 1801, that reduction repealed as part of the repeal of that Judiciary Act in 1802; $2,000 in 1887; $3,000 in 1911; $10,000 in 1958; $50,000 in 1988; and $75,000 in 1996. Under § 1332, each plaintiff independently needs to meet the “amount-in-controversy” requirement. However, the Supreme Court held in 2005 in Exxon Mobil Corp. v. Allapattah Services, Inc., that under the supplemental jurisdiction statute – 28 U.S.C. § 1367, passed in 1990, discussed at § 17.2.2.4 nn.144-45 – a federal court may exercise supplemental jurisdiction over additional plaintiffs whose claims do not satisfy the minimum “amount-in-controversy” requirement, provided the claims are part of the same case or controversy as the claims of a plaintiff who does satisfy that requirement.

The Court had held that as a matter of the constitutional grant of diversity jurisdiction in Article III, § 2, cl. 1, cited at § 17.2.1, only diversity between one party on each side – so-called, minimal diversity – is required. Using its power to make “regulations” for the federal courts, Congress has provided under 28 U.S.C. § 1332 that complete diversity is required of all plaintiffs from all defendants. A single non-diverse party can contaminate every other claim in a lawsuit and require dismissal of the action in federal court. In such cases, if one party on each side is from the same state, that state’s courts can be presumed to be “neutral” between the plaintiff’s and defendant’s side of the litigation, and thus unbiased litigation can take place in that state. In cases where the number of parties involved makes a complete diversity requirement impractical, such as for mass tort cases that qualify under the Multiparty, Multiforum Trial Jurisdiction Act of 2002, 28 U.S.C. § 1369, or class actions involving more than $5 million in damages sought, under the Class Action Fairness Act of 2005, 28 U.S.C. § 1332(d), Congress has provided for only a minimal diversity requirement.

Between 1875 and 1980, “federal question” jurisdiction had the same “amount-in-controversy” requirement as “diversity” jurisdiction. That requirement was dropped in 1980 pursuant to Pub. L. 96-486, Dec. 1, 1980. Congress has also provided in 28 U.S.C. § 2284 that special three-judge district court panels will hear challenges to the constitutionality of state or congressional

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110 Id. at 2617-18; State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523, 530-31 (1967).
redistricting plans, as well as in other cases provided for by federal law, such as in the Gramm-Rudman-Hollings Balanced Budget Act, the Line-Item Veto Act, and numerous statutes touching on First Amendment rights of free speech, such as some regulation of obscenity or indecency on the Internet. Appeals from those decisions are filed directly in the Supreme Court, pursuant to 28 U.S.C. § 1253.

In 1971, in *Bivens v. Six Unknown Federal Narcotics Agents*, the Court recognized for the first time an implied private action for damages against federal officers alleged to have violated a citizen’s constitutional rights. While Justice Brennan’s majority opinion did not discuss the jurisdictional issue explicitly, the authority to imply a *Bivens* action has been grounded in later cases, as it was in Justice Harlan’s concurrence in *Bivens*, on 28 U.S.C. § 1331, and its “federal question” language giving district courts jurisdiction to decide cases “arising under the Constitution, laws, or treaties of the United States.” *Bivens* involved a violation of the Fourth Amendment. Subsequent cases have recognized implied damage remedies under the Fifth Amendment in *Davis v. Passman* and under the Eighth Amendment in *Carlson v. Green*. As discussed at § 20.1.4.2.B, success in a *Bivens* action is limited by principles of executive immunity applicable to federal officials.

As might be expected, formalist judges, whether extreme or moderate, conservative or liberal, have resisted such an “implied” right of action, preferring to rest court power on explicit, literal text. Such resistance to an implied right of action is also supported by the Holmesian tendency to defer to the government, particularly strong among extreme Holmesians, and the conservative tendency to resist additional forms of actions. However, this view can be offset by: (1) a Holmesian willingness, particularly strong among moderate Holmesians, to follow the purpose behind provisions even in the absence of literal text; (2) the natural law maxim that “where there is a right, there should be a remedy”; (3) the instrumentalist focus on use of courts to advance social policy; and (4) the liberal tendency to create causes of action for individuals against government abuse. Thus, in *Bivens*, liberal instrumentalists, Justices Brennan, Marshall, and Douglas, strongly supported the *Bivens* result. They were joined by liberal Holmesian Justice White, who on remedial issues often voted with the liberal instrumentalists, as discussed at § 11.3.3, and by Justices Stewart and Harlan, who were conservative, but moderate Holmesians with natural law leanings, as discussed at § 10.4. *Bivens* was an easy case to justify implying such a remedy, since the plaintiff would not have had any other practical relief absent a *Bivens* remedy. Conservative formalist Chief Justice Burger, along with liberal formalist Justice Black, dissented in *Bivens*, reflecting their

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formalist views. They were joined in dissent by Justice Blackmun, who during his first two years on the Court in 1971-72 voted most consistently with Chief Justice Burger, before finding his moderate, centrist natural law voice during the rest of the 1970s, and moderate, liberal instrumentalist voice during the 1980s, as discussed at § 11.4.

During its 2001 term, the Supreme Court held in *Correctional Services Corp. v. Malesko*¹¹⁶ that there was no *Bivens* right of action under the Eighth Amendment against private entities that engaged in an alleged constitutional deprivation while acting under color of federal law, such as a contractor providing a halfway house for federal inmates. Conservative Holmesian Chief Justice Rehnquist, wrote for a 5-4 majority comprised of himself and Justices Scalia and Thomas, the two formalist Justices on the Court, and Justices O’Connor and Kennedy, two natural law Justices. The Chief Justice noted that since 1980 in *Carlson v. Green*, cited at § 17.2.2.1.B n.115, the Court had “consistently refused to extend *Bivens* liability to any new context or any new category of defendants,” including *Bush v. Lucas* in 1983, which involved an action against a federal agency, rather than a federal official. Nor was there reason to extend *Bivens* here, where officials were claimed to have been negligent, because there was no lack of effective alternative remedies, inasmuch as a federal tort remedy was available.¹¹⁷

Reflecting the liberal instrumentalist willingness to imply private rights of action to advance social policies reflected in statutes or the Constitution, Justice Stevens, joined in dissent by Justices Souter, Ginsburg, and Breyer, said that the Court had never suggested that a category of federal agents can commit Eighth Amendment violations with impunity. He noted that the reasons that motivated *Bivens* should lead to the conclusion that corporate agents should not be treated more favorably than human agents, stating, “A tragic consequence of today’s decision is the clear incentive it gives to corporate managers of privately operated custodial institutions to adopt cost-saving policies that jeopardize the constitutional rights of the tens of thousands of inmates in their custody.” Chief Justice Rehnquist replied by noting that most of the examples used by Justice Stevens to support his conclusion involved private facilities that housed state prisoners – prisoners who already enjoy a right of action against private correctional providers under 42 U.S.C. § 1983.¹¹⁸ Justice Stevens’ approach reflects the moderate, liberal instrumentalism of Justices Stevens, Ginsburg, and Breyer, and the extreme natural law willingness of Justice Souter, discussed at § 12.3.2, to follow not only the core holdings of instrumentalist-era precedents, like *Bivens*, but their general reasoning as well.

In contrast, Justices O’Connor and Kennedy, reflecting their moderate natural law willingness to follow the core holdings of instrumentalist-era precedents, but not their general reasoning, discussed at § 12.3.2, were willing to distinguish *Bivens*, *Passman*, and *Carlson*, where other remedies were not viewed as adequate, versus *Malesko*, where other remedies were adequate. Thus, the natural law maxim of “where there is a right, there should be a remedy” was not strongly implicated in *Malesko*.

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¹¹⁸ *Id.* at 71 n.5; *id.* at 81 (Stevens, J., joined by Souter, Ginsburg & Breyer, JJ., dissenting).
Reflecting the formalist reluctance to imply private rights of action, Justice Scalia, concurring with Justice Thomas, underscored the point that in the 2001 case of *Alexander v. Sandoval*\(^\text{119}\) the Court had indicated increased reluctance to invent “implied” private rights of action under statutes. There was even greater reason to abandon it in the constitutional field, since an “implication” imagined in the Constitution can presumably not be repudiated even by Congress.\(^{120}\)

## § 17.2.2.2 Federal Court Review of State Court Decisions Involving Federal Law Issues

Federal judicial power extends to review of state court cases that involve federal questions under the language of Article III, § 2, cl.1, which provides for federal jurisdiction in cases “arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority.” Under 28 U.S.C. § 1257, enacted in 1988, Supreme Court review of all final decisions by the highest state court is discretionary, through a petition for certiorari, where a decision could be had on any issue of federal law. This statute is clearly constitutional in view of *Martin v. Hunter's Lessee* and *Cohens v. Virginia*, discussed at § 17.1.2.2 and the power of Congress in Article III to provide for “Exceptions” and “Regulations” to the Court’s jurisdiction, discussed at § 17.2.3.1.

Under Supreme Court doctrine, a state court decision is not final until it has effectively determined the entire litigation.\(^{121}\) Under the current version of § 1257, Supreme Court review is authorized even if that final decision upholds a federal claim. Prior to 1914, the Supreme Court was authorized to review state supreme court decisions only if they rejected the federal claim. After 1914, pursuant to Act of 1914, 38 Stat. 790, the Supreme Court could review a case even if the state court upheld the federal claim and held a state statute invalid.

Note that only the Supreme Court has been granted jurisdiction by Congress directly to consider appeals from state court decisions. Lower federal courts have not been given appellate jurisdiction over state courts, although original actions can be filed collaterally in federal courts to question state court actions, as is done in habeas corpus proceedings pursuant to 28 U.S.C. § 2254. 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. Since 1988, almost all of the Court's jurisdiction is discretionary, and a denial of certiorari has no precedent value.\(^{122}\) Even when taking certain appeals was required, the Court declined some cases on justiciability grounds, discussed in § 17.3.\(^{123}\)

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\(^{120}\) *Malesko*, 534 U.S. at 75 (Scalia, J., joined by Thomas, J., concurring).

\(^{121}\) See *Jefferson v. City of Tarrant*, 522 U.S. 75 (1997).


\(^{123}\) See, e.g., *Naim v. Naim*, 350 U.S. 891 (1956) (miscegenation case remanded to state court on ripeness grounds that the record below was not sufficiently well-developed for Court review).
In addition to these principles, the Court has adopted a general rule that an injured party must exhaust state remedies before bringing a constitutional challenge in federal court, although the Court has never decided whether this is an Article III requirement or a prudential principle capable of being altered by congressional statute.\textsuperscript{124} During the instrumentalist era, the Court held in 1963 in \textit{McNeese v. Board of Education}\textsuperscript{125} that 42 U.S.C. § 1983, which covers all suits against state officials for unconstitutional action, was an enormous exception to this exhaustion rule. Since 1963, \textit{McNeese} has been followed by Holmesian and natural law Justices as a matter of “settled law.”\textsuperscript{126}

For this reason, whether an action can be brought under § 1983, or only under some other statutory provision, such as a § 2254 habeas corpus proceeding, makes a difference in terms of whether state remedies must be exhausted first. For example, the Court held in \textit{Preiser v. Rodriguez}\textsuperscript{127} that prisoner challenges to the “fact or duration of confinement” can only be brought under the habeas corpus statute, since a habeas corpus proceeding directly addresses wrongful detention. Therefore, state remedies had to be exhausted before the claim could be brought. On the other hand, as held in \textit{Wilkinson v. Dotson},\textsuperscript{128} suits by prisoners challenging the constitutionality of conditions of confinement, or procedures used to determine the duration of confinement, such as the procedures involved in parole eligibility hearings, would not necessarily affect the “fact or duration of confinement,” and thus are not “core” habeas claims. Thus, those challenges can be brought under § 1983 in a federal district court without a requirement of exhaustion of state remedies.

\section*{Limited Federal Review of State Court Decisions on State Law Matters in Cases Also Involving Federal Questions}

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.\textsuperscript{129} 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.\textsuperscript{130} Thus, a state Supreme Court decision invalidating a state law on


\textsuperscript{125} 373 U.S. 668, 67-73 (1963).


\textsuperscript{127} 411 U.S. 475 (1973).

\textsuperscript{128} 544 U.S. 74 (2005). \textit{See also} Hill v. McDonough, 126 S. Ct. 2096 (2006) (whether lethal injection procedures would violate the Eighth Amendment affects conditions, but not fact or duration of confinement, and thus can be brought as an § 1983 action).

\textsuperscript{129} See Murdock v. Memphis, 87 U.S. 590 (1875).

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 and what rights were granted in the contract to avoid Contracts Clause review, or what is property to evade Takings Clause review. The Contracts Clause is discussed at § 22.1, and the Takings Clause is discussed at § 22.2.

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.

Each of the four liberal instrumentalists on the Court at the time Michigan v. Long was decided dissented from the Court’s presumption that the state ground was not independent absent a clear statement. Justice Stevens’ dissent was the most forceful, adopting the opposite presumption that the state grounds were independent absent a clear statement to the contrary. Justice Stevens said that if it appears the state court would protect a citizen under either federal or state law, the Court should not review the decision because no federal interest was offended, uniformity of federal law would not be compromised, and such a posture is consistent with judicial restraint. Such a presumption would also make it easier for state courts to develop their own constitutional law that might provide for greater protection for individuals than under the federal Constitution. Justices Brennan, Marshall, and Blackmun also refused to adopt the majority approach, but adopted alternative approaches of the Court either determining on its own, absent any presumption, whether the state

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134 463 U.S. at 1066-68 (Stevens, J., dissenting).
opinion rested on independent state law grounds, or instead asking the state court for clarification.\textsuperscript{135}

For the separate issue of cases heard in federal court that involve resolving issues of state law, as can occur, for example, 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 both 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, as discussed at § 17.2.4.4, based on the uncertainty.\textsuperscript{136}

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.\textsuperscript{137} However, that deference is often rebutted in practice.\textsuperscript{138} The Court indicated in \textit{Salve Regina College v. Russell}\textsuperscript{139} 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{140}

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


\textsuperscript{138} See, \textit{e.g.}, Town of Castle Rock, Colorado v. Gonzales, 125 S. Ct. 2796, 2804 (2005).


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. Resolution of this question will depend upon normal consideration of text, context, history, practice, precedent, and prudential considerations. In addition, many state courts adopt the same kind of prudential restraints on judicial review that federal courts have adopted under Ashwander, discussed at § 17.1.3.2.

§ 17.2.2.4 Jurisdiction Acquired by Removal of Cases from State Courts

Under 28 U.S.C. § 1441(a), a defendant can remove to a federal district court any civil action brought in a state court over which district courts have original jurisdiction. As the Court held in City of Chicago v. International College of Surgeons, this includes cases containing claims that local administrative action violates federal law that also contain state law claims for on-the-record review of administrative findings. This case originated as an appeal in state court from a municipal agency's denial of demolition permits. The Court explained that even though state law creates a particular cause of action, a case may be considered to arise under the laws of the United States if the right to relief under state law requires resolution of a substantial question of federal law.

With regard to accompanying state law claims, the Court said in International College of Surgeons that principles of pendent and ancillary jurisdiction apply. Under 28 U.S.C. § 1367, these principles allow a federal court with original jurisdiction to carry with it jurisdiction over state law claims that derive from a common nucleus of operative fact, such that the relationship between the original claim and the state claims comprise but one constitutional case. Under § 1367, district courts may decline to exercise supplemental jurisdiction over a claim if: (1) the claim raises a novel or complex issue of state law, (2) the state law claim substantially predominates over the claim or claims over which the district court has original jurisdiction, (3) the district court has dismissed all claims over which it has original jurisdiction, or (4) in exceptional circumstances, there are compelling reasons for declining jurisdiction. Exercise of such supplemental jurisdiction is thus a matter of discretion, not of right, based upon principles of economy, convenience, fairness, and comity.

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144 Id. at 164-74. An instrumentalist dissent, focused on policy, said the Court was creating a cross-system appellate authority that would unwisely increase the jurisdiction of the federal courts at the expense of state court autonomy. Id. at 175-76 (Ginsburg, J., joined by Stevens, J., dissenting).

In addition, district courts may not decide state law claims, or stay their adjudication, where any of a number of abstention doctrines apply, as discussed at § 17.2.4.4.

§ 17.2.3  Limitations on Jurisdiction Imposed on the Courts

§ 17.2.3.1  Congressional Control of Judicial Review by Federal Courts

As stated in Article III, § 1, “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.” Using its power, Congress established a limited number of federal district courts in 1789, with appeal from those courts to the United States Supreme Court. Additional district courts were added during the 19th century as the Nation expanded. To deal with the increased case-load of appeals from those district courts to the Supreme Court, Congress created 9 intermediate circuit courts of appeals in the Evarts Act, in 1891, with appeal from those circuit courts to the Supreme Court if certified by that court of appeals, or discretionary with the Supreme Court through a grant of certiorari, as noted at § 14.2.2 n.42. Since 1891, the number of the circuit courts of appeals has risen, with 12 general circuit courts (1st - 11th and the Court of Appeals for the District of Columbia), as well as certain specialized courts, such as the Federal Circuit, which deals with certain specialized federal cases, such as appeals from the Court of Federal Claims, the Court of Veterans Appeals, and intellectual property cases, such as patent, trademark, and United States Trade Commission cases. A map and internet links to the various lower federal courts appears at “www.uscourts.gov/courtlinks/”. 146

On behalf of the Federalist-inspired Marshall Court, which favored a strong view of federal power, as discussed at § 14.2.1 nn.14-19, Justice Story said in Martin v. Hunter’s Lessee 147 that Article III, § 1’s language vesting the federal judicial power in “one supreme Court,” and “such inferior Courts” as Congress “may . . . establish” meant that Congress must vest the entire judicial power somewhere in the federal judicial system. However, the Jacksonian-inspired Taney Court, which had a less expansive view of federal power, as discussed at § 14.2.1 nn.20-26, held in Sheldon v. Sill 148 that since Congress has the discretion under this language whether to create lower federal courts, Congress may withhold jurisdiction from the courts it creates. Several congressional enactments regarding jurisdiction have thus not vested all potential judicial power granted by Article III.

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147 14 U.S. (1 Wheat) 304, 328-31 (1816).

148 49 U.S. 441, 448-49 (1850) (diversity jurisdiction removed for a class of contract cases where federal commercial law would have applied between 1842 until 1937 if the case were heard in federal court under the doctrine of Swift v. Tyson, 41 U.S. (16 Pet.) 1, 18-22 (1842), overruled in Erie Railroad Co. v. Tompkins, 304 U.S. 64, 71-80 (1938); under the statute the cases could only be brought in state court, so state contract law would apply, reflecting the states’ rights predisposition of both the Supreme Court and Congress during the Taney Court era. After Erie, state contract law would apply even if the case were heard in federal court, though federal procedure would apply).
For example, lower federal courts are not authorized to hear appeals from state court decisions. Two statutes bar federal actions where effective remedies are available in state courts: the Johnson Act involving state public utility regulatory orders, and the Tax Injunction Act, involving any state tax. In addition, the Anti-Injunction Act, 28 U.S.C. § 2283, prevents federal courts from enjoining pending proceedings in state courts except as expressly authorized by Congress, or when necessary to protect jurisdiction, or to effectuate the court’s judgments. The impact of the Anti-Injunction Act has been limited, however, by the Court’s holding in *Mitchum v. Foster* that 42 U.S.C. § 1983 is an express authorization that allows injunctions against even pending state court proceedings.149

The Court has held that Congress may withdraw appellate jurisdiction from the Supreme Court, even as to pending cases. In *Ex parte McCordle*,150 the concern of the Radical Republican Congress, which withdrew appellate jurisdiction over a class of habeas corpus petitions by individuals held by military authorities in the South following the Civil War, was that the Court might use the case to declare unconstitutional the military occupation of the South. The Court’s holding that Congress had this power, even as to a case after it had been argued in the Court, but before a decision was reached, 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.”

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 1996.151 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.152

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150 *Ex Parte McCordle*, 74 U.S. 506 (1868).


The Court’s holding in *Ex parte McCardle* was limited somewhat in *United States v. Klein*.\(^{153}\) 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. 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 “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.

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 provision or prohibition found in the Constitution, such as relating to Equal Protection, Due Process, the First Amendment, or the Takings Clause; or (2) violates general separation of powers principles by intruding too greatly into the powers of the judiciary. With respect to the first issue, though Congress has never been held to use its power over jurisdiction in this way, it is relatively well-established that other provisions in the Constitution do limit Congress’ power over jurisdiction. Thus, for example, 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.\(^{154}\)

With respect to the second issue, it remains unsettled to what extent Congress can create significant 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.

For the non-formalist reasons of maintaining established general structural principles, as well as the liberal instrumentalist special concern with protecting civil rights, noted at § 11.2.1.2 nn.17-20, and the natural law maxim of “where there is a right, there should be a remedy,” noted at § 12.3.3 n.136, a majority of the Court today would likely view such congressional action as unwarranted. Even extreme Holmesian deference-to-government Chief Justice Rehnquist noted in Felker v. Turpin that Congress had not attempted to remove all jurisdiction from the Supreme 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, even 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 or Article II courts can be created to hear and try cases involving federal issues that are separate from Article III federal court jurisdiction. Under a narrow view of such power, Congress can only create federal courts which do not have the Article III protections of life tenure and no diminution in salary in three limited areas: (a) non-Article III courts in territories or the District of Columbia, because of the special congressional control over these areas listed in the Constitution; (b) court-martial courts, because of special 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 the rights in such cases are created by the legislative branch, and do not depend on pre-existing common-law or constitutional rights, the theory is that Congress can provide for Article I courts to adjudicate claims under these statutes since the rights did not have to be created by Congress in the first instance. This

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156 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 the constitutionality of bans on same-sex marriage 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).


category includes such special courts as the Tax Court to adjudicate tax matters, the Patent Court adjudicating patent claims, and the Claims Court, to hear cases involving claims on the federal treasury where the federal government has waived sovereign immunity, as under the Federal Tort Claims Act, as well as various administrative decisionmaking done by Administrative Law Judges, such as for social security disability claims or immigration law matters.

This narrow view is typically favored by instrumentalist judges, who prefer cases to be heard by Article III judges who have the independence of life-tenure and no diminution in salary. For example, in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, Justice Brennan’s plurality opinion, joined by Justices Marshall, Blackmun, and Stevens, concluded quite broadly that since bankruptcy courts do not fall into any of the above-named three categories, ultimate decisions in bankruptcy cases must be made by Article III judges. Despite this conclusion, as a practical matter bankruptcy judges, although now officially magistrates under the control of Article III district court judges, still make most determinations in bankruptcy cases.

This narrow view of Congress’ power to create Article I courts has never been adopted by a majority of the Supreme Court. Instead, while acknowledging the three named categories above, the Court has been willing to grant Congress greater flexibility. This is certainly true for formalist judges, based on the literal language of the Constitution granting Congress great power over federal court jurisdiction, and for Holmesian judges, based on their deference to government predisposition. Even natural law judges, however, have been willing to phrase the issue in terms of broader general separation of powers arguments concerning whether the individual's interests are adequately protected by the Article I court, and the province of the judiciary is not intruded into too greatly.

For example, in *Thomas v. Union Carbide Agricultural Product Co.*, Justice O’Connor wrote for the Court that the binding arbitration provisions of Federal Insecticide Act were constitutional, despite no Article III court review. Similarly, over a dissent by Justices Brennan and Marshall, Justice O’Connor wrote for the Court in *Commodity Futures Trading Commission v. Schor* that the Commodity Futures Trading Commission could be given power in reparation proceedings before the Commission to hear counterclaims based upon traditional state common law rights. In the bankruptcy area, however, the Court has continued the more stringent approach of the *Marathon* plurality opinion, in cases like *Granfinanciera, S.A. v. Nordberg*, a case also authored by Justice Brennan. Such an approach may reflect the natural law predisposition among all natural law judges to follow at least the core holdings of judicial precedents.


160 473 U.S. 568, 571 (1985); id. at 594 (Brennan, joined by Marshall & Blackmun, JJ., concurring in the judgment); id. at 602 (Stevens, J., concurring in the judgment).

161 478 U.S. 833, 848-57 (1986); id. at 859 (Brennan, J., joined by Marshall, J., dissenting).

162 492 U.S. 33, 54-56 (1989)
Note that because these Article I courts are not Article III courts, the Article III "case or controversy" requirements, discussed at § 17.3, do not apply. Thus, if statutorily permitted, such courts can render advisory opinions, and normal Article III rules regarding standing, ripeness, or mootness do not have to apply. In addition, though typically all these non-Article III courts have been created by Congress, there is the possibility of Article II courts created by the Executive. The most prominent possibility of this would be military tribunals created by executive order under the President’s Commander-in-Chief power to deal with aspects of the war on terror after 9-11. The creation of such courts, absent congressional authorization, would raise profound separation of powers problems regarding congressional versus executive power, and was substantially limited by the Supreme Court in 2006 in *Hamdan v. Rumsfeld*, as noted at § 19.3.3 n.57.

Even if created pursuant to express or implied congressional approval, the jurisdiction of such courts would also raise additional constitutional issues, such as pushing the boundaries of the special congressional control over the military. This would be true not only for instrumentalist judges, with their concern for protecting the unempowered in society, but also in terms of the natural law separation of powers concerns of whether individual interests are adequately protected by the tribunal, and the province of the judiciary is not intruded into too greatly. These issues would also have to be considered against a backdrop of Due Process Clause concerns and international obligations under various international treaties, such as the Geneva Conventions. These issues, which were also raised in *Hamdan v. Rumsfeld*, are addressed as part of the procedural due process discussion at § 27.4.4.8 nn.409-16.

§ 17.2.3.2 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. 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.

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*. This doctrine is consistent with Stages 3 and 4 being based on concrete operational thought, as discussed

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165 95 U.S. 714, 724-26 (1877).
at § 15.3 nn.37-43, and thus a focus on concrete presence in the state. However, in 1945, the Court broadened the required contacts in *International Shoe Co. v. Washington* 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.” This doctrine is based more on the abstract formal operational thought reasoning typical of Stages 4½, 5 and 6, as discussed at § 15.3 nn.44-46, and thus a focus on abstract mental “reasonable anticipation.”

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, thus invoking the benefits and protections of its laws.” Reflecting the greater use of balancing tests and factor weighing approaches since 1937, discussed at §§ 4.2.1 nn.33-38 (balancing tests) & 4.2.2 text following n.48 (factor weighing approaches), 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.

As part of the dual theory of sovereignty, discussed at § 18.4.5 nn.236-38, federal courts must not only find that exercising jurisdiction over the defendant comports with federal standards of due process, but also that the state’s “long-arm” statute has authorized “service of process” in the case. Most states have enacted “long-arm” statutes that authorize jurisdiction co-extensive with the confines of due process. Thus, the question of exercising jurisdiction typically comes down to the Due Process Clause. A similar Due Process analysis applies to federal jurisdiction enforcing judgments reached under international law.

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166 326 U.S. 310, 316 (1945).


In addition to this Due Process constitutional constraint, the Court also has developed a prudential restraint on the exercise of jurisdiction. Under *forum non conveniens* doctrine, a court 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.\(^{172}\)

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§ 17.2.4 State Sovereign Immunity Limitations Against Enforcing Federal Rights in Suits Against States, State Agencies, and State Officers

### § 17.2.4.1 General History of the 11th Amendment

On February 19, 1793, the Supreme Court held in *Chisholm v. Georgia*\(^ {173}\) 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, cited at § 17.2.1, 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.\(^ {174}\) 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.\(^ {175}\)

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.\(^ {176}\) The 11th Amendment provides: "The Judicial power of the United States shall not be

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\(^{173}\) 2 U.S. (Dall.) 419 (1793).


\(^{175}\) *Chisholm*, 2 U.S. at 433-38, 449-50 (Iredell, J., opinion).

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 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

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179 9 U.S. (5 Cranch) 115 (1809).
180 19 U.S. (6 Wheat.) 264, 412 (1821).
181 Gibbons, supra note 176, at 1947. For discussion of the history of Supreme Court interpretations of the 11th Amendment during the initial natural law era, from 1798 until the advent of federal question jurisdiction in 1875, see generally id. at 1941-70.
Confederate States of America, which adopted the United States Constitution with appropriate modifications, such as broadly supporting slavery, but having a reduced Commerce Clause, as discussed at § 14.2.1 n.17, 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 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.182

Once federal question jurisdiction became available in 1875, however, 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,183 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,184 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. The evidence supporting the Court’s decision in Hans was reviewed in great depth by the Court in the 1999 case of Alden v. Maine.185 This view is also consistent with the conservative predisposition, shared by formalist-era Courts, in favor of states’ rights, discussed at § 6.2.2.3.

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.186 The Court has also held that the 11th Amendment applies to actions involving states, even if a federal court might otherwise apply the doctrine of pendent jurisdiction.187 Finally, in Alden v. Maine,188 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.

182 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).

183 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).

184 134 U.S. 1, 14-15 (1890).


186 See id. at 728, and cases cited therein.


§ 17.2.4.2  Limits on the 11th Amendment Doctrine

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 waivers aspects of state sovereign immunity if the state had not consented to be sued in its own state courts is not clear. Congress can make waiver of the immunity a condition of participating in a 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. 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.

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. 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

189  See 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).

190  See Dellmuth v. Muth, 491 U.S. 223 (1989) (waiver as condition on participation in a federal program); Pennhurst, 465 U.S. at 99 (state waiver must be clear and unequivocal); Hutto v. Finney, 437 U.S. 678 (1978) (attorneys’ fee ancillary).


192  See McKesson Corp. v. Division of Alcohol Beverages and Tobacco, Dep’t of Business Regulation of Florida, 496 U.S. 18, 26-31 (1990).
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.\(^{193}\) 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.\(^{194}\)

Based on its literal text, a formalist-era Court held in *Lincoln County v. Luning*\(^{195}\) 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 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.\(^{196}\)

This aspect of 11th Amendment doctrine regarding local governmental entities not being covered by the words “State” in the 11th Amendment is in conflict with holdings under the 14th Amendment, discussed at § 26.1 nn.1-4, where the word “State” binds counties, cities, or municipalities under the view that they are creatures of the state and 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 should not apply.

In making these decisions, the Court asks, as in *McMillian v. Monroe County*,\(^{197}\) 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 naturally relevant, although the decision is ultimately one of federal law. As the Court stated in *McMillian*:

> Our inquiry is dependent on state law. . . . This is not to say that state law can answer the question for us by, for example, simply labeling as a state official an official who clearly makes


\(^{195}\) Lincoln County v. Luning, 133 U.S. 529 (1890).


\(^{197}\) 520 U.S. 781, 785-86 (1997).
county policy. But our understanding of the actual function of the government official, in a particular area, will necessarily be dependent upon the definition of the official’s functions under relevant state law. Cf. Regents of Univ. of Cal. v. Doe, 519 U.S. 425, 429 (1991) (“[The] federal question can be answered only after considering the provisions of state law that define the agency’s character.”). 198

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. 199 State universities are usually held to be state actors, 200 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. 201 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. 202 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.” 203 But that consideration is just one factor, with the factors of the nature of state control over decisionmaking, the manner of appointment (state or local election or appointment), and the manner in which state law characterizes the position, also relevant. 204 A better way to develop this confused doctrine, consistent with a focus on reasoned elaboration of the law, appears at § 17.2.4.3 nn.252-56. 205

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, 

198 Id. at 786.


200 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).


205 On these cases generally, see 13 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3531.11 (1998); Chemerinsky, supra note 204, at 194-97.
which held, as discussed above at § 17.2.4.1 n.183, 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. There, the Court held that federal courts may enjoin unconstitutional acts by state officials who are connected with enforcing a statute that is invalid on its face or as applied. The Court said that 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. However, Ex parte Young is limited by principles of executive official qualified immunity, discussed at § 20.1.4.2.B, and by Edelman v. Jordan, where the Court held that, in an action against state officials, retroactive relief from the state is not allowed, that is, payment of state funds for past violations.

Another limit on the 11th Amendment was discussed in 1976 in Fitzpatrick v. Bitzer. In Fitzpatrick, the Court held that by "unmistakably clear language" Congress may provide 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 "unmistakenly clear," the evidence must appear in the text of the statute, not legislative history. Applying this test of "unmistakably clear language," the Court has held that § 1983 does not manifest an intent to authorize retrospective relief.

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., 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 the doctrine of state sovereign immunity. Justice Brennan said that Hans v. Louisiana was not to the contrary since Hans

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212 491 U.S. 1, 13-23 (1989).
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.\(^{213}\) This result is consistent with the liberal Holmesian tendency to defer to congressional exercises of power.

Justice Scalia's dissenting opinion, joined by Justices Rehnquist, O'Connor, and Kennedy, said it had been declared otherwise in *Hans v. Louisiana*. That case, Justice Scalia said, had held broadly that despite the limited text of the 11th Amendment, federal jurisdiction over unconsenting states "was not contemplated by the Constitution when establishing the judicial power of the United States."\(^{214}\) Justice Scalia observed that there was no need to state that conclusion in the 11th Amendment itself, since it was a background principle of wide acceptance.\(^{215}\)

In support of *Union Gas*, Professor Tribe has said that the 11th Amendment conferred rights only against the federal judiciary and not against Congress. Article I suggests that the national government was intended to have plenary power to regulate certain subjects when such regulation would serve the Nation's interests. Tribe added, however, that there are three limiting principles:

1. Congress cannot give an Article III court any authority to resolve disputes outside Article III's textual confines;
2. Any attempt to confer jurisdiction and abrogate immunity must be reasonably ancillary to an otherwise valid substantive exercise of federal lawmaking power; and
3. The 10th Amendment recognizes the states' constitutional role and suggests that the Court should not lightly infer congressional inroads on state autonomy.\(^{216}\)

Professor Tribe's carefully crafted limits on *Union Gas* were swept aside by a majority of the Court in 1996. 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*.\(^{217}\)

The opinion in *Seminole Tribe* was written by Chief Justice Rehnquist. Rehnquist said that none of the policies underlying *stare decisis* required continued adherence to the holding of *Union Gas*. It was always of questionable precedential value, he said, largely because a majority had expressed

\(^{213}\) *Id.* at 57 (White, J., concurring in the judgment in part and dissenting in part).

\(^{214}\) 491 U.S. at 32 (Scalia, J., joined by Rehnquist, C.J., and O'Connor & Kennedy, JJ., dissenting), citing *Hans v. Louisiana*, 134 U.S. 1, 15 (1890).

\(^{215}\) *Id.* at 31-32.


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 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.\textsuperscript{218} It would be inappropriate for the court to supplement that scheme with one created by the judiciary, citing Schweiker v. Chilicky.\textsuperscript{219}

In reaching this result, Justice Rehnquist's opinion tracked the four-Justice dissent in Union Gas.\textsuperscript{220} His opinion blended formalist arguments of history and tradition, conservative Holmesian focus on deferring to states, and the natural law support for the “dual theory of sovereignty” theory of federalism established in past cases, including Hans.\textsuperscript{221} His opinion, therefore, was joined by formalist Justices Scalia and Thomas, and conservative natural law Justices O'Connor and Kennedy.

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 especially concerned that the majority's opinion would prevent Congress from providing a federal forum for a broad range of actions against states. He said the sovereignty of the states is subordinate both to the citizenry of each state and the supreme law of the sovereign. He added that no one had identified any acceptable reason for concluding that the absence of a state's consent to be sued in federal courts should affect the power of Congress to authorize federal courts to remedy violations of federal law by states or their officials in actions not covered by the 11th Amendment's text.\textsuperscript{222} Justice Stevens’ arguments are predominantly liberal, instrumentalist prudential considerations. Although he undertook an analysis of precedents, he put more weight on consequences – limiting the power of Congress to create federal causes of action against a state, or its Governor, for the violation of a federal right.

Justice Souter, dissenting, with Justices Ginsburg and Breyer, also took issue with the holding in Hans that a state could plead sovereign immunity against a noncitizen suing under federal question jurisdiction, and for that reason a state must enjoy the same protection in a suit by one of its own citizens. Beyond that, he contended that the Court in Hans had misread statements in The Federalist Papers and that, in any event, Hans did not even 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 Contracts Clause. Justice Souter then explored historical materials to show that even those framers who expected common-law immunity to survive ratification were

\textsuperscript{218} Id. at 57-70.

\textsuperscript{219} Id. at 74, citing Schweiker, 487 U.S. 412 (1988).

\textsuperscript{220} See id. at 64-70.

\textsuperscript{221} Id. at 64-73.

\textsuperscript{222} Id. at 76-78 (Stevens, J., dissenting).
talking about diversity jurisdiction, not immunity of a state against the general federal question jurisdiction of the national courts.\(^{223}\) These arguments are not liberal instrumentalist in nature. Instead, Justice Souter relied on his interpretation of cases, history, and general principles of constitutionalism, including the concept that express provisions of the Constitution should not be trumped by judicially discoverable principles “untethered” to any written provision.\(^{224}\)

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. The most important is *City of Boerne v. Flores*.\(^{225}\) There, in a 5-4 decision, Justice Kennedy wrote that § 5 authorized Congress only to remedy or prevent unconstitutional actions by states. Under § 5, Congress could not make a substantive change in the governing law. Justice Kennedy said that the line is not easy to discern, and the Congress must have wide latitude in determining where it lies. However, there must be a “congruence and proportionality” between the injury to be prevented or remedied and the means adopted to that end. Applying that test, Justice Kennedy examined the legislative record of the Religious Freedom Restoration Act, which purported to require strict scrutiny of all state action that substantially burdens religious exercise, rather than the rational basis test currently used by the Court. Kennedy said the legislative record lacked examples of modern instances of generally applicable laws passed because of religious bigotry. Thus, the Act was so out of proportion to any remedial or preventive object that it was not responsive to, or designed to prevent, unconstitutional behavior, and was an attempt to make a substantive change in the law.

Similar 5-4 conclusions 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 trademarks and patents,\(^{226}\) under the Age Discrimination in Employment Act,\(^{227}\) and under the Americans with Disabilities Act.\(^{228}\) In two recent cases, however, Congress’ power to abrogate state sovereign immunity under the 14th Amendment did prevail. These cases dealt with the Family and Medical Leave Act, and a portion of the American with Disabilities Act regulating access of disabled persons to state courthouses.\(^{229}\) Since these cases all involve aspects

\(^{223}\) Id. at 100-85 (Souter, J., joined by Ginsburg & Breyer, JJ., dissenting).

\(^{224}\) Id. at 117.

\(^{225}\) 521 U.S. 507 (1997).


of Congress’ § 5 enforcement power under the 14th Amendment, these cases are discussed at § 28.3.

Not surprisingly, the same 5-4 split that appeared in Seminole Tribe reappeared in Federal Maritime Commission v. South Carolina State Ports Authority.230 A private party there brought an administrative claim before the Federal Maritime Commission (FMC). Any decision by the administrative law judge could be enforced only in a federal district court. Writing for the Court, Justice Thomas affirmed a dismissal of the suit, saying that the preeminent purpose of state sovereign immunity is to accord states the dignity consistent with their status as sovereign entities. He said, “Given both this interest in protecting States’ dignity and the strong similarities between FMC proceedings and civil litigation, we hold that state sovereign immunity bars the FMC from adjudicating complaints filed by a private party against a nonconsenting State.” Justice Thomas continued, “By guarding against encroachments by the Federal Government on fundamental aspects of state sovereignty, such as sovereign immunity, we strive to maintain the balance of power embodied in our Constitution and thus to ‘reduce the risk of tyranny and abuse from either front.’” Justice Thomas made clear that the FMC remained free to investigate claims against states and to institute own administrative proceedings against a state.

Dissenting, Justice Stevens said that in his view the 11th Amendment merely restricted federal courts’ diversity jurisdiction. Thus, even Hans v. Louisiana was in error.231 Justice Breyer also dissented, joined by Justices Stevens, Souter, and Ginsburg. Justice Breyer asserted that the principle of law enunciated by the majority had no basis in any text, in any tradition, or in any relevant purpose. Justice Breyer said that it denied the executive and legislative branches the structural flexibility needed to deal with modern government demands. Further, it would force growth of the federal bureaucracy to oversee the actions of the states, thus undermining the very constitutional objectives that the Court’s decision claimed to serve.232

§ 17.2.4.3 State Sovereign Immunity Considerations Generally

As noted at § 17.2.4.1 n.188, 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. Affirming a state court decision dismissing an overtime pay claim under the Fair Labor Standards Act, the Court stated in Alden,233 “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, and its history, and the authoritative interpretation 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

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230 535 U.S. 743, 760, 769 (2002). See also Rhode Island Dep’t of Envtl. Management v. United States, 304 F.3d 31 (1st Cir. 2002) (states' sovereign immunity from suit extends to adversary administrative proceedings that are prosecuted against state by private party).

231 Id. at 770 (Stevens, J., dissenting).

232 Id. at 772-88 (Breyer, J, joined by Stevens, Ginsburg & Souter, JJ., dissenting).

As discussed at § 12.3.3 nn.129-43, the Court’s decision in \textit{Alden v. Maine} involved an important discussion between Justice Kennedy and Souter on the question of historically what was the framers and ratifier’s structural theory of sovereign immunity against the backdrop of the “dual theory of sovereignty.” As noted there, this split between Justices Kennedy and O’Connor, on one side, and Justice Souter, on the other side, has been played out in each of the recent cases discussed above involving the 11th Amendment and related issues of state sovereign immunity. Coloring each side in this debate is the individual’s view on what the proper federalist balance should be. For example, there are no examples of direct federal regulation authorizing suits by individuals against states before the Civil War. Supporters of a strong theory of sovereign immunity can use that fact, as did Justice Kennedy in \textit{Alden}, to support the view that the framing and ratifying generation shared a belief that such regulation would be unconstitutional. Supporters of restricting the 11th Amendment to diversity jurisdiction point out that the framers and ratifiers may have felt comfortable restricting the constitutional protection to diversity jurisdiction, since they knew that the structural restraints built into the Constitution would limit most congressional intrusion on state sovereignty, absent important legislative goals.

Similarly, one proposed version of the 11th Amendment, which was rejected, provided that the “Judicial power of the United States, except in cases arising under treaties made under the authority 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 a foreign state.” Proponents of a strong version of sovereign immunity can use the rejection of this proposal, as did Justice Kennedy in \textit{Alden}, as evidence that the framers of the 11th Amendment intended it to apply broadly, even as to treaties, as well as to all other aspects of federal law, including maritime and admiralty jurisdiction. Proponents of the narrower view can suggest this language was rejected precisely because if it were adopted the 11th Amendment would have been read to apply to other federal laws and to admiralty and maritime, and only not to apply to treaties.

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234 \textit{Id.} at 742-43. This immunity is not necessarily waived by a state removing a case to a federal court, since removal waives the 11th Amendment jurisdictional barrier, see \textit{supra} note 189, but sovereign immunity is substantive. Stewart v. North Carolina, 393 F.3d 484 (4th Cir. 2005).

235 \textit{Id.} at 743-45.


237 Gibbons, \textit{supra} note 176, at 1933.

238 \textit{Alden}, 527 U.S. at 721.
This proposal was made by Jeffersonian supporter, and states’ rights activist, Albert Gallatin. This suggests that Gallatin viewed the proposal as increasing the breadth of the 11th Amendment, which suggests that narrowing the 11th Amendment was the intent of those who rejected the proposal.\textsuperscript{239} By striking the language, the Federalist Party, which controlled majorities in the House and Senate, probably intended to limit the 11th Amendment to diversity jurisdiction, and not have it cover treaties, federal laws, or admiralty and maritime cases.\textsuperscript{240}

At the time, the Federalist party held majorities in both the House and the Senate. The specific result in \textit{Chisholm} was being used by anti-Federalists to stir up suspicion of the new national government, with some states, like Massachusetts and Virginia, circulating petitions that could be used as a vehicle to call a new Constitutional Convention.\textsuperscript{241} Against this historical backdrop, Federalist support for a limited 11th Amendment to be sent to the states would take the more dangerous issue of a Constitutional Convention off the political agenda.

Despite the attempt by some to use statements by Hamilton, Madison, and Marshall during the ratification debates to support the strong theory of sovereign immunity, careful attention to their language, and the context in which it was used, actually supports the narrow view of limiting sovereign immunity to diversity jurisdiction. Each of their statements were directed to rebutting the concern of anti-Federalists that the Constitution, as drafted, would permit states to be sued in federal courts for their Revolutionary War, or colonial-era, debts. This was particularly a concern of Southern states since a number of Northern speculators had bought up war debts at depressed prices. Further, the Treaty of Paris in 1783, which ended the Revolutionary War, provided that Britain would get relief with debts owed to it paid in sterling, not paper money.

All of these creditors were hoping for relief under the Constitution. This relief could come either from the federal government taking over these debts, or relief in federal courts that might be more likely to hold states to their obligations than state courts, given the flexibility of the prevailing doctrine adopted in state courts that states would have to pay only under a broad concept of “moral obligation” or “good faith” performance.\textsuperscript{242} Although the federal government did take over basic state Revolutionary War debts in 1791, as well as assuming federal debts acquired under the Articles of Confederation, pursuant to Article VI, cl.1 of the Constitution, for other state debts, the anti-Federalist concern turned out to be real in terms of federal court intervention in \textit{Chisholm v. Georgia}. From this perspective, the 11th Amendment merely reinstated Hamilton, Madison, and Marshall’s views regarding states not being able to be sued in federal court for their state debts under state law pursuant to diversity jurisdiction.

\textsuperscript{239} Gibbons, \textit{supra} note 176, at 1933-34.

\textsuperscript{240} \textit{Id.} at 1934-35.

\textsuperscript{241} \textit{Id.} at 1931-32.

\textsuperscript{242} For a good discussion of the problem of state Revolutionary War debts, see Paul E. McGreal, \textit{Saving Article I from Seminole Tribe: A View from the Federalist Papers}, 55 SMU L. Rev. 393, 396-406 (2002).
Hamilton’s views on state sovereign immunity consistent with this understanding are stated in The Federalist Papers No. 32 & 81. In No. 81, Hamilton addressed the concern that states might be amenable to suit in federal courts for their state debts, and rejected that view based upon his theory of state sovereignty developed in No. 32. In that article, Hamilton had discussed state immunity from the perspective of preemption theory, noting that states would retain all of their existing powers unless preempted by federal power. Hamilton listed three ways in which the Constitution provided for federal preemption of state power: (1) express grants of exclusive jurisdiction to the federal government, as for Congress’ power to make rules for the District of Columbia; (2) express grants of power to the federal government and express limitations on state power, such as Congress’ power to “lay and collect taxes, duties, imposts, and excises,” and the limitation that “No State, shall, without the consent of Congress, lay any impost or duties on imports or exports, except for the purpose of executing its inspection laws”; and (3) cases where federal power existed and concurrent state power would be “contradictory and repugnant,” although not merely “inconvenient.” As an example of this, Hamilton listed Congress’ power to make “uniform” rules of naturalization.

These three categories appear cover the range of preemption possibilities: express preemption, either by express grant or express limitation on state power, and implied preemption. As discussed at § 20.3.1.2 n.135, the category of implied preemption involves both (1) field preemption, where the entire field of state regulation is preempted, such as regarding naturalization, the example listed by Hamilton, and (2) conflict preemption, where (i) compliance with both state and federal regulations is impossible (in Hamilton’s terms, “contradictory”) or (ii) where state law stands as an obstacle to accomplishing Congress’ purposes (in Hamilton’s terms, “repugnant”).

Hamilton’s use of the terms “contradictory” and “repugnant” suggests Hamilton had in mind all manner of federal preemption, not merely the two provisions in Article I, § 8 that refer to “uniform” rules – naturalization and bankruptcy, in Article I, § 8, cl. 4. Had Hamilton only intended the two “uniform” clauses to be included, he would have used that term, not the broader “contradictory and repugnant” language. By tying state sovereign immunity to preemption principles, Hamilton’s view was that states would surrender sovereign immunity in any case where federal law had preemptive effect. This would involve any congressional exercise under Article I, § 8, consistent with Union Gas, and consistent with Hamilton’s strong federal power views, and would reject Seminole Tribe.

On the other hand, there would be no federal jurisdiction for cases involving state debts under state law, since there was no federal power to preempt over that subject matter. Chisholm held to the contrary, and thus the 11th Amendment was a corrective to reinstate the initial vision. The language of the 11th Amendment stating that the judicial power “should not be construed” to extend to diversity cases supports this view that the 11th Amendment was viewed by its framers as merely restating the original intent of the drafters. Under Hamilton’s preemption vision, states would be free to tax on their own areas that did not interfere with federal taxing schemes, the other concern of the anti-Federalists regarding the state debt issue. The anti-Federalists were concerned that federal taxing power would crowd out the ability of states to tax to fund their operations and pay their debts. Hamilton also specifically addressed this concern in No. 32.

\[243 \text{ Id. at 398-401.}\]
Marshall and Madison’s comments during the ratification debates were similarly made against a backdrop of this concern with state sovereignty. Both said that the language in Article III, § 2, cl. 1 on federal jurisdiction for cases “between a State and citizens of another State” or “between a State . . . and foreign States, Citizens or Subjects” referred to states suing as plaintiffs, not being sued by an individual and in the role of a defendant.244 Particularly given the context of these statements to rebut arguments concerning the state law issue of state Revolutionary War debts, these statements both literally, and were likely intended to, refer to cases where jurisdiction would be based on the nature of the parties, that is, the diversity cases, not cases involving federal questions. State versus state cases, of course, would involve a state suing as a plaintiff, and thus could be brought in federal court, as the Supreme Court has always held. This view is also reflected in the belief during the natural law era that states could be sued by foreign states based on treaty obligations, and thus under federal question jurisdiction, just not in diversity jurisdiction pursuant to the 11th Amendment’s text regarding no suit in federal court based on the parties being a “State” and “foreign States.”245

Had Marshall shared the broader concept of state sovereign immunity at the time of the framing, one would expect to see that vision expressed somewhere during Marshall’s 35 years on the Supreme Court. Yet consistently under Marshall Court decisions, the more limited reading of the 11th Amendment prevailed, restricting it to diversity jurisdiction, consistent with its text and this understanding of Hamilton, Madison, and Marshall’s views. Indeed, in Cohens v. Virginia,246 Marshall distinguished cases involving states where jurisdiction was based on the nature of the parties, to which the 11th Amendment did apply, from cases involving “the constitution or laws of the United States,” that is, federal questions, to which the 11th Amendment did not apply.

Some federal action intruded on states during the Marshall Court era. Cases came about either as a result of the impact of federal treaties on states, particularly treaties with Britain over debts and land, or as a result of admiralty and maritime jurisdiction, typically involving ownership and operation of ships. These cases could be troublesome for state finances, but sovereign immunity was never recognized in any of these cases, principally through the Osborn principle of being able to sue state officials, even for money damages, even when those damages would eventually be paid by state treasuries, as long as states were not the party of record in the case.247 Had the Marshall Court shared in the strong view of state sovereignty, they would likely have limited the Osborn principle, as did the formalist-era courts in In re Ayers, Ex parte Young, and other cases, noted at § 17.2.4.1 n.183. Given the limited amount of federal regulation, the Taney Court had no occasion, or need,


245 See generally Thomas H. Lee, The Supreme Court of the United States as Quasi-International Tribunal: Reclaiming the Court’s Original and Exclusive Jurisdiction over Treaty-Based Suits by Foreign States Against States, 104 Colum. L. Rev. 1765, 1767-70 (2004).

246 19 U.S. (6 Wheat.) 264, 412 (1821).

to upset the limited understanding of the 11th Amendment. Only with the more conservative, pro-
states’ rights formalist-era Court did the 11th Amendment come to have the broader meaning it has
today.

As noted at § 14.2.5, the Supreme Court has moved since 1986 into a modern natural law era of
judicial decisionmaking. As discussed at § 16.4 nn.92-96, the fundamental idea behind this modern
natural law perspective is that governmental action should be tested by whether its means and ends
accord with the reason and logic of an impartial spectator, which requires giving each person equal
concern and respect. As noted at § 16.4 nn.103-05, such a modern natural law impartial spectator
approach supports an analysis permitting “play in the joints” for social policy decisions, rather than
constitutionalizing value decisions not determined by the principle of equal concern and respect.
The text of the 11th Amendment, and history surrounding its adoption, seem to support on balance
the limited view of the 11th Amendment that would permit “play in the joints” for Congress to decide
on whether to grant individuals rights to sue states to enforce federal law.248

Further, such an approach would require giving equal concern and respect to the changes in
federalism wrought by the Civil War and reflected in the 14th Amendment, particularly its Privileges
or Immunities Clause249 and its Due Process Clause.250 As discussed at § 25.3 nn.55-63, one view
of the 14th Amendment Privileges or Immunities Clause is that it was intended, in part, to give each
citizen of the United States a right to have federal law enforced in the states. At a minimum, such
an approach suggests that the framers and ratifiers of the 14th Amendment believed in the more
limited view of the 11th Amendment as represented by the then-current Marshall and Taney Court
precedents, rather than the more expansive view of the 11th Amendment represented by Hans and
later formalist-era precedents.

Adoption of this doctrine would require overruling the Court’s recent 11th Amendment jurisprudence
on the ground that those decisions are substantially wrong as reflecting too great a conservative
preference for states’ rights, a preference not represented in constitutional text, structure, history,
or legislative and executive practice. This would mirror the Court’s rejection in 10th Amendment
doctrine of the conservative preference for states’ rights represented by National League of Cities
v. Usery, and its replacement by the more textually faithful analysis of the 10th Amendment in
Garcia v. San Antonio Metropolitan Transit Authority,251 discussed at § 18.4.4 nn.219-31.

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248 See generally John F. Manning, The Eleventh Amendment and the Reading of Precise
Constitutional Text, 113 Yale L.J. 1663 (2004), and sources cited therein.

249 See generally William J. Rich, Taking “Privileges and Immunities” Seriously: A Call to
Expand the Constitutional Canon, 87 Minn. L. Rev. 153, 181-83, 200-10 (2002); William J. Rich,
Privileges or Immunities: The Missing Link in Establishing Congressional Power to Abrogate State

250 See generally Erwin Chemerinsky, The Hypocrisy of Alden v. Maine: Judicial Review,

Such an approach would also permit the Court to dispense with the unpredictable, and analytically unworkable, distinctions currently being drawn concerning how much state influence over local action is sufficient to make the local action attributable to the state. This would be similar to the Court rejecting in *Garcia* the unpredictable, and unworkable, aspect of *National League of Cities* regarding what is a traditional versus non-traditional governmental function, discussed at § 7.3.3.1 nn.146-51. Under current 11th Amendment doctrine, it is understandable that the Court does not want to make the 11th Amendment analysis fully applicable to local action, since, as has been noted, “it is [local government] that provides most social services in this country, such as police and fire protection, education, and sanitation. Therefore, if the Eleventh Amendment barred suits against municipalities, federal courts could not ensure compliance with the Constitution by those who are most likely to violate it.”252 Under a more limited view of the 11th Amendment, treating local governmental action as part of state action, as is done under the 14th Amendment, discussed at § 26.1 nn.1-4, would not pose that problem.

Of course, even under Justice Souter’s narrower view, the plain text of the 11th Amendment would remain, which prevents states from being sued in federal court under diversity jurisdiction. However, under this view, Congress could abrogate state sovereign immunity with regard to any valid federal enactment, including those enactments justified under the Commerce Clause, either under Hamilton’s preemption kind of analysis, or Marshall’s view that the 11th Amendment does not apply to cases “arising under this Constitution, the Laws of the United States, and Treaties made,” or as part of a 14th Amendment Privileges or Immunities Clause analysis, rather than having to prove, as under current doctrine, state action in violation of the Equal Protection or Due Process Clauses of the 14th Amendment. This would place the decision on immunity back in the hands of Congress, where the original Constitution, with its Supremacy Clause, and even more so the Civil War Amendments, with their limitations on state power, likely intended the power to be placed.

Viewing state sovereign immunity through the lens of the 14th Amendment would also solve the current anomaly in the law, where the 11th Amendment is viewed as a jurisdictional matter for most purposes of procedure, but can be waived by the state, which ordinarily cannot be done for jurisdictional matters.253 Under this view, the 11th Amendment is jurisdictional in nature, but the waiver is accomplished as part of the limitations on state power implicit in Article I, § 8 and the 14th Amendment, which are substantive, thus authorizing substantive waivers of sovereign immunity by the state itself or Congress.

Of course, under the current view of the 11th Amendment, there is an argument that since the 11th Amendment is jurisdictional, it should not be waivable, and should be raised *sua sponte* by a federal court if it is not raised by the parties themselves.254 One could also argue that the very use of the term “State” in the Constitution implies that the framers believed that individual states, like “foreign

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252 Chemerinsky, supra note 204, at 194.

253 See id. at 215-16.

States,” were intended to have broad sovereign immunity applicable to individual nations. However, there is no specific historical evidence that supports the view that the framers made that kind of conscious choice, rather than just continuing the prevailing term “State” to describe the 13 states that were to make up the new federal union. Further, even in a confederation of independent states, as the states were under the Articles of Confederation, or under the model of the European Union today, there is no necessary requirement of broad state immunity from union-wide laws.

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, as noted at §17.2.4.1 n.178; individuals can sue under Ex parte Young for injunction relief, discussed at § 17.2.4.2 nn.206-08; the federal government can create incentives for states compliance under its Spending Clause power, discussed at § 18.3.2.2; 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.

§ 17.2.4.4 Additional Restraints on Federal Courts Involving State Court Actions: Abstention Doctrine and Other Prudential Restraints

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

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256 See generally James E. Pfander, Member State Liability and Constitutional Change in the United States and Europe, 51 Am. J. Comp. L. 237 (2003).


258 401 U.S. 37, 54 (1971).


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. Reflecting a liberal instrumentalist predisposition for effective enforcement of civil rights, 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.

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262 481 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, as well as for the injunctive or declaratory relief involved in *Pennzoil*, because a determination that the party’s constitutional rights have been violated would have the same practical 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).

263 *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).

Pullman abstention was extended in *Louisiana Power & Light Co. v. City of Thibodaux*[^265] to involve abstention in a state eminent domain proceeding, which though not formally an equitable 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.”[^266]

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.[^267] 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.[^268]

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*,[^269] 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.[^270] 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.[^271]

In *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*,[^272] 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 by its actions.

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. Plaintiffs contended that a $567,000 fee imposed by a city for converting residential rooms to tourist rooms was a taking. They had initially filed an action in a state court for an administrative mandamus against imposing the fee, but that action was stayed when they filed suit in a federal court for an as-applied challenge to the ordinance which authorized the fee. 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. This conclusion was based on the Court’s precedent of 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

273 Id. at 293, citing Parsons Steel, Inc. v. First Alabama Bank, 474 U.S. 518, 523 (1986).


275 Id. at 327, citing Williamson County, 473 U.S. 172, 195 (1985).

276 Id. at 342-48.
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. Related issues of “comity” based on the Article IV, §1 Full Faith and Credit Clause of the Constitution are discussed at § 23.1.4.

As a final point regarding prudential restraints on the federal courts, in *Ashwander v. T.V.A.*, discussed at § 17.1.3.2, the Court stated general principles of judicial restraint that constitutional questions should not be decided in a friendly suit; by *dicta*; more broadly than the facts; if there is another ground for decision, *e.g.*, an interpretation that would avoid the constitutional question; on behalf of a party not injured by the challenged law; on behalf of parties who have obtained benefits from the challenged law; or, for cases involving the constitutionality of a statute, whether a construction of statute is fairly possible by which the question may be avoided. These principles apply equally to considerations of the constitutionality of state or federal laws. Similarly, the constitutional and prudential limitations on federal court jurisdiction, discussed next at § 17.3, also apply to cases in federal court involving state or federal laws.

§ 17.3 Justiciability Limits on Federal Court Jurisdiction

As noted at the beginning of § 17.2, Article III 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 of justiciability. These are the doctrines of standing, discussed at § 17.3.1; ripeness, discussed at § 17.3.2; mootness, discussed at § 17.3.3; and political questions, discussed at § 17.3.4.

Based upon a predisposition to resolve cases on the merits to advance sound social policies, the instrumentalist approach to these doctrines 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 and bright-line rules tends to lead formalists to adopt a more strict interpretation of these doctrines. Similarly, based upon a predisposition to defer to government, the Holmesian approach in close cases tends to favor finding no standing, the case is not ripe, is moot, or involves a political question. The natural law approach tends to represent a middle between these extremes, without a strong predisposition in either direction, based upon the natural law respect for reasoned elaboration of the law against a background of considering the sources of text, purpose, context, history, legislative and executive practice, and judicial precedents.

§ 17.3.1 Standing to Sue: Constitutional and Prudential Limits on Federal Jurisdiction

§ 17.3.1.1 Introduction to the General Principles of Standing

The text of Article III of the Constitution, which provides for federal judicial power over certain

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277 *Id.* at 348-52 (Rehnquist, C.J., joined by O’Connor, Kennedy & Thomas, JJ., concurring).
"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 in 1944 in *Stark v. Wickard*.\(^\text{278}\)

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.’"\(^\text{279}\) To establish Article III standing, current doctrine requires that plaintiffs must allege a past or prospective “injury in fact” to themselves, “caused” by the challenged action, and 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."\(^\text{280}\) 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."\(^\text{281}\) 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."\(^\text{282}\) The various prudential principles which affect standing are discussed at § 17.3.1.4.

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.\(^\text{283}\) 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.\(^\text{284}\)

Article III standing requirements 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*

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However, where the state court judgment on the claim was adverse to one of the defendants in the state court action, rather than adverse to plaintiffs, who because they did not have Article III standing for purposes of having their case heard in federal court had no real cognizable complaint in federal court about losing the state case anyway, the Court held in *Asarco, Inc. v. Kadish* 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. Chief Justice Rehnquist, reflecting his conservative Holmesian deference-to-state-government predisposition, and literal-minded formalist Justice Scalia, dissented from the Court’s judgment and would have applied *Doremus* to let the state court decision stand without federal review. They noted such unreviewable state court decisions already occur in those states whose courts have the power, unlike the federal courts, to render advisory opinions, as discussed at § 7.3.3.1 n.516.

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 directly caused plaintiff a physical or economic injury which can be remedied by damages or an injunction. Difficulties arise, however, once plaintiffs are outside the classic case of individuals suing for their own physical or economic injuries. Thus, 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. Problems are also raised by the federal Qui Tam statute, 31 U.S.C. § 3730, discussed at § 17.3.1.3.E., which allows private persons to bring actions on behalf of the United States.

These difficulties frame the two central questions of modern standing doctrine: (1) how difficult should it be to establish standing in these non-traditional kinds of cases, and (2) whether the difficulties which arise in these cases are constitutional difficulties mandated by Article III, or merely prudential difficulties that can be overcome by acts of Congress that grant standing. In the

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1970s, in *Warth v. Seldin*, the Court said that in these situations it might invoke a non-constitutional "prudential" limitation on standing to sue, such as the prudential principle in *Warth* that a harm shared equally by a large class of citizens was 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* and *Lujan v. Defenders of Wildlife*, the Court has stated that plaintiffs who raise only generalized grievances about government do not state an Article III case or controversy.

In 1992, Professor Cass Sunstein, of the University of Chicago Law School, published in the *Michigan Law Review* a significant article on the doctrine of standing that addressed these two issues. Professor Sunstein concluded that the Supreme Court erred in 1992 when it decided in *Lujan* that, because Article III limits judicial power to cases and controversies, standing to bring a case in a federal court: (1) always depends on plaintiff suffering an "injury in fact"; and (2) this is true even if standing is authorized by Congress.

With regard to the first central issue of standing, *i.e.*, how difficult should it be to establish standing in non-traditional kinds of cases, Sunstein contended that the "injury-in-fact" requirement has no textual or historical support. Professor Sunstein noted, "What of 'injury in fact'? No court referred to this phrase before *Barlow v. Collins* in 1970. After that year, the phrase appears in about ten cases during each succeeding five-year interval, until a leap to ten references in the brief period from 1990 to 1992. Thus the injury-in-fact test played no role in administrative and constitutional law until the past quarter century." The correct test for standing, said Sunstein, is whether state or

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293 *Id.* at 166-68.
294 *Id.* at 169. To emphasize his conclusion that modern standing law is not based on history, Professor Sunstein supplied some quantitative information derived from his search in LEXIS:

In the history of the Supreme Court, standing has been discussed in terms of Article III on 117 occasions. Of those 117 occasions, 55, or nearly half, of the discussions occurred after 1985 – that is, in the past seven years. Of those 117, 71, or over two thirds, of the discussions occurred after 1980 – that is, in just over a decade. Of those 117, 109, or nearly all, of the discussions occurred since 1965. The first reference to "standing" as an Article III limitation can be found in *Stark v. Wickard*, decided in 1944. The next reference does not appear until eight years later, in *Adler v. Board of Education*.

*Id.*
federal law or the Constitution has conferred on the plaintiff "a cause of action." This is a more flexible test and usually would be easier for the plaintiff to meet than the "injury-in-fact" test because historically a number of causes of action have existed, such as *qui tam* and informers' actions, which do not depend upon the plaintiff establishing any "injury in fact."^{295}

With regard to the second central issue of standing, *i.e.*, whether standing is a constitutional requirement or merely prudential so that Congress can freely enlarge standing, Sunstein contended that the "injury-in-fact" test may deprive Congress of a power that it properly has to enlarge standing by creating rights of action widely shared by many persons. According to Sunstein, Congress should be viewed as having broad constitutional power to create new causes of action, thus making standing doctrine principally a prudential matter subject to congressional control.^{296}

Professor Sunstein stated that the movement away from this correct view, which existed in the 19th century, was brought about largely by three 20th century developments. First, in the 1930s and 40s, there was a struggle over the constitutional legitimacy of the emerging regulatory state. Some Justices, especially Justice Frankfurter, raised justiciability issues to guard the New Deal from too frequent judicial attack.^{297} Second, in 1970, when attempting to establish a very lenient standing test for beneficiaries of the Administrative Procedure Act, so the beneficiaries could promote fidelity to legislative enactments,^{298} Justice Douglas introduced in *Association of Data Processing Service Organizations, Inc. v. Camp*,^{299} the two-pronged test of (1) "injury in fact", while (2) being within the "zone of interests" of the relevant law. Third, after confining the "zone of interests" test in later cases so it would not be a bar to standing, the Court toughened what was required to establish "injury in fact," for a variety of reasons. According to Professor Sunstein, these reasons include:

1. Resistance to Congress creating new kinds of property rights and allowing people to vindicate them, a resistance generated by deep familiarity with the traditional common-law catalogue of legal rights;
2. Article III separation of powers concerns; and
3. A belief that a distinction should be drawn between regulated objects and the beneficiaries of regulation, who ordinarily should not be allowed to sue for under-regulation because of: (a) concerns over whether certain governmental regulations are morally questionable; (b) concern about administrative over-enforcement or the capture of agencies by beneficiaries; and (c) questions about whether the Court can play a fruitful role in implementing regulatory statutes.^{300}

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^{295} Id. at 166-67, 170-79.

^{296} Id. at 223.

^{297} Id. at 179.

^{298} Id. at 185.


Professor Sunstein attributed little weight to these three concerns. He would have the Court apply only the test of whether the plaintiff has a cause of action because of some source of law — common law, statute, or the Constitution. To avoid having *Lujan* cause the dismissal of future citizen-initiated suits, should it survive as a viable precedent, Sunstein recommended that Congress create a system of bounties for citizens in cases involving private defendants or the executive branch, so the bounty can be considered a property interest on which to base standing. He also suggested that Congress should exercise its power to create property rights in benefits provided by regulatory statutes, and to establish standing to vindicate those property rights.

Finally, Sunstein foresaw a glimmer of hope for his preferred outcome in the concurring opinion by Justice Kennedy in *Lujan*. The hopeful language was as follows: "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. 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."

Sunstein hoped that this opinion might "open the possibility that Congress has the power to create quite novel property interests, to grant those interests to many people or even to citizens, and to confer standing to enable people to vindicate those interests." For Professor Sunstein this point is important, even if any particular Congress is unlikely to exercise this power to create additional private rights of action in many cases.

Some have described the evolution of standing doctrine as "confused," "amorphous," or an area regarding which only "worthless generalizations" can be made. As it true for the evolution of any constitutional doctrine, the evolution of standing doctrine can best be understood by paying attention

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301 *Id.* at 166.

302 *Id.* at 232-35.


304 *Sunstein,* supra note 292, at 236.

to changes in Court personnel and the Justices' respective styles of decisionmaking. In general, when the standing issue was raised in the pre-instrumentalist Court eras, prior to 1954, the Court confined judicial power to traditional kinds of actions during the natural law and formalist eras (1789-1873 and 1873-1937, respectively). The Court gradually developed an Article III injuries test during the Holmesian era (1937-1954). The instrumentalist Court (1954-1986), particularly during its 1960s heyday, attempted to transform standing doctrine in ways that would permit "citizen attorneys general" wide latitude to bring actions in the federal courts against regulated parties and government officials to require compliance with the law. Finally, the post-instrumentalist Court (1986-today) has returned standing doctrine to a more traditional posture, and returned results in standing cases back substantially to where they were before the instrumentalist "blip" in standing doctrine.

It is true, as Professor Sunstein stated, that in post-instrumentalist standing cases the Justices have been giving greater explicit emphasis to the doctrine of separation of powers than did their pre-instrumentalist predecessors. Consistent with a modern natural law focus on reasoned elaboration of the law, this contemporary development is a reasoned elaboration of pre-instrumentalist precedent and will help bring about, as the Court has said more than once, the realization in standing doctrine of separation of powers concepts embedded in the Constitution.

§ 17.3.1.2 Constitutional Principles of Standing Doctrine

A. 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 Marbury v. Madison,306 "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." 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 courts meddling with executive prerogatives, Marshall said in Marbury,307 "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. As 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."308

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306 5 U.S. (1 Cranch) 137, 163 (1803).
307 Id. at 170.
A typical Supreme Court case during the Marshall Court era related to standing was *Weston v. City Council of Charleston.* In this case, the owners of stock in a bank incorporated by Congress sought a writ of prohibition against a city's proposal to impose a tax on that stock. Standing was not brought into question since a writ of prohibition was a traditional common law action and the city's proposed action of imposing a tax would have directly injured the plaintiffs' property interests.

Drawing on state cases, Professor Sunstein pointed out that the details of "standing" doctrine in the original natural law period were based on the concept of the common law "cause of action." Under this approach, there was no independent inquiry into whether the plaintiff had an "injury in fact" that was "caused by the challenged conduct." Indeed, early on Congress passed *qui tam* statutes and authorized informers' actions whereby people could sue to enforce public duties and keep a share of the resulting damages or fines without regard to whether they had suffered any personal injury.

This understanding of standing has been noted by commentators as varied in their approaches to constitutional interpretation as Louis Jaffe, Raoul Berger, and Cass Sunstein. Thus, as an historical matter, the willingness of courts during the original natural law period to consider cases brought by citizens to vindicate what today we would consider to be generalized grievances appears reasonably well-settled, though no Supreme Court case of this era ever explicitly addressed the question. Analytically, however, the logic behind permitting suits for generalized grievances – to obtain court decrees that prevent the government from behaving unconstitutionally – also supports the notion of the Court rendering advisory opinions to prevent unconstitutional government behavior from occurring in the first instance. However, on separation of powers grounds, early United States 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 after Hayburn's case, Chief Justice Jay, and the Associate Justices, sent a letter to President Washington's Secretary of State, Thomas Jefferson, confirming this view that the federal courts may not constitutionally give advisory opinions. The letter stated in part:

[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

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311  *Id.* at 171-77.
313  2 U.S. (2 Dall.) 409 (1792).
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 matter. Thus, in this instance, concerns regarding separation of powers and the appropriate role of the Court in our constitutional design triumphed over the 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.  

In short, during the original natural law era the Court did not fully work out the tension between a separation of powers base to Article III jurisdiction, reflected in Marshall's language in *Marbury*, and the English "cause of action" base to standing doctrine. One reason the Court may not have been much concerned with this state of affairs appears to have been that there was discretionary power to refuse jurisdiction in cases where the plaintiff did not have a personal interest.  

This articulation is consistent with the influences on judicial interpretation discussed in Chapter 15. As noted at § 15.3, Stage 3 natural law was based on concrete operational thought, which is prior to Holmesian Stage 4½ and its base in formal operational thought. As noted at § 15.4.1 nn.50-56, there is a conflation of custom and reason at Stage 3, which is reflected in standing doctrine based on customary causes of action. One would not expect a full-fledged theoretical approach to standing to be developed during a period predominantly based on concrete operational thought reasoning.

**B. 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 traditional and customary meaning of "cases and controversies" as found in judicial precedents, including those of England, while continuing to acknowledge 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. As could be expected from Stage 4 formalism being based on concrete operational thought, discussed at § 15.4.1 nn. 60-66, during the formalist era the Court mostly followed the existing concrete precedents of the natural law era, giving them a more literal, or formalist, interpretation.

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315 *See* Berger, *supra* note 312, at 830-32.


317 *See* Berger, *supra* note 312, at 838-40. *See also* Union Pacific R. Co. v. Hall, 91 U.S. 343, 356 (1875) ("Granting the writ [of mandamus] is discretionary with the court, and it may well be assumed that it will not be unnecessarily granted."). As noted in *Hall*, this discretion power to refuse jurisdiction was rarely used. *Id.* at 355.
For example, in 1875 in *Union Pacific Railroad Co. v. Hall*, the Court allowed private merchants to bring a mandamus action against a railroad to require it to build a bridge and use the bridge as part of its operating line, according to what the law required. The Court indicated that there would be no problem in allowing such an action in England, and that the preponderance of American authority also supported the doctrine that private persons may move for a mandamus to enforce a public duty without the intervention of the government. The Court continued, however, by stating that allowing such an action was discretionary with the Court, and that the Court was assuming that the defendant would not be harmed by many such actions. It should also be noted that, on the facts of the case, it was likely that the plaintiff merchants had suffered an injury in fact by the failure of the railroad to comply with its duties. Though *Hall* was brought as a writ of mandamus on behalf of the public generally, plaintiffs in *Hall* were "merchants in Iowa" who had "frequent occasion to receive and ship goods over the company's road," and thus were directly injured by the failure of the road to be built.

In 1911, the Court referred once again to the broad common-law tradition of standing in *Muskrat v. United States*. The Court stated, "By cases and controversies are intended the claims of litigants brought before the courts for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights, or the prevention, redress or punishment of wrongs." The specific holding in *Muskrat* was that under our common-law tradition Congress cannot create a procedure for testing the constitutionality of a law in a suit where there are no adverse interests. In 1921, the traditional form of a lawsuit was also not thought in *Fairchild v. Hughes* to encompass 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 that to the extent a state had a traditional case of "rights of person or property," "rights of dominion over physical domain," or "quasi-sovereign rights actually invaded or threatened," the plaintiff state would have a justiciable case. However, Massachusetts suffered no injury, said the Court, 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."

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318 91 U.S. 343 (1875).
319 Id. at 354-56.
320 Id. at 354.
321 219 U.S. 346, 357, 361 (1911).
322 258 U.S. 126, 129 (1921).
323 262 U.S. 447, 480, 484-85 (1923).
The Court also observed that such cases do not fall under the traditional definition of justiciability, as defined in prior cases. The Court noted, "It is of much significance that no precedent sustaining the right to maintain suits like this has been called to our attention, although, . . . a large number of statutes appropriating or involving the expenditure of moneys for non-federal purposes have been enacted and carried into effect."324

Regarding Mrs. Frothingham's standing as an injured taxpayer, the Court focused more explicitly than in prior cases on the interplay between justiciability and separation of powers concerns that inform the traditional definition of justiciability. 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.325

The Court also noted a formalist concern with certainty and predictability, stating, “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.”326

Despite this language from Frothingham, the formalist period ended without the Court having to resolve precisely the question of under what circumstances a plaintiff with a generalized grievance may have standing to challenge the constitutionality of a federal act if authorized by Congress to do so. The Court in this era did not repudiate the concept that a writ of mandamus, or other similar writ, could be secured by a party having only a generalized grievance, subject to the discretion of the Court. However, the Court's specific conclusions in the cases cast doubt over whether the Court would be willing to adopt any very general and broad concept of standing.

The formalist approach to congressional ability to create standing where none existed before is similarly informed by separation of powers concerns. Reflecting the formalist approach, Justice Scalia recounted in 1992 in Lujan v. Defenders of Wildlife327 that the Court had often held that a particular individual's general grievance about government – claiming only harm to every citizen's interest in proper application of the Constitution and laws – does not state an Article III case or

324 Id. at 487-88.
325 Id. at 488-89.
326 Id. at 487.
controversy. Justice Scalia then adopted a strict separation of powers justification for these holdings. Under this approach, there are rigid distinctions between the appropriate role of Congress, the courts, and the executive, and thus there are rigid limits on Congress' ability to use the courts to help check executive department compliance with federal laws. As Justice Scalia stated in *Lujan*:

> 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." 328

Underscoring the conclusion that from this strict separation of powers view Congress should have no special leeway in determining when standing should be granted in federal courts, even when the source of the asserted right is a federal statute, Justice Scalia said:

> [T]here is absolutely no basis for making the Article III inquiry turn on the source of the asserted right. Whether the courts were to act on their own, or at the invitation of Congress, in ignoring the concrete injury requirement described in our cases, they would be discarding a principle fundamental to the separate and distinct constitutional role of the Third Branch – one of the essential elements that identifies those "Cases" and "Controversies" that are the business of the courts rather than of the political branches. 329

Having thus stated that Congress' ability to create standing where it would otherwise not be found by the Court is greatly limited, Justice Scalia did note that nothing in his opinion contradicted the principle stated in prior cases that the injury required by Article III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing. The two cases he used to illustrate that principle involved congressional elevation to the status of legally cognizable injuries

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328 504 U.S. at 577.

329 *Id.* at 576. This view is in contradiction to Justice Powell's statement in *Warth v. Seldin* that standing "often turns on the nature and source of the claim asserted," 422 U.S. at 500, a view which reflects the impact on the modern natural law approach to standing of a sharing of powers, checks-and-balances approach to separation of powers. See *infra* text accompanying notes 430-38. It is also in contradiction to a Holmesian approach toward standing, which also adopts a sharing of powers, checks-and-balances approach to separation of powers analysis. See *infra* text accompanying notes 354-60. And, of course, it is in contrast to an instrumentalist approach which permits Congress to create standing as long the Court is not placed in the position of rendering advisory opinions and concrete adverseness exists between the parties. See *supra* text accompanying notes 368-72. For an example of a formalist strict separation of powers approach to standing, but which to achieve its result adopted functional sharing of powers language, consistent with recent Supreme Court majority opinions, see Charles S. Abell, *Note, Ignoring the Trees for the Forest: How the Citizen Suit Provision of the Clean Water Act Violates the Constitution's Separation of Powers Principle*, 81 Virginia L. Rev. 1957 (1995).
some concrete, *de facto* injuries that were previously inadequate in law. One was injury to an individual's personal interest in living in a racially integrated community, while the other was injury to a company's interest in marketing its product free from competition.330 Explaining the general principle which justified these case results, Justice Scalia quoted from a 1972 case, *Sierra Club v. Morton*, 331 “[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.”

Exactly what this language means in practice is unclear. A rigid formalist approach would probably want to limit this principle to the cases cited by Justice Scalia, that is, cases where a concrete actual injury of the same kind as existed at common law is made the basis of a cause of action created by Congress. This approach would not let Congress add injuries to the list of those sufficient for standing which are more generalized or abstract, like an interest in an ecosystem generally (“ecosystem nexus”), or an interest in animals generally (“animal nexus”), or a general professional interest in studying animals without any concrete plans for that study (“vocational nexus”).332

Justice Scalia's opinion in *Lujan* is consistent with this result, but does not clearly foreclose the greater congressional ability that may exist under Holmesian or modern natural law approaches, as discussed at §§ 17.3.1.2.C nn.354-60 & 17.3.1.2.E nn.430-38. To get members of the Court other than a formalist like Justice Thomas to join his *Lujan* opinion, it may have been necessary for Justice Scalia to leave his opinion deliberately vague on this point.

**C. The Holmesian Era: 1937-1954**

The limited view of standing suggested in *Frothingham* was developed further by the Supreme Court between 1937 and 1954, when a majority of the Justices were deeply influenced by Holmes. During this period, the Court acknowledged an explicit separation of powers base to standing doctrine, and for the first time began to articulate standing doctrine in terms of the requirement of a "distinct injury." This articulation is consistent with the influences on judicial interpretation discussed at § 15.3 nn.67-69. As noted there, Holmesian Stage 4½ is based on formal operational thought, which involves abstract reasoning about the theoretical foundations of existing phenomenon. Such theoretical reasoning is consistent with a movement from a concrete “cause of action” approach to restatement as a “distinct injury” requirement. However, as noted at § 15.3 nn.70-71, since this first stage of formal operational thought focuses in moral terms on the arbitrariness of any rule system, it yields a system of moral reasoning based merely on the values of the dominant forces in society.

A limited view of standing is consistent with this Holmesian deference-to-government posture. On issues of justiciability, this posture of judicial deference suggests that courts should decide cases only when it is clear that the parties have standing, that the case is ripe for resolution and not moot,


332 *Id.* at 565-67.
and that it does not represent a political question. The Holmesian approach is also reflected in Justice Brandeis' list of principles in *Ashwander v. Tennessee Valley Authority*, discussed at § 17.1.3.2, that the Court has developed "for its own governance in the cases confessedly within its jurisdiction . . . under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision." Justice Brandeis mentioned, in passing, the need for personal injury when he wrote in *Ashwander* that "the Court will not pass upon the validity of a statute upon complaint of one who fails to show that he is injured by its operation."

After the events of 1937, when a consistent 5-Justice Holmesian majority replaced the pre-1937 formalist majority on the Court, as discussed at § 14.2.3, the Holmesian/Brandeis approach to standing triumphed. Not surprisingly, the initial cases in the Holmesian era continued to use the same common-law cause of action terminology. However, the cases began to reach results more limited in their view of standing than were reached during the formalist era.

For example, in 1939, the Court refused to grant standing in *Tennessee Electric Power Co. v. Tennessee Valley Authority*, where a lawsuit was brought by a private utility company which alleged it would suffer economic damage by unfair TVA competition. The Court said that the kind of damage complained of was *damnum absque injuria*, that is, not consequent upon the violation of any right recognized by law. Connecting the result to the traditional reasoning of the natural law and formalist periods, the Court explained that the plaintiff lacked standing because the right claimed – to be free from competition like that posed by the TVA – was not "one of property, one arising out of contract, one protected against tortious invasion, or one founded upon a statute which confers a privilege." That the result would have been different during the formalist era is suggested by the dissent in the case from the two remaining formalist holdovers on the Court from the pre-1937 formalist era.

As the Holmesian era progressed, the requirement of an injury different from that suffered generally, independent of a common-law cause of action analysis, began to appear more prominently. For example, in 1944, in *Stark v. Wickard*, the first case to use the word “standing” as a constitutional requirement, Holmesian Justice Reed defended the distinct injury requirement as implicit in that part of the traditional natural law approach focused on the separation of powers base for standing doctrine. Justice Reed quoted language by Chief Justice Marshall in *Marbury v. Madison* to support

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334 *Id.* at 347.
335 306 U.S. 118 (1939).
336 *Id.* at 137-38.
337 *See id.* at 147-52 (Butler, J., joined by McReynolds, J., dissenting) (complainants each had a valuable right as a public utility and its value will suffer diminution by defendant's program. Therefore, plaintiffs were entitled to have a judgment on the questions they raised).
the view that Justice Marshall required the plaintiff to have a personal interest beyond that of the people generally.

Similarly, this 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.*339 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.'"

Though written after 1954, the Holmesian approach toward standing can also be found in Professor Bickel's "passive virtues" theory as to when a court should refuse to reach a decision on the merits.340 It is also reflected in the 1961 case of *Poe v. Ullman,*341 where Justice Frankfurter wrote of "prudential limitations" to a case being justiciable342 and emphasized an injury-in-fact requirement.343 Justice Frankfurter explained the source of standing limitations in *Poe* as follows: "[These limitations] have derived from the historically defined, limited nature and function of courts, [and from] the fundamental federal and tripartite character of our National Government and from the role – restricted by its very responsibility – of the federal courts, and particularly this Court, within that structure."344

Additional evidence of this Holmesian perspective continued to appear during the instrumentalist era in Justice Harlan's dissent in *Flast v. Cohen.*345 In that 1968 case, an instrumentalist majority allowed taxpayers to challenge a congressional appropriation as invalid because of the Establishment

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342 Id. at 504 ("[F]ederal judicial power is to be exercised to strike down legislation, whether state or federal, only at the instance of one who is himself immediately harmed, or immediately threatened with harm, by the challenged action.").

343 To emphasize the injury requirement, Justice Frankfurter quoted from *Frothingham v. Mellon*: "The party who invites the power [to annul legislation on grounds of its unconstitutionality] 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 a result of its enforcement . . ." *Id.* at 504-05, *quoting* *Frothingham v. Mellon*, 262 U.S. 447, 488 (1923).

344 Id. at 503.

Clause. Arguably this suit was on behalf of the public rather than the plaintiffs because the plaintiffs had not suffered any tangible personal injuries. Justice Harlan, dissenting, said that there must be some effective 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."

Because of its posture of deference to the other branches of 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* 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*. 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. 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.

Chief Justice Rehnquist's opinion in *Valley Forge Christian College v. Americans United for the Separation of Church and State* is a good example of a Holmesian approach toward the injury-in-fact requirement. 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 the 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 first distinguished *Flast* on narrow factual grounds, saying that *Valley Forge* involved administrative rather than congressional action, and that the authorizing legislation in *Valley Forge* was an exercise of Congress' power under

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346 *Id.* at 131, citing Missouri, Kansas, and Texas R. Co. v. May, 194 U.S. 267, 270 (1904) (Holmes, J., opinion).


348 262 U.S. at 593.

349 *Id.*

the Property Clause rather than the Taxing and Spending Clause of Article I, § 8.351 Later cases, however, like Bowen v. Kendrick,352 make it clear that these factual distinctions are not what motivated the Rehnquist opinion in Valley Forge.

Instead, after alluding to the "rigor with which the Flast exception to the Frothingham principle ought to be applied," Justice Rehnquist rejected the personal constitutional right argument. He said that psychological consequences produced by observing conduct with which one disagrees are not an injury sufficient to confer standing under Article III. He added, “It is evident that respondents are firmly committed to the constitutional principles of separation of Church and State, but standing is not measured by the intensity of a litigant's interest or the fervor of his advocacy.” Reflecting the Holmesian deference to government, Justice Rehnquist continued, "The federal courts were simply not constituted as ombudsmen of the general welfare," and that "cases or controversies" do not arise merely because litigation might be a convenient vehicle for correcting constitutional errors.353

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. As Justice Harlan noted in Flast,354 "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."

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351 454 U.S. at 479-80.

352 In Bowen v. Kendrick, 487 U.S. 589, 619 (1988), Chief Justice Rehnquist admitted that the fact that the congressionally authorized action had flowed through an agency in Valley Forge was irrelevant to the decision. But Justice Rehnquist still distinguished Valley Forge from Flast based on the Property Clause explanation. Id. However, from a functional analysis, usually used by Holmesian judges, whether congressional expenditures are by tax funds or government property, they are equally congressional expenditures. This functional point was explicitly made by the instrumentalis in their dissent in Valley Forge. 454 U.S. at 511-12 (Brennan, J., joined by Marshall, J., and Blackmun, J., dissenting); id. at 515 (Stevens, J., dissenting).

353 Id. at 481, 486-87.

354 392 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 only the following: "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 in situations in which Congress has authorized a suit. The difficult case of Muskrat v. United States, 219 U.S. 346, 31 S. Ct. 250, 55 L. Ed. 246, does not require more." Id.
For these reasons, Holmesian judges should be willing to move substantially beyond Justice Scalia's two cases of congressionally-enhanced standing to other cases if congressional intent is clearly stated, provided the Court is not asked to become an ombudsman for the general welfare. For example, in *Joint Anti-Fascist Refugee Committee v. McGrath*, 355 Justice Frankfurter, concurring, spoke of Congress' ability to create standing by statute as long as the injury was an "adverse personal interest," "not wholly negligible," and "more than that [suffered] in some indefinite way in common with people generally." In *Trafficante*, 356 Justice White, concurring, indicated that while he might not be prepared to find standing were the Court deciding the case absent congressional authorization, the fact of congressional authorization made standing easier to find. And, as previously discussed, Justice Harlan's dissent in *Flast v. Cohen* also suggests relatively broad authority for Congress to create standing where none would previously exist. 357

Focusing on the earlier Holmesian-era cases, such as *Tennessee Electric Power Co. v. Tennessee Valley Authority*, which used the cause of action terminology, and on the Holmesian willingness to let Congress create new private rights of actions, Professor Sunstein noted in his article that the Brandeis/Frankfurter innovations were broadly compatible with the traditional English and American common-law cause of action approach to standing. For the most part, he said, their opinions "can be read to hold that no one has a right to sue unless some law has conferred a right to do so." 358 He added that in "cases in which the cause of action was denied, no such right had been conferred," and that this was "the key point in the relevant opinions." Professor Sunstein also noted, quite correctly, that Justice Brandeis' list of factors in *Ashwander* counseling judicial restraint were phrased as prudential factors, not Article III constitutional requirements. 359 Of course, Justice Brandeis' opinion, in 1936, preceded the later Holmesian-era cases that developed the distinct injury test.

This reading of the cases ignores the later Holmesian-era cases that speak in terms of an injury-in-fact requirement. However, Sunstein's reading is broadly consistent with a Holmesian/Frankfurter/Brandeis approach to standing that emphasizes deference to the legislature in determining the

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It must be acknowledged that perhaps Justice White's conclusion here was limited to Congress exercising its enforcement authority under § 5 of the 14th Amendment, since Justice White cited *Katzenbach v. Morgan*, 384 U.S. 641, 648-49 (1966), a case involving § 5, in support of his conclusion to defer to the congressional grant of standing. However, congressional authority to pass the Civil Rights Act of 1968, involved in *Trafficante*, like the congressional authority to pass the Civil Rights Act of 1964, is based on the Commerce Clause. See *Heart of Alabama Motel, Inc. v. United States*, 379 U.S. 241, 258-59 (1964). So, technically speaking, Justice White's deference to Congress approach in *Trafficante* applies to virtually any congressional action.


358 Sunstein, supra note 292, at 180.

359 *Id.* at 180 & n.83.
contours of the Supreme Court's jurisdiction. Furthermore, no Holmesian-era case directly resolved the question of the extent to which Congress could authorize citizen-actions to challenge the constitutionality of a statute in situations where the Court would not otherwise find an injury. In sum, the pre-instrumentalist-era cases clearly resolved only the easy question that the Constitution naturally permits federal courts to decide actions involving challenges to laws whose operation causes injury to the plaintiff in some personal way that differentiates the plaintiff from other persons in society. Despite the common-law cause of action rhetoric in most of the pre-instrumentalist standing cases, the Court had never explicitly granted standing to a plaintiff based only on a generalized grievance rationale where the plaintiff had no colorable claim of direct injury.360

D. The Instrumentalist Era: 1954-1986

Because of instrumentalist concern with individuals being able to vindicate their rights in court, as discussed at § 11.2.1.2 nn.17-20, 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.361 For example, rejecting Professor Bickel's "passive virtues" approach to constitutional adjudication, Justice Brennan, an archetypical 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."362

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

360 Cases like Weston v. City Council of Charlestown and Union Pacific Railroad Co. v. Hall are not to the contrary, as the plaintiffs in each of these cases had a colorable claim of personal injury. See supra text accompanying notes 309, 318-20.

361 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."). See generally Geoffrey R. Stone, Louis M. Seidman, Cass R. Sunstein & Mark V. Tushnet, Constitutional Law 94-106 (2d ed. 1991) (discussing the broadening of standing doctrine during the 1960s and early 1970s, and reflecting on the fact that during the late 1970s and 1980s, when the Court narrowed standing doctrine, Justices Brennan and Marshall frequently dissented).

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. Based upon this reasoning, the Chief Justice rejected the idea that there is an absolute bar in Article III to suits by federal taxpayers. Instead, 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.”

The Chief Justice then turned to the problem of determining what circumstances give a federal taxpayer the personal stake and interest that imparts the necessary concreteness. His answer was to invent a two-pronged test. First, 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 because the Establishment Clause specifically limits the taxing and spending power granted by Article I, § 8. In contrast, Mrs. Frothingham lacked the second nexus because she was merely alleging that Congress had exceeded the general powers delegated to it by Article I, § 8 and, thus, had invaded the powers reserved to the states by the Tenth Amendment.

Dissenting in *Flast*, Justice Harlan noted that the nexus criteria are unrelated to the extent of a taxpayer's personal interest. Justice Harlan stated, "The intensity of a plaintiff's interest in a suit is not measured, even obliquely, by the fact that the constitutional provision under which he claims is, or is not, a 'specific limitation' upon Congress' spending powers."
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.\footnote{368}{See 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, with regard to the first central issue of standing, 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)*.\footnote{369}{412 U.S. 669, 689-90 (1973).} 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.*\footnote{370}{409 U.S. 205, 208-12 (1972), interpreting 82 Stat. 83, 42 U.S.C. § 3610(d).} The Court stated, “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.*\footnote{371}{401 U.S. 614, 616-17 (1973).} 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

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\footnote{368}{See 392 U.S. at 94-101.}
\footnote{369}{412 U.S. 669, 689-90 (1973).}
in *Linda R.S. v. Richard D.*\(^{372}\) 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 has 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 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). Though 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. Instead, by a variety of doctrinal developments, the late stages of the instrumentalist era saw the Court cut back on the implications of *Flast* and begin once again to emphasize the constitutional nature of standing doctrine, its roots in the separation of powers doctrine, and the need for a concrete personal injury.

The first signal of a change in the Court's perspective occurred during 1974 in *United States v. Richardson*,\(^{373}\) where the majority held that a federal taxpayer did not have standing to challenge financial secrecy provisions in the Central Intelligence Agency Act of 1949 on the ground that it violates Art. I, § 9, cl. 7, a clause that requires a statement of account of all public money from time to time. The holding in *Richardson* was that there was no logical nexus, as required by *Flast*, between the status of taxpayer and the lack of detailed reports. However, per Chief Justice Burger, the Court also noted that Richardson's claim – that without this information he could not intelligently follow actions of the CIA or Congress – was a generalized grievance and not a concrete injury.

Similar increased attention to an Article III separation of powers concrete injury requirement, as opposed to *Flast*'s mere judicial administrative effectiveness concern with concrete adverseness to sharpen the issues for court review, appeared in *Schlesinger v. Reservists to Stop the War*.\(^{374}\) Plaintiffs, who were an association of past and present members of the Reserves, sued in that capacity, and as citizens and taxpayers, to challenge the Reserve membership of some members of Congress. They alleged that such membership violated the Incompatibility Clause, Art I. § 6, cl. 2, which states that "no Person holding any Office under the United States, shall be a Member of either House during his continuance in Office." The challengers said that the possible inconsistent obligations of the members of Congress might deprive plaintiffs of the faithful discharge of those members' services.

\(^{372}\) 410 U.S. 614, 617 n.3 (1973).

\(^{373}\) 418 U.S. 166, 175-77 (1974).

With regard to taxpayer standing, Chief Justice Burger noted, as in *Richardson*, that the plaintiffs failed to satisfy the first nexus of *Flast* because as taxpayers they were not challenging action under the taxing and spending power of Art. I, § 8, but rather "the action of the Executive Branch in permitting Members of Congress to maintain Reserve status." With regard to citizen standing, however, the Court was forced to address the constitutional injury requirement more directly. In denying the plaintiff’s standing on generalized grievance grounds, the Chief Justice stated: "Concrete injury, whether actual or threatened, is that indispensable element of a dispute which serves in part to cast it in a form traditionally capable of judicial resolution. . . . [Only] concrete injury presents the factual context within which a court [is] capable of making decisions."  

§ 17.3.1.3  The Modern Natural Law Approach: 1986-Today

A.  The Injury-in-Fact Requirement

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.

Elaborating the concerns animating standing doctrine, Justice Kennedy has noted that application of the separation of powers doctrine is intended not only to avoid advisory opinions and insure concrete adverseness in judicial proceedings, the reasons given by Chief Justice Warren in *Flast*, but also to confine the Court to appropriate judicial functions and to avoid eroding the President's duty to see that the laws are faithfully executed. 376 The questions of what judicial functions are "appropriate" under this approach, and what constitutes "erosion" of Presidential duty, naturally depend on how the judge approaches separation of powers questions generally.

As discussed in greater depth at § 19.1, the natural law approach toward separation of powers has been to find that the framers were motivated by a sharing of powers, check-and-balances philosophy, rather than Justice Scalia's formalist strict separation of powers approach. For example, in 1833, Justice Story said that separation of powers is not meant to require the three branches of government:

> 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 department 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. 377

375  *Id.* at 220-21, 228.

376  *Lujan*, 504 U.S. at 580-81 (Kennedy, J., joined by Souter, J., concurring).

This approach has been adopted by modern natural law Justices. Accordingly, natural law Justices have generally allowed sharing of powers concepts to inform their analysis of the "appropriate" judicial function and what constitutes "erosion" of Presidential power. Thus, they permit sharing of powers concepts to inform their analysis of the congressional ability to create standing by permitting individuals to sue in court to ensure that the executive is taking care that the laws are faithfully executed. Natural law Justices have also typically adopted a moderate checks-and-balances approach to inform their analysis of how much injury in fact is required to permit plaintiffs to sue ("check") defendants in court, particularly government defendants.

Reflecting, as he often did, an incipient resurgence of a modern natural law approach, Justice Powell, concurring in 1974 in United States v. Richardson, said that he would abandon the Flast two-part nexus test which, building on Baker v. Carr, had moved the Court to quite relaxed requirements for standing. Central to his argument were separation of powers concerns, particularly the worry that Flast had gone too far in permitting citizens to draw courts into performing a "checking" function on governmental activity. Powell noted:

Relaxation of standing requirements is directly related to the expansion of judicial power. It seems to me inescapable that allowing unrestricted taxpayer or citizen standing would significantly alter the allocation of power at the national level, with a shift away from a democratic form of government. I also believe that repeated and essentially head-on confrontations between the life-tenured branch and the representative branches of government will not, in the long run, be beneficial to either.

On the other hand, as a moderate "checks-and-balances" approach, Justice Powell's views on standing contain the traditional natural law receptivity to granting standing as long as some concrete injury in fact is established. Two closely related cases, decided within three years of Richardson, provide good insight into Justice Powell's approach.

In 1975, in Warth v. Seldin, Justice Powell was joined by conservative Holmesian and formalist Justices on the Court to form a majority denying the plaintiff standing. Prior to dealing with the facts, Justice Powell set forth, on behalf of the Court, his understanding of the then-current principles of standing. Regarding the constitutional limit, Justice Powell said that Art. III judicial

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378 See, e.g., Public Citizen v. United States Dep't of Justice, 491 U.S. 440, 487 (1989) (Kennedy, J., concurring, joined by Rehnquist, C.J., and O'Connor, J.) ("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."); Mistretta v. United States, 488 U.S. 361, 380-81 (1989) (Blackmun, J., joined by all Justices except Justice Scalia) ("[T]he Framers did not require – and indeed rejected – the notion that the three Branches must be entirely separate and distinct.").

379 Richardson, 418 U.S. at 187-88 (Powell, J., concurring).

380 Id. at 188.

381 422 U.S. 490 (1975).
power exists to redress or otherwise protect against injury to the complaining party only when the plaintiff has suffered some threatened or actual concrete injury resulting from the putatively illegal action.\textsuperscript{382} As to prudential limits, Powell said that the harm of a generalized grievance alone normally does not warrant exercise of jurisdiction and that normally the plaintiff must assert his own legal rights and cannot rest his claim to relief on the legal rights or interests of others.\textsuperscript{383}

The Court then applied these principles to the facts in \textit{Warth}. \textit{Warth} involved an attempt to enforce the Constitution against government action, without the benefit of a specific statutory action. The plaintiffs in \textit{Warth} were various organizations and individuals who contended that the defendant town's zoning ordinance excluded persons of low and moderate income from living in the town, in violation of constitutional rights. Because none of the plaintiffs had presented evidence of present ability to build or buy low-income or moderate-income housing in the town even if the ordinance were ruled unconstitutional, the Court held that the plaintiffs had not alleged injury to themselves caused by the alleged infractions.\textsuperscript{384}

The dissents in \textit{Warth} expressed a concern that perhaps \textit{Warth} represented adoption of a heightened injury requirement in cases where the majority was hostile to the claim on the merits.\textsuperscript{385} Two years later, however, in \textit{Village of Arlington Heights v. Metropolitan Housing Development Corp.},\textsuperscript{386} the Court, per Justice Powell, made it clear that an injury in fact can be established in a \textit{Warth}-like case as long as some attention is paid to establish that an actual injury exists. Plaintiffs who alleged they would qualify for low-cost housing in a specific project blocked by allegedly unconstitutional zoning laws were granted standing because, unlike the plaintiffs in \textit{Warth}, they could show an actual specific project blocked by the city's zoning laws.\textsuperscript{387}

This approach towards standing, which involves the traditional natural law receptivity to granting standing as long as some concrete injury is actually established, is now ensconced as the majority approach on the Supreme Court. The result of the Court's recent major decisions regarding injury in fact has been to dismiss some rather tenuous claims of injury, but to allow an action to be brought by almost all persons with any kind of realistic personal stake.

\textsuperscript{382} \textit{Id.} at 499.

\textsuperscript{383} \textit{Id.} at 499-500.

\textsuperscript{384} \textit{Id.} at 502-08.

\textsuperscript{385} \textit{Id.} at 520, 527-29 (Brennan, J., joined by White, J., and Marshall, J., dissenting) (suggesting that the result could be explained only by hostility to the claim on the merits; it should be sufficient that builders averred past injury and a future intent, if barriers are cleared, to develop suitable housing; individual plaintiffs should not be expected, prior to discovery and trial, to know the future plans of builders or precise details of the housing market); \textit{id.} at 518 (Douglas, J., dissenting) (majority's opinion represents hostility to the claim on the merits).

\textsuperscript{386} 429 U.S. 252 (1977).

\textsuperscript{387} \textit{Id.} at 261-64.
Naturally, standing will be found where a direct, present injury is apparent. Thus, standing was found in *McCleskey v. Kemp*, 388 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*, 389 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*, 390 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, as would his ability to gain reelection, 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*, 391 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-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.

Another typical standing case is *Wyoming v. Oklahoma*. 392 In this case, Wyoming alleged a decline in Wyoming severance tax revenues from fewer sales of coal by Wyoming producers caused by an Oklahoma statute which required Oklahoma coal-fired utilities to burn a mixture containing at least 10% Oklahoma-mined coal. Conservative formalist and Holmesian Justices were unwilling to grant a summary judgment motion finding standing because they argued that a material fact question existed over whether the alleged injury was too speculative in nature. 393 However, the natural law Justices, along with instrumentalists on the Court, formed a majority who agreed with the Special Master's findings that a sufficiently concrete injury in the case was an undisputed fact. 394

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389 491 U.S. 95, 103 (1989).
393 *Id.* at 465-68 (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., dissenting) (Wyoming had not established that overall sales of Wyoming coal producers were diminished by the Oklahoma statute, only that less sales occurred in Oklahoma. Thus, a general issue of material fact existed regarding whether Wyoming's tax revenues were affected by the Oklahoma statute).
394 *Id.* at 447-450 (Wyoming alleged that the Oklahoma law results in Oklahoma utilities reducing their purchase of Wyoming-mined coal; Wyoming likely would gain lost revenues if its
Perhaps most revealingly, 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 materially enhanced if tickets are bought. Similarly, it is important from an analytic perspective that plaintiffs be able to demonstrate an actual concrete injury to housing purchases or building projects that are blocked by zoning laws, the difference between the results regarding standing in *Arlington Heights versus Warth*. No great limitation on standing is created by such a requirement because the burden on plaintiffs to establish an actual injury is minimal. Thus, the Kennedy/Souter approach is willing to find an injury in fact as long as some actual or reasonably imminent injury is alleged and proven.

The natural law respect for precedent can also be important in the results reached in modern standing doctrine. For example, respect for the core holdings of instrumentalist-era precedents was critical in finding standing 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 explicitly relied upon the core holding of *Flast* as a precedent to support its holding in *Bowen*.

suit to overturn the Oklahoma law succeeded and, thus, it was directly affected in a real and substantial way that could be redressed by judicial action).

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, rather than just stating they had vague plans to visit the site); *id.* at 581-83 (Stevens, J., concurring) (buying tickets not required to satisfy standing); *id.* at 590-92 (Blackmun, J., joined by O'Connor, J., dissenting) (buying tickets not required to satisfy standing).

For representative court of appeals cases, see, e.g., Wilbur v. Locke, 423 F.3d 1101, 1107-09 (9th Cir. 2005), *cert. denied*, 126 S. Ct. 1338 (2006) (negotiations between state of Washington and Native American tribe to enter into a Compact regarding taxation of cigarette sales by Native American retailers sufficiently non-speculative to give retailer standing, based on allegation that the Compact would be executed “within the near future”); Baur v. Veneman, 352 F.3d 625, 631-36 (2nd Cir. 2003) (standing granted to challenge Department of Agriculture policy on “downer” cows because of non-speculative injury-in-fact from “mad cow” disease if the policy is not effective). *But see* National Resources Defense Council v. EPA, 440 F.3d 476, 483-84 (D.C. Cir. 2006) (plaintiffs did not suffer injury in fact by final rule issued by the EPA under “Montreal Protocol” regarding critical use of methyl bromide, where chance of injury to members due to alleged increase in probability of contracting skin cancer, cataracts, and other ailments was miniscule).

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*, 398 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.

In *Lujan v. National Wildlife Foundation*, 399 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.

In *United States v. Hays*, 400 resident voters in one district were held to lack standing to challenge the lines drawn for another district as unconstitutionally based solely 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, as where

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398 495 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. Engaging in an instrumentalist policy balance, the dissent concluded that a desire to prevent uninvited intermeddlers from pursuing habeas corpus relief was outweighed in this case by society's interest in preventing an illegal execution. *Id.* at 176-81 (Marshall, J., joined by Brennan, J., dissenting).


400 515 U.S. 737, 743-47 (1995). Justice Stevens said he would find standing to challenge the creation of a majority-minority district only if it is proved that the state's redistricting had substantially disadvantaged plaintiff voters in their opportunity to influence the political process, or that they have been shut out of the process. *Id.* at 750-51 (Stevens, J., concurring in the judgment). Justices Souter, Ginsburg and Breyer left it open whether they would join the majority’s approach, Justice Stevens' approach, or adopt an alternative approach in later cases. *See id.* at 747 (Ginsburg, J., concurring in the judgment only); *id.* at 750 (Souter, J., joined by Breyer, J., concurring in Justice O'Connor's opinion only as it related to plaintiffs residing outside a racially gerrymandered district). *See also* Hoffman v. Jeffords, 175 F. Supp. 2d 49 (D. Vt. 2001), aff'd 2002 WL 1364311, 2002 U.S. App. LEXIS 12495 (D.C. Cir. 2002), *cert. denied*, 537 U.S. 1108 (2003) (voters challenging Senator Jeffords' switch from the Republican Party to independent have no personal injury to grant standing).
plaintiff resides in a racially gerrymandered district or there is other evidence of personal harm, 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 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.

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. For example, in Northeastern Florida Chapter of Associated General Contractors v. Jacksonville, a racial set-aside program was the direct cause of plaintiff’s injury of a denial of an equal opportunity to compete absent racial discrimination. If the injury is indirect, however, it may be more difficult to show causation.

The case which laid the foundation for all recent denials of standing because of lack of causation was the 1975 case of Warth v. Seldin. In that case, 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

402 Id. at 120-30 (Marshall, J., joined by Brennan, Blackmun & Stevens, JJ., dissenting).
404 422 U.S. 490, 506, 514-17 (1975).
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," discussed at § 17.3.1.2.E.2 n.390. 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.

Despite such holdings that found indirect causation adequate for standing, the causation requirement has become a hurdle in the path of proving standing in cases involving inferences from IRS tax policy. For example, in the 1984 case of *Allen v. Wright,* the parents of black children could not obtain judicial review of Internal Revenue Service standards relating to the tax exempt status of racially discriminatory private schools. Although reduction of an opportunity for children to receive education in an integrated school would be an injury that would justify standing, the Court said it was not shown that the withdrawal of tax exemptions from discriminatory schools would make an appreciable difference in public school integration in the plaintiffs' locality. Justice O'Connor said that it was speculative whether the withdrawal of the tax exemption would cause particular schools to change their policies or that any parent of a child attending such a private school would transfer the child to public schools as a result of any changes once the school lost its tax-exempt status.

In reaching this decision, Justice O'Connor said the decision was underpinned by the separation of powers concern not to have courts enforcing generalized claims seeking to have the government act in certain ways. Instrumentalist Justices Brennan, Stevens, and Blackmun dissented in the case, saying the connection between tax policy and school attendance was clear enough for standing purposes.

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409 Id. at 758-65.

410 Id. at 766 (Brennan, J., dissenting); id. at 783 (Stevens, J., joined by Blackmun, J., dissenting). Justice Marshall did not participate in the case. Id. at 766.
A similar conclusion had occurred earlier in *Simon v. Eastern Kentucky Welfare Rights Organization*. 411 There, indigents and organizations representing indigents claimed that the IRS encouraged hospitals to deny service to indigents by allowing hospitals favorable tax treatment even if the hospitals limited aid to indigents seeking emergency room service. Causation was missing, said Justice Powell, since "it is purely speculative whether the denials of service specified in the complaint fairly can be traced to 'encouragement' or instead result from decisions made by the hospitals without regard to the tax implications." Accordingly, the complaint did not suggest any substantial likelihood that victory would result in plaintiffs receiving the treatment they desired. Justice Brennan, joined by Justice Marshall, disagreed with Justice Powell's reasoning regarding causation. Justice Brennan said that plaintiffs had a right protected by the Internal Revenue Code to an opportunity and an ability to receive medical service and there was injury to that right caused by the IRS action which established the necessary personal stake in the outcome. 412

As a practical manner, it is unclear why the Court has been so reluctant in these cases to trace chains of causation from tax policy to individual behavior, since tax policy does affect individual behavior, and is often intended to have that result. Perhaps these cases represent a legacy of the modern Court's rejection of taxpayer standing involved in *Flast*, and hostility to questions challenging tax policy, though the issues involved in the two kinds of cases are quite distinct. Some support for this hypothesis appears in *Allen v. Wright*, where the Court quoted with approval the court of appeals observation in *Allen* that the earlier case of *Simon* "suggests that litigation concerning tax liability is a matter between taxpayer and IRS, with the door barely ajar for third-party challenges." 413

A more understandable case denying standing based upon a lack of causation occurred in 1986. In *Diamond v. Charles*, 414 a pediatrician was held to lack standing to defend an Illinois anti-abortion statute whose enforcement the lower federal courts had enjoined, a decision in which the state acquiesced. The Court said it was only speculation that the doctor would have more fee-paying patients if fewer abortions were performed.

Causation was also the focus of the analysis in *Bennett v. Spear*. 415 The plaintiffs there claimed an injury caused by a “Biological Opinion” allegedly being acted on by the Secretary of the Interior without following required procedures. The Government contended that the Opinion was only

412 *Id.* at 55-56 (Brennan, J., joined by Marshall, J., concurring).
413 468 U.S. at 748-49.
414 476 U.S. 54, 66 (1986). See also *Nova Health Systems v. Gandy*, 416 F.3d 1149, 1155-58 (10th Cir. 2005) (health care facility lacks standing to sue state officials challenging statute making abortion providers liable for post-abortion medical costs associated with abortions performed on minors without parental consent, because even if state officials were enjoined from seeking damages under statute, there would still be many other prospective litigants, including minors and treating physicians, who could potentially sue provider, and thus any harm not “caused” by state officials).
"advisory" and that the proximate cause of any harm was an as-yet unidentified decision by the Fish and Wildlife Service. Even formalist Justice Scalia rejected this contention, stating that it "wrongly equates injury 'fairly traceable' to the defendant with injury as to which the defendant's actions are the very last step in the chain of causation." Justice Scalia noted, "While, as we have said, it does not suffice if the injury complained of is "th[e] result [of] the independent action of some third party not before the court," . . . that does not exclude injury produced by determinative or coercive effect upon the action of someone else." Justice Scalia then concluded that the Service was aware of the "virtually determinative effect of its biological opinions." Thus, "it is not difficult to conclude that petitioners have met their burden – which is relatively modest at this stage of the litigation [a motion to dismiss for lack of jurisdiction] – of alleging that their injury is 'fairly traceable' to the Service's Biological Opinion and that it will 'likely' be redressed – i.e., the Bureau will not impose such water level restrictions – if the Biological Opinion is set aside.”

C. Current 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 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. For this reason, although redressability is logically part of a complete analysis, redressability adds little to the causation analysis.

Justice O'Connor's attempt to distinguish redressability from causation in Allen v. Wright does not withstand full analysis. In Allen, Justice O'Connor was properly troubled by the fact that where "the relief requested goes well beyond the violation of the law alleged," plaintiff may be able to establish that there is a means to redress the injury even if those means go beyond the harm caused by the defendant. This analysis only establishes, however, that injury in fact and redressability are not sufficient grounding for Article III concerns; causation is a necessary element. Justice O'Connor was thus right in Allen to the extent her point was that cases like Simon v. Eastern Kentucky Welfare Rights Organization were deficient in phrasing the Article III standing requirement as depending only on whether "the plaintiff has shown an injury to himself that is likely to be redressed by a favorable decision." However, once injury in fact and causation are part of the Article III analysis, the Court has never clearly explained what the third element of redressability meaningfully adds to the analysis.


418 Allen, 468 U.S. at 753 n.19.

419 Simon, 426 U.S. at 38.
This is not to say that there are no issues involved with whether a particular remedial scheme is appropriate to enforce. Various doctrines of equity are appropriately kept in mind, such as in selecting contempt sanctions against state or local officials, federal courts should use the "least possible power adequate to the end proposed."420 As discussed at § 17.4.4, these doctrines are concerned, however, with whether a particular remedial scheme should be implemented. All presume that a remedial scheme could be implemented constitutionally, and thus differ from a constitutionally grounded Article III redressability requirement.

Because of the close connection between causation and redressability, and their focus on reasoned elaboration of the law, natural law Justices have not seemed to embrace fully "redressability" as a third independent requirement of Article III standing analysis in the same way as formalist and Holmesian Justices, who have focused on it as a matter of existing "positive" law. Thus, in recent cases, the redressability factor has usually been dodged by natural law Justices. For example, in Renne v. Geary,421 voters were prevented from challenging a provision in the California Constitution that prohibited political party endorsements in official voter pamphlets for partisan elections. The voters had failed to challenge a separate California statute that might also ban such endorsements in voter pamphlets. Thus, striking down the constitutional provision might not redress the injury alleged. In Justice Kennedy's opinion for the Court, however, the specific holding in the case was that in any event ripeness concerns meant that the case would not be heard at this time.422 Of course, focusing on causation, it might just as easily be said that the ban on endorsements in voter pamphlets was not caused by the provision in the California Constitution which the plaintiffs had challenged, since another independent provision might ban the endorsements in any event. This observation underscores the "mirror-image" quality of causation versus redressability analysis.

In Lujan,423 a plurality of conservative formalist and Holmesian Justices found redressability lacking. In addition to the plaintiffs' lack of injury in fact discussed at § 17.3.1.2.B n.327-32, the plurality said that it was conjectural whether the activity alleged to affect the plaintiffs would be redressed by changing the United States government's behavior, because the United States was supplying less than 10% of the funding for the projects which the plaintiff alleged were doing them harm. But this part of the opinion was not joined by any natural law Justice.424

422 Id. at 321-23.
424 Id. at 580 (Kennedy, J., joined by Souter, J., concurring) (unnecessary to address redressability, since injury in fact is lacking); id. at 595-98 (Blackmun, J., joined by O'Connor, J., dissenting) (concluding that because there exists a constitutional injury in fact caused by the challenged conduct, redressability poses no problem).
Redressability was also an issue in *Steel Co. v. Citizens for a Better Environment*. 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. He noted:

1. The requested declaratory judgement would be worthless since a statutory violation was admitted.
2. The civil penalties authorized by the statute are payable to the United States government, not the individual plaintiff in the case.
3. Psychic satisfaction is not an acceptable Article III remedy since it does not redress a cognizable Article III injury.
4. Plaintiff requested costs, but a plaintiff cannot achieve standing to litigate a substantive issue by bringing suit for the cost of bringing the suit.
5. Giving plaintiff access to defendant's records and future filings would be remedial only if the plaintiff alleged a continuing violation or imminence of a future violation.

In Part II of his concurrence, Justice Stevens disagreed with this analysis regarding redressability, noting that civil penalties payable to the United States treasury, like punitive damages payable to the state in state tort actions, should be viewed as valid ways to "redress" a plaintiff’s injury. In Part III of his opinion, Justice Stevens, joined by Justices Souter and Ginsburg, concurred in the majority’s result, because he concluded that the Court should have dismissed the case on the merits since the relevant statute did not permit citizen suits for past violations.

Justices Kennedy and O'Connor agreed with the majority opinion that usually the Court should be certain of its jurisdiction before reaching the merits, but would leave open the possibility that the Court could reserve difficult questions of jurisdiction when the case alternatively could be resolved on the merits in favor of the same party, as Justice Stevens did in Part III of his opinion. Justice Breyer said he would reserve judgment on that matter, but he said that he probably would agree with Justice O'Connor and Kennedy's conclusion.

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426 Id. at 104-06.
427 Id. at 127-34 (Stevens, J., joined by Souter & Ginsburg, JJ. as to Part III, concurring in the judgment); id. at 134 (Ginsburg, J., concurring in the judgment).
428 Id. at 110-11 (O'Connor, J., joined by Kennedy, J., concurring); id. at 111-12 (Breyer, J., concurring in part and concurring in the judgment).
Another case of redressability occurred in *Wyoming Sawmills, Inc. v. United States Forest Service.* 429 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 with 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. Viewed alternatively, the court could have said that any future loss in timber sales could not be proven to be caused by the challenged conduct, the consultation with the tribes. Any argument that the plaintiff had a right to have the government not engage in unconstitutional consultations would be a generalized grievance, not sufficiently concrete to be an injury-in-fact, following *Richardson* and *Schlesinger*, discussed at § 17.3.1.2.D. nn.373-75.

D. Congressional Authority to Create Standing

Justice Powell's opinion in *Warth v. Seldin,* and Justices Kennedy and Souter’s concurrence in *Lujan,* are probably the two best examples of the modern natural law approach to the possibility of Congress granting standing where the Court otherwise would not find standing. In *Warth,* 430 Justice Powell noted that standing “often turns on the nature and source of the claim asserted. The actual or threatened injury required by Art. III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing. . . . Essentially, the standing question is whether [the provision] can be understood as granting persons in plaintiff's position a right to judicial relief.”

This language is in direct contrast to Justice Scalia's approach where standing does not depend on the nature or source of the claim asserted, and reflects a sharing of powers understanding of separation of powers concerns. Under Justice Powell's approach, the Court may be willing to grant standing if Congress decides that checks and balances would be improved if individual litigants could sue in court to check executive department compliance with the law, and either the President agrees or two-thirds of both houses override a Presidential veto. For this reason, Justice Powell's language offers some comfort for a broader view of congressional power to create standing because it suggests that the standing inquiry will be different, and easier, for the plaintiff to meet if the nature and source of the right asserted is a congressional statute. However, Justice Powell limited his conclusion in *Warth* regarding congressional ability to create standing by noting:

Of course, Art. III's requirement remains: the plaintiff still must allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants. But as long as this requirement is satisfied, persons to whom Congress has granted a right of action, either expressly or by clear implication, may have standing to seek relief on the basis of the legal rights and interests of others, and, indeed, may invoke the general public interest in support of their [claim]. 431

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430 *Warth,* 422 U.S. at 500.

431 *Id.* at 501.
In *Lujan*, Justice Kennedy, joined by Justice Souter, adopted an approach similar to that of Justice Powell in *Warth*. As Justice Powell had indicated in *Warth*, Justice Kennedy noted in *Lujan*:

> 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. . . . 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.432

Similarly, just as Justice Powell had counseled that there is some limitation on Congress' power to create new causes of action, Justice Kennedy observed:

> 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 viability 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 question 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." . . . In addition, the requirement of concrete injury confines the Judicial Branch to its proper, limited role in the constitutional framework of government.433

Thus, while it seems that this modern natural law approach, along with a Holmesian approach, will grant Congress great leeway in creating standing where none existed before, there are some limits, based upon separation of powers concerns, on how far Congress can go in making generalized grievances a matter of proper constitutional standing. By carefully indicating that some limits apply, the Holmesian and natural law Justices seem to be cautioning Congress not to go too far in extending standing in citizen suit cases.

That Congress can go pretty far, however, is suggested by the reasoning in Justice Blackmun's dissent in *Lujan*, which was joined by Justice O'Connor. Justice Blackmun feared that the Court might be seeking to impose fresh limitations on the power of Congress to allow citizen-suits in the federal courts for injuries deemed "procedural" in nature. He said that the federal courts do not violate the separation of powers doctrine when, at the command of Congress, they enforce procedures that Congress has imposed on the executive branch. Here, Congress did not delegate executive power to the courts; rather, Congress sought only to strengthen the procedures it

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432 504 U.S. at 580. Applying this principle to the facts of the case, Justice Kennedy continued, "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.'" *Id.*

433 *Id.* at 581.
legislatively mandated. Thus, he concluded, Justice Scalia's opinion reflected "an unseemly solicitude" for protecting the powers of the executive branch.434

In reaching this conclusion, Justice Blackmun's opinion explicitly rejected Justice Scalia's "anachronistically formal view of the separation of powers." He noted that from a sharing of powers, checks-and-balances approach, just as "Congress does not violate separation of powers by structuring the procedural manner in which the Executive shall carry out the laws, surely the federal courts do not violate separation of powers when, at the very instruction of Congress, they enforce these procedures."435 On this point, Justice Blackmun's opinion is not necessarily inconsistent with Justice Kennedy's and Souter's concurrence. Both Kennedy's concurrence and Blackmun's dissent adopt a similar sharing of powers, checks-and-balances approach toward separation of powers issues. From such a perspective, the Constitution is not necessarily violated if Congress calls on the courts to help hold the executive branch to procedures mandated by Congress.436 One can well imagine Justices Ginsburg and Breyer, who have joined the Court since Lujan, either agreeing with, or being slightly more receptive to standing, than the approaches represented in the Kennedy/Souter concurrence or the Blackmun/O'Connor dissent in Lujan.437 Justice Stevens' concurrence in Lujan makes it clear that typically he is more willing to find standing than are Justices Kennedy and Souter.438

Thus, given the current make-up of the Court, so long as Congress makes clear what injury constitutes the invasion of a right and relates that injury to a class of persons entitled to bring suit, Congress should be able to expand standing substantially beyond what the Court might otherwise

434 Id. at 601-06 (Blackmun, J., joined by O'Connor, J., dissenting).

435 Id. at 602, 604.

436 Of course, for Justice Blackmun, as for Justice Kennedy, there were some limitations on how far Congress can go. See id. at 606 (Blackmun, J., joined by O'Connor, J., dissenting) ("There may be factual circumstances in which a congressionally imposed procedural requirement is so insubstantially connected to the prevention of a substantive harm that it cannot be said to work any conceivable injury to an individual litigant. But, as a general matter, the courts owe substantial deference to Congress' substantive purpose in imposing a procedural requirement. In all events, "[o]ur separation of powers analysis does not turn on the labeling of an activity as 'substantive' as opposed to 'procedural.'"). Indeed, the only major difference between the Kennedy/Souter concurrence and the Blackmun/O'Connor dissent seems to be whether plane tickets must be bought on the Lujan facts to satisfy the injury-in-fact requirement of Article III.

437 For example, in Hays v. United States, 515 U.S. 737 (1995), Justices Stevens, Souter, Ginsburg, and Breyer, all refused to join unreservedly Justice O'Connor's majority opinion.

438 Justice Stevens concurred in the judgment in Lujan because he thought on the merits that Congress did not intend the challenged consultation requirement to apply to activities in foreign countries. However, he disagreed with the Court's conclusion that the threatened injury to plaintiffs' interests was not imminent, and concluded in his opinion that Congress could grant standing to these plaintiffs if Congress so intended. 504 U.S. at 581-82.
find adequate. Per the approach of Justices Powell, O’Connor, Kennedy, and Souter, the Court will still insist on finding some kind of concrete and personal injury against a backdrop of separation of powers concerns and, thus, will be more restrictive than during the instrumentalist era. Indeed, even Professor Sunstein stated, “I do not contend that there are no limits to Congress' power to decide what is a 'case' or 'controversy.' In all likelihood, for example, Congress is barred from overcoming the ban on advisory opinions. . . . In very rare cases, there may even be barriers to the congressional conferral of standing for separation-of-powers reasons. Consider, for example, a grant of standing to all members of Congress to challenge all executive action. I do not deal with such exotic examples here.”

Based upon reasoned elaboration of the separation of powers concerns implicit in Marbury v. Madison, precedents from the original natural law, formalist, and Holmesian eras, and the explicit focus on separation of powers concerns in standing cases that have been decided since 1974, this modern natural law approach will also be more restrictive than the traditional natural law "cause of action" approach.

However, the modern natural approach will be more receptive to finding an injury in fact than was suggested by the heightened injury requirements of the Holmesian approach. And the modern natural law approach will be much more receptive than the modern formalist approach regarding Congress' ability to create standing where none existed before.

In light of the above analysis, the results of modern standing cases are not surprising if one separates the Justices into those who evince: (1) a formalist concern with clearly defined injuries and a strict separation of powers approach that limits the ability of individuals to sue in court to aid the executive function of taking care that the laws be faithfully executed; (2) a Holmesian deference to government concern in deciding whether individuals have standing; (3) a natural law focus with protecting the rights of individuals against the backdrop of a sharing of powers, checks-and-balances approach to the separation of powers; and (4) an instrumentalist theory that standing depends primarily on whether the case has concrete adverseness, with parties clearly adversaries on each side, rather than a concrete injury requirement. While the Supreme Court of the instrumentalist era, in its desire to bring about legal reform, was quite willing to frame standing doctrine as a set of relatively lax prudential guidelines, the modern formalists and Holmesians, in company with the increasing number of modern natural law Justices, have joined to reverse or limit the instrumentalist decisions which remade standing doctrine into a set of easily met prudential guidelines.

For these reasons, in the immediate future the Court is likely to:

(1) follow, rather than extend or contract, existing precedents on standing which call for concrete injury, causation, and redressability;

(2) require Congress to think carefully before creating any new citizen-suits, so as to satisfy the concerns expressed by Justices Kennedy and Souter in Lujan; and

Sunstein, supra note 292, at 179 n.79. Professor Sunstein also noted that in his view some constitutional rights may be sufficiently "personal" to the individual directly affected that Congress could not grant third-party standing to vindicate those rights. Id. at 235 n.311, citing William A. Fletcher, The Structure of Standing, 98 Yale L.J. 221, 278-79 (1988).
(3) take a moderate approach toward the injury-in-fact and causation components of Article III analysis, making use of reasoning by analogy from the precedents when applying existing principles and precedents to new fact situations.

The resulting judicial posture, while perhaps not as exciting as being ombudsman for the nation, should provide an appropriate and balanced response to issues of standing. By requiring for standing not only concrete adverseness – the instrumentalist phrasing based predominantly on a concern with effective judicial decisionmaking – but also a concrete injury requirement caused by the challenged conduct, the Court's current approach accords with traditional separation of powers concerns.

E. Standing under the Qui Tam Statute

It is illegal under 31 U.S.C. § 3729, the False Claims Act, knowingly to present a false or fraudulent claim for payment or approval to the federal government. The Qui Tam statute, 31 U.S.C. § 3730, provides that any person may have a civil action against “any person” who violates 31 U.S.C. § 3729. Plaintiff can recover a reasonable amount up to 25 percent of the judgment unless the government exercises its right to step in, in which case the amount drops to 10 percent. In either event, plaintiff gets reasonable costs if the suit is successful.

The Qui Tam statute raises obvious 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 were held to have standing in Vermont Agency of Natural Resources v. United States re rel. Stevens.440 Adopting a theory suggested by the Ninth Circuit, the Court said that the law can be interpreted as a partial assignment of the government’s damages claim to the relator, giving rise to “representational standing.” For the Court, Justice Scalia referred to the doctrine that the assignee of a claim has standing to assert the injury in fact suffered by the assignor.

The Court left open in Vermont three further questions. First, are local government entities exempt from liability under the FCA because of the presumption against imposing punitive damages on such entities? Second, do qui tam suits violate the separation of powers because they impermissibly intrude on the executive’s Article II duty to take care that the laws be faithfully executed? Finally, assume that Congress amends the statute in order to allow qui tam suits against states. Would that violate the 11th Amendment immunity that states have against suits brought against them for damages? Perhaps not, in view of the Court’s theory that it is the United States government’s cause of action that the relator is bringing in his or her representational capacity. It may be recalled that the 11th Amendment does not apply to actions brought by the United States government against a state, § 17.2.4.1 n.178, though the Court said in Vermont there is “serious doubt” on this score.441

440 529 U.S. 765, 771-78 (2000). In Vermont, the Court also held that “any person” made liable in the federal Act for presenting a false claim to the United States Government did not include a State because the damages awarded are essentially punitive in nature and there is a general presumption that punitive penalties are not to be imposed on governmental agencies. Id. at 781-88.

441 Id. at 787-88.
Under the normal, formalist strict separation of powers approach, *qui tam* actions should probably be viewed as unconstitutional, since the litigant has only a generalized grievance, and *qui tam* actions basically involve transferring from the executive to individual litigants the duty to see that the laws are faithfully executed. It can also be noted that, as an additional technical problem, a *qui tam* plaintiff undertakes executive functions and yet has not been appointed according to the Appointments Clause of Article II, § 2. Nevertheless, based upon formalist adherence to the specific intent of the framers and ratifiers and to settled law, it is not surprising that even Justice Scalia upheld the constitutionality of the *qui tam* statute in *Vermont*. Of course, the great respect for judicial precedents that natural law Justices have, combined with their sharing of powers, checks-and-balances approach to separation of powers, makes it even more likely that natural law judges would uphold the constitutionality of *qui tam* statutes. The Holmesian deference to government approach regarding congressional conferral of standing, and the instrumentalist willingness to let Congress create standing as long as the Court is not placed in the position of rendering advisory opinions, mean that these judges too would likely continue to uphold the constitutionality of *qui tam* statutes.

§ 17.3.1.4 Prudential Principles of Standing

As noted at § 17.3.1.1, in addition to the Article III requirements for standing, the Court has also developed a number of prudential principles to determine whether to grant standing in any individual case. Because these principles are not required by the Constitution, but are only prudential principles developed by the Court, Congress can overrule these principles in cases involving the Supreme Court’s appellate jurisdiction by using its power to make regulations and exceptions to the Supreme Court’s appellate jurisdiction. The prudential principles can be organized under five broad headings: (1) generalized grievances; (2) the “zone of interest” test; (3) third-party standing; (4) representational standing; and (5) equitable discretion.

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. During the instrumentalist era, when the Article III standing doctrine was easier for plaintiffs to meet, this prudential principle regarding generalized grievances was used to deny plaintiffs standing in cases where the plaintiffs were viewed as having Article III standing. Thus, 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

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442 See Sunstein, supra note 292, at 173-77 (discussing the specific intent of the framers regarding *qui tam* actions); § 9.2.2.2 (formalist adherence to settled law).

443 529 U.S. at 771-78. See also *Lujan*, 504 U.S. at 572-73 (Justice Scalia noting that *Lujan* did not involve "Congress [creating] a concrete private interest in the outcome of a suit against a private party for the government's benefit, by providing a cash bounty for the victorious plaintiff.").

publications, plaintiff cannot be an informed voter.\textsuperscript{445} So, too, reservists and citizens had only an abstract interest in, and no nexus as taxpayers for, objecting to CIA secrecy.\textsuperscript{446}

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 \textit{Allen v. Wright}\textsuperscript{447} 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. 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, post-\textit{Allen v. Wright}, has limited applicability. The most important consequence of this shift is that once the generalized grievance concern is an Article III concern, not a mere prudential principle, Congress cannot easily reinstate jurisdiction to sue for plaintiffs with generalized grievances through a statutory citizen suit provision. Instead, Congress has to use whatever power it has under the Article III analysis to articulate injuries and chains of causation where none existed before, a more confined congressional power, as discussed at § 17.3.1.3.D.

\textbf{B. The "Zone of Interests" Test}

During the instrumentalist era, when Article III standing was easier to achieve, the Court developed two kinds of “zone of interests” tests to limit standing on prudential grounds: one for constitutional claims, and one for statutory claims.

The constitutional “zone of interests” test was stated in \textit{Flast v. Cohen},\textsuperscript{448} where the Court found standing for federal taxpayers to raise an Establishment Clause challenge to government spending that reached some parochial schools. In \textit{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 \textit{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.

\footnotesize
\begin{itemize}
\item \textsuperscript{445} Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208 (1974).
\item \textsuperscript{446} United States v. Richardson 418 U.S.166 (1974).
\item \textsuperscript{447} 468 U.S. 737 (1984).
\item \textsuperscript{448} 392 U.S. 83, 96, 99-100 (1968).
\end{itemize}

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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*. In no other case, including cases with similar facts, such as *Valley Forge Christian College*, discussed at § 17.3.1.2.C nn.350-54, 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, discussed at § 17.3.1.1 n.290, 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.

With regard to statutory claims, the statutory “zone of interests” test was developed by Justice Douglas in 1970 in *Association of Data Processing Service Organizations, Inc. v. Camp*. There, an association of data processors challenged a ruling by the Comptroller which allowed national banks to make data processing services available to other banks and to bank customers. Because of the resulting increase in competition, plaintiff data processors suffered Article III injury. The question was whether they had standing to sue under § 702 of the Administrative Procedure Act (APA), which granted standing to a person "aggrieved by agency action within the meaning of a relevant statute." In an opinion by Justice Douglas, the Court concluded that Congress had not intended to allow suit by every person suffering injury in fact. Douglas said that in addition to the requirement that the complainant be "adversely affected," i.e., injured in fact, the Court had a prudential requirement of asking “whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.”

The precise question before the Court was the scope of § 702 of the APA, and the case could easily be interpreted as merely a gloss on the meaning of that section if Justice Douglas had not gone on to add "or constitutional guarantee in question." Several later cases have suggested that this phrase, which probably had meaning to Justice Douglas as a prudential limitation to an almost constitutionally unlimited power to find standing, continues to have some meaning in the context of a constitutionally based interpretation of Article III.

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450 *Allen*, 468 U.S. 737, 758-65 (1984); *Valley Forge*, 454 U.S. 464, 470, 479-80 (1982). *See also* DaimlerChrysler Corp. v. Cuno, 126 S. Ct. 1854 (2006) (municipal taxpayers lack standing as taxpayers to challenge an investment tax credit as creating an excessive burden under the dormant commerce clause); Lingle v. Arakaki, 423 F.3d 954, 968-69 (9th Cir. 2005) (state taxpayers have standing to bring a lawsuit claiming appropriation of state revenues to support state programs that limit benefits to persons of “Hawaiian ancestry” violates the Equal Protection Clause), *vacated*, 126 S. Ct. 2859 (2006)[S]
452 *Id.* at 153-54, interpreting 5 U.S.C. § 702.
453 *Id.* at 153.
For example, in Valley Forge, as part of a supporting argument that prudential limitations on standing were closely related to policies reflected in the Article III requirement of actual or threatened injury, Justice Rehnquist listed three prudential limitations: first, that the plaintiff must generally assert his own legal rights and interests; second, that the Court will not adjudicate pervasively shared generalized grievances; and third, that "plaintiff's complaint fall within the 'zone of interests' to be protected or regulated by the statute or constitutional guarantee in question."\(^{454}\) A zone of interests inquiry was also undertaken in a dormant Commerce Clause case.\(^{455}\)

Despite this use of the zone of interests test, these cases did not firmly establish the zone of interests test as a part of all standing inquiries. In 1987, Justice White attempted in Clarke v. Securities Industry Association\(^{456}\) to trim back the test to its roots in the APA. Acknowledging that the zone of interests test had been the subject of much critical scholarly writing, Justice White noted that the "principal cases in which the 'zone of interests' test has been applied are those involving claims under the APA, and the test is most usefully understood as a gloss on the meaning of § 702." According to Justice White, under the APA the presumption is in favor of judicial review of agency action, but that presumption could be overcome "whenever the congressional intent to preclude judicial review is 'fairly discernible in the statutory scheme.'"\(^{457}\)

As to when this zone-of-interest test is met, Justice White said:

> In cases where the plaintiff is not itself the subject of the contested regulatory action, the test denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit. The test is not meant to be especially demanding; in particular, there need be no indication of congressional purpose to benefit the would-be plaintiff."\(^{458}\)

Justice White indicated that this is the appropriate test for actions brought under § 702 of the APA. Where a private right of action under a statute is asserted in conditions that make the APA inapplicable, as for a preliminary question of whether there is an implied right of action at all, rather than just whether the plaintiff is within the “zone of interests” of the statute granting some persons

\(^{454}\) 454 U.S. 474-75.

\(^{455}\) Boston Stock Exchange v. State Tax Comm'n, 429 U.S. 318, 320 n.3 (1977) (holding invalid as a discriminatory burden on interstate commerce a statute imposing lower taxes on interstate stock transactions where the sale took place within the state, rather than outside the state).

\(^{456}\) 479 U.S. 388, 400 n.16 (1987). Naturally, the same “zone of interests” test should be applied when an APA action is joined with a suit under the substantive statutory provision whose procedures are alleged to be violated. See, e.g., Bennett v. Spear, 520 U.S. 154, 162-66 (1997).

\(^{457}\) Clark, 479 U.S. at 396.

\(^{458}\) Id. at 395-400.
the right to sue, the Court requires the would-be plaintiff to show more, as under *Cort v. Ash*,\(^{459}\) that the plaintiffs were “one of the class for whose especial benefit the statute was enacted.”

Justice White's restriction of the zone of interests test to the context of the APA is consistent with a Holmesian approach towards standing – one focused on deference to the legislature. If the test is grounded in a congressional statute, Congress is free to amend the test by statute if Congress so wishes. Justice White's restriction of the zone of interests test to the APA is also consistent with a natural law concern for reasoned elaboration of modern standing doctrine.

Since *Data Processing* was decided in 1970, the Court has tightened the Article III constitutional test by requiring a concrete injury caused by the challenged conduct and redressability by the Court, as discussed above. Given this fact, it is unclear what role remains for the zone of interests test in constitutional cases. As elaborated by Justice White, the "not terribly demanding" zone of interests test would appear to be far less demanding than the current version of the injury-in-fact test that is now declared to be a constitutional minimum. In addition, the lack of clarity as to what the zone of interests test can add in constitutional cases, combined with the paucity of cases using zone of interests analysis to deal with constitutional issues, suggests the difficulty of developing a workable zone of interests analysis in constitutional cases that would add coherence and consistency to the law.

All of these considerations suggest that the modern Court will not extend use of the zone of interests test much beyond the confines of § 702 of the Administrative Procedure Act or other statutes which purport to grant standing. Although Justice White's exegesis in *Clark* on the zone of interests test was said to be "wholly unnecessary" by a three-judge concurrence,\(^{460}\) Justice White's remarks were supported by five Justices, Justice Scalia not participating. There is a possibility, however, that the zone of interests test may not be fully confined to § 702 of the APA, as indicated by Justice Scalia's dissent in *Wyoming v. Oklahoma*. Following a literal approach to precedents regarding the zone of interests test, formalist Justices Scalia and Thomas, along with Holmesian Chief Justice Rehnquist, indicated a willingness to apply the zone of interests test in a dormant Commerce Clause case, and more generally in constitutional cases of all kinds.\(^{461}\) The majority did not embrace this analysis, however, and thus the zone of interests test is probably limited as Justice White has suggested.\(^{462}\)

459 See id. at 400 n.16, discussing *Cort v. Ash*, 422 U.S. 66 (1975).

460 *Id.* at 410 (Stevens, J., joined by Rehnquist, C.J., and O'Connor, J., concurring).


The fact that the “zone of interests” test still has some bite to it under the APA is indicated by *Air Courier v. American Postal Workers Union*. In this case, the postal workers’ union challenged a Postal Service decision to give up monopoly control over “extremely urgent” letters. The majority, per Chief Justice Rehnquist, held that the unions were not within the “zone of interests” of the relevant Postal Service regulations because nothing in the statutory language or legislative history suggested that in passing these regulations “Congress intended to protect jobs with the Postal Service.” Concurring, Justices Stevens, joined by Justices Brennan and Marshall, indicated that no “zone of interests” test need be done because the relevant “section of the Postal Reorganization Act provides that the judicial review provisions of the Administrative Procedure Act (APA) do not apply to the exercise of the powers of the Postal Service. It is therefore not only unnecessary, but also unwise, for the Court to issue an opinion on the entirely hypothetical question whether, if the APA did authorize judicial review of actions of the Postal Service, its employees would have standing to invoke such review to challenge a regulation that may curtail their job opportunities.”

More recent opinions have found that most parties with Article III injury-in-fact are within the “zone of interests” of the relevant statute. For example, in *Bennett v. Spear*, several ranch operators and irrigation districts sued the Secretary of the Interior and other officials of the Interior Department. Plaintiffs alleged economic injury in fact from failure by officials to follow procedures prescribed in the Endangered Species Act before accepting a Biological Opinion report that recommended lowered water levels in reservoirs serving land in which plaintiffs had an interest. Plaintiffs said they were within the zone of interests intended to be protected by a provision in the ESA that "any person may commence a civil suit on his own behalf . . . . to enjoin any person. . . who is alleged to be in violation of any provision of this chapter." The Government contended that this authorization was limited to persons who alleged an interest in preserving a species.

The Court agreed with plaintiffs. The Court pointed to the "remarkable breath" of the statutory language, saying there was no textual basis to conclude that it applied to environmentalists alone. Justice Scalia's opinion, for a unanimous Court, said that implications from the text were augmented by (1) an obvious purpose in the statute to encourage enforcement by so-called "private attorneys general," and (2) a reservation to the Government of a right of first refusal to pursue the action initially and a right to intervene later on. Thus, Congress had expanded the zone of interests to include developers as well as environmentalists. Since the “zone of interests” doctrine is clearly a prudential principle, even a formalist like Justice Scalia, who grants Congress limited power over defining injuries and chains of causation under the Article III branch of standing doctrine, discussed at § 17.3.1.2.B nn.327-32, acknowledged that "the breadth of the zone of interests varies according to the provisions of law at issue."

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464 Id. at 921-22 (Stevens, J., joined by Brennan & Marshall, JJ., concurring).

A similar broad approach to the “zone of interests” test appeared in *National Credit Union Administration v. First National Bank & Trust Co.* In this case, the Court concluded that banks had standing to challenge a change in federal regulations that would allow credit unions to compete more directly with the banks. As in *Bennett*, where both developers and environmentalists were viewed as within the zone of interests there, both banks and credit unions were part of the balance of interests represented by this enactment, and thus both within the zone of interests as well. Application of this doctrine broadly would mean that virtually any individual who has suffered an injury-in-fact from a statute would be within the “zone of interests” of individuals part of the statutory balance, rendering the statutory “zone of interests” test as irrelevant in the future as the constitutional “zone of interests” test currently appears to be.

C. Standing to Assert the Rights of Third Parties

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* 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 limitations 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 lawsuits 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. 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 *nolo contendere*, although Justices Stevens, Ginsburg, and Souter dissented from this conclusion.

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468 *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).

469 Kowalski v. Tesmer, 543 U.S. 125, 128-34 (2004); *id.* at 138-41 (Ginsburg, joined by Stevens & Souter, JJ., dissenting).
Not surprisingly, instrumentalist Justices have been the most willing to find that third-party standing exists, while formalist and conservative Holmesian have been the least 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 conservative Holmesian judges will give the statute that interpretation, since Congress can always overrule a prudential principle by a statute.

An additional exception appeared in *Craig v. Boren*.470 In this case, the Court held, in the alternative, that a party has standing if a lower court has decided the merits, without objection by either party, and the constitutional questions are presented vigorously and cogently. However, in light of the Court's increasing emphasis on the injury-in-fact requirement for standing, discussed at § 17.3.1.3, it seems likely that this exception will no longer be recognized by the Court.

A final exception regarding third-party standing involves the ability of parties in First Amendment cases to challenge a statute as substantially overbroad, and thus unconstitutional as applied to other parties, even though the statute could be validly applied to their conduct, discussed at § 29.6.1.5.471

D. Representational 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. Each kind of case raises its own concerns.

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.472 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.473 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.”474


474 *Id.* at 556.
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.475 However, the Court has consistently held that states cannot use 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.476

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.”477 A classic case illustrating this principle is *Pennsylvania v. West Virginia*.478 In that case, West Virginia, then the leading producer of natural gas, required gas producers in the state to meet the needs of all local customers before shipping any gas interstate. Ohio and Pennsylvania sued under the Supreme Court's original jurisdiction claiming that the statute violated dormant commerce clause principles as constituting an excessive burden on interstate commerce. Both states claimed to be protecting a twofold interest – "one as the proprietor of various public institutions and schools whose supply of gas will be largely curtailed or cut off by the threatened interference with the interstate current, and the other as the representative of the consuming public whose supply will be similarly affected." The Court stated, "The private consumers in each State not only include most of the inhabitants of many urban communities but constitute a substantial portion of the State's population. Their health, comfort and welfare are seriously jeopardized by the threatened withdrawal of the gas from the interstate stream. This is a matter of grave public concern in which the State, as the representative of the public, has an interest apart from that of the individuals affected. It is not merely a remote or ethical interest but one which is immediate and recognized by law."

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.479 Cities, or other municipalities, may also have standing to bring

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478 262 U.S. 553, 591-92 (1923).

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 internal political organization, where no standing would exist. Whether foreign states may sue in federal courts as parents patriae to vindicate the rights of their citizens is a matter of debate.

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 join in the lawsuit for standing prudentially to be granted. Chief Justice Rehnquist’s opinion actually went farther to suggest that in the absence of the suing legislators proving that they had sufficient votes to prevail on the merits of the issue behind the lawsuit, then perhaps no suit of this kind could ever be brought. 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. The difference between Chief Justice Rehnquist’s broader, more Holmesian deference-to-government decision, permitting the political interplay between Congress and the President to resolve whatever separation of powers issues were involved, and a natural law approach focused more analytically on whether a majority of the House or Senate support the lawsuit so the suit is really in their name, is not likely to be of much practical difference. In the vast majority of cases, either approach will lead to the same result.

The Court’s decision in Raines was followed on its narrower holding by a lower court in Walker v. Cheney. In Walker, the Comptroller General of Congress was denied power to sue Vice-President

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480 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).

481 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).


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

484 521 U.S. 811, 824-30 (1997); id. at 830 (Souter, J., joined by Ginsburg, J., concurring); id. at 835 (Stevens, J., dissenting); id. at 838 (Breyer, J., dissenting). Despite joining Justice Souter’s concurrence, Justice Ginsburg also joined the majority opinion. Id. at 813.

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.

E. Equitable Discretion

In *Allen v. Wright*, the Court stated that sometimes case or controversy considerations may “shade into those determining 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.”

In addition, without regard to the question of 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*, 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 on behalf of his daughter who was attending public school. Mr. Newdow did not have the legal right to sue on behalf of his daughter under his custody arrangement with his ex-wife, and the ex-wife, who did have the legal right to represent the daughter, opposed the lawsuit. The Court stated, “In our view, it is improper for the federal courts to entertain a claim by a plaintiff whose standing to sue is founded on family law rights that are in dispute when prosecution of the lawsuit may have an adverse effect on the person who is the source of the plaintiff’s claimed standing. When hard questions of domestic relations are sure to affect the outcome, the prudent course is for the federal court to stay its hand rather than reach out to resolve a weighty question of federal constitutional law.” Unlike the prudential principles regarding abstention, which apply in the context of on-going or expected state proceedings to justify abstention, noted at § 17.2.4.4, the principle of equitable discretion can apply, as in *Newdow*, to cases filed only in federal court.

§ 17.3.2 The 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. Thus, before the federal courts will entertain a declaratory judgment suit or suit for an injunction, the plaintiff must show that there is a real and immediate threat of injury. A case is ripe for decision in a federal court only if


487 423 U.S. 362, 378-79 (1976), and cases cited therein.


490 See, e.g., Younger v. Harris, 401 U.S. 37, 41-42, 46-49 (1971) (a person indicted under the California Syndicalism Act could seek an injunction on the ground it was unconstitutional, but not persons who merely felt inhibited in their teaching); City of Los Angeles v. Lyons, 461 U.S. 95, 103-06 (1983) (that plaintiff might again be subjected to a chokehold applied beyond the strictures
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.\textsuperscript{491}

In making that determination, the Court considers both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.\textsuperscript{492} The Court is more likely to find a case not ripe if it relates to a state statute that has not yet been interpreted by the state's courts.\textsuperscript{493} 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.\textsuperscript{494}

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.\textsuperscript{495} 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.\textsuperscript{496} 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.


\textsuperscript{492} Texas v. United States, 523 U.S. 296, 300-02 (1998).

\textsuperscript{493} Id. at 301.

\textsuperscript{494} 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).

\textsuperscript{495} Regional Rail Reorganization Act Cases, 419 U.S. 102, 123-25 (1974).

\textsuperscript{496} 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.
The Court seems particularly concerned with this 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. Of course, in addition to establishing standing and that the case is ripe, the plaintiff in an action for an injunction must show the likelihood of substantial and immediate irreparable injury, and the inadequacy of remedies at law.

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. There, the plaintiffs sought a declaratory judgment that the Hatch Act, which limits the 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, 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.

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498 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 both great and immediate).


A good Supreme Court discussion of ripeness from the modern post-1986 Court perspective occurred in *Ohio Forestry Ass'n, Inc. v. Sierra Club*.\(^{501}\) 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 first explained that with respect to controversies involving administrative agencies, the ripeness requirement is designed "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." Applying that concept, the Court found that: (1) to withhold court consideration at present 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.\(^{502}\)

In another post-1986 case, *Texas v. United States*,\(^{503}\) the Court also found the claim not ripe. Texas, a covered jurisdiction under the Voting Rights Act, sought a ruling that preclearance procedures did not apply to the appointment of a master to oversee the operations of a local school district which was not performing according to state academic performance indicators. The Court said that it was too speculative whether there would ever be a problem that needed solving. Nor could the Court anticipate whether under any circumstance such an appointment could constitute a change affecting voting. In any event, if Texas wanted to make such an appointment it could go ahead, without delay, and seek a preliminary injunction against enforcement of the federal law.

The Court did find ripeness in *Suitum v. Tahoe Regional Planning Agency*.\(^{504}\) 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 agency obtained summary judgment on the ground that plaintiff's claim was not ripe for adjudication because she had not attempted to sell the transferable development rights (TDR's) she had been given in exchange for the bar on development. The district court and the Ninth Circuit Court of Appeals had agreed that the case was not ripe for an adjudication on taking because until plaintiff applied for transfer of her TDR's to a purchaser, there was no evidence on the degree of interference with plaintiff's reasonable investment-backed expectations and no final decision on application of the law to her property.


\(^{504}\) 520 U.S. 725 (1997).
The Supreme Court reversed. Justice Souter's opinion first noted the two independent prudential hurdles regarding ripeness in cases of regulatory taking. There must be (1) a final decision from the entity implementing the regulations, and (2) the plaintiff must have sought compensation through the State procedures provided for that purpose. Leaving to the Court of Appeals, on remand, the question of whether the agency had any procedure for paying just compensation, 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. As to transferable development rights (TDR's), the agency had power to veto a particular sale if the buyer's planned use would be illegal, but ability to sell the property was beyond question.505

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.,506 citing Buckley v. Valeo and Socialist Labor Party v. Gilligan, “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, when the threat against which plaintiff seeks a declaration or injunction is quite speculative and remote, the Court will conclude, as it did in Lyons, the chokehold case, that no Article III injury has occurred, or that in any event Article III ripeness requirements are not met. Other times, as in Justice Powell's opinion in Goldwater v. Carter,507 it is clear that the Justice, or the Court, has found Article III satisfied, but that it would not be prudent to decide the case. In Goldwater, Powell said that 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.

Most often, the Court does not carefully explain whether the issue arose under Article III or involves only prudential concerns. However, formalists and Holmiesians, 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.

505 Justice Scalia, with Justices O'Connor and Thomas, concurred in the judgment but objected to any discussion of transferable development rights (TDR's) for that would tend to suggest that the value of the TDR's was relevant to whether a final decision on taking had occurred. A final decision was made, said Scalia, when the agency refused to allow plaintiff to build a house on her land because it fell within a "Stream Environmental Zone." The market value of any TDR given in exchange relates only to the just compensation issue. Id. at 745-50.


The treatises similarly do not provide a neat theoretic base for the ripeness doctrine. Professor Tribe has said that the categorization of a case as unripe for federal adjudication cannot be reduced to an orderly, much less a highly principled and predictable, process. On the other hand, he said, it is unclear whether judicial discretion to engage in such avoidance of decision could be significantly constrained without unduly restricting the flexibility needed to discharge the Article III function wisely. Professor Tribe ventured two generalizations. First, a case in which early legal challenges are held to be ripe normally presents either or both of two features: significant present injuries produced by contemplation of a future event or legal questions that do not depend for their resolution on an extensive factual background. Thus, the Court may be more willing to find a case ripe if the plaintiff is challenging a law as facially vague or overbroad, than if the challenge is to the law as applied. Second, a prudential factor underlying the determination of ripeness is the extent that a delay in judgment will cause hardship. Delay may cause harm by imposing the continuing harm of uncertainty and expense flowing from doubt about the authority of legal rules governing relations between private parties, by failing to provide clear guidelines needed for effective long-term investment, or by failing to honor explicit legislative goals of certainty.

Professors Nowak and Rotunda are no more precise. They say that just as a case can be brought too late, and thereby be moot, it can be brought too early, and therefore not yet be ripe for court adjudication. While the general ripeness principle is not disputed, its application by the Supreme Court has resulted in a line of cases with seemingly inconsistent rulings.

Perhaps the better approach would be to conclude that the “case” or “controversy” injury-in-fact requirement encompasses both Article III standing and ripeness concerns. This would be consistent with the Court’s precedents, which in speaking about the Article III ripeness test have typically resorted to general “case” or “controversy” language. For example, in both *Buckley v. Valeo* and *Socialist Labor Party v. Gilligan*, cited in *Reno*, the Court’s analysis of the constitutional component of ripeness merely focused on the Article III “case” or “controversy” requirement.

From the perspective of reasoned elaboration of the law, it is unclear, if a plaintiff has met the Article III test for standing, what additional requirements should be imposed to satisfy an Article III ripeness requirement. A plaintiff who has suffered an injury in fact, caused by the challenged conduct, redressable by the court, should be viewed as having a sufficiently ripe case to satisfy an Article III “case” or “controversy” requirement. Development of the doctrine in this way would mean that all of the ripeness concerns of fitness for judicial decision, including whether the facts have sufficiently crystallized for judicial decision, and the issue of the relative hardship to the parties of deciding the case now, or not, would be viewed as prudential considerations, which they seem to be.

Looking to the future, as the instrumentalist Justices of the 1960s have been replaced largely by non-instrumentalist Justices, the Court today will tend to give greater weight to separation of powers

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concepts that encourage judicial restraint than did the Court of the instrumentalist era, thus increasing the likelihood that even in a case where standing exists, the Court will find the case not ripe for resolution. Nevertheless, even in the *Lyons* chokehold case, arguments exist whereby the Court could find both standing and ripeness, based on credible allegations that the city authorized the chokehold and many officers had so used the hold on persons not resisting arrest.

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 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 have still had more votes than Gore after the Florida Supreme Court’s ordered recount, the dissent may well have been factually right in making their assertion that *Bush v. Gore* was not ripe for resolution under normal ripeness principles.

§ 17.3.3 The Doctrine of Mootness and the Ban on Giving Advisory Opinions

§ 17.3.3.1 Introduction to Mootness and Advisory Opinion Doctrine

Because Article III speaks in terms of “Cases” and “Controversies,” the Court will not render an advisory opinion. This conclusion is based not only on this text of Article III, but on history. The framers did not accept a proposal to give the Court power to issue advisory opinions. The ban on federal courts giving advisory opinions was initially, and most famously, stated in 1792 in *Hayburn’s Case*, discussed at § 17.3.1.2.A. nn.313-15. 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


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


Alabama, Delaware, and Oklahoma by state statute, some state Supreme Courts have power to issue advisory opinions, as do many constitutional courts in other countries and courts created pursuant to international treaties. These opinions are reviewable in federal court only if they lead to an injury-in-fact, which can be used to satisfy federal standing, ripeness, and advisory opinion doctrine.

Just as federal courts will not render advisory opinions, federal courts will not render an opinion in a “collusive suit.” 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,” as can occur if the defendant pays attorneys on both sides of the lawsuit.

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 controversy, and, particularly in cases involving constitutional challenges to governmental action, exercise prudence in deciding whether to decide the case, especially if the facts suggest some conflict of interest among the parties to the lawsuit, 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 Supreme 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


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 has already made some decision regarding an abortion prior to the case being decided by the Supreme Court.

Another exception involves the “voluntary cessation of allegedly illegal conduct, which could reoccur.” Such voluntary cessation does not deprive the tribunal of power to hear and determine the case. 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 in the class will face the same issue in the future. As the Court held in *Sosna v. Iowa*, a class action case does not become moot merely 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.

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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 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*, 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.

§ 17.3.3.2 Points of Contention in Mootness Doctrine

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 prudential principle and what part are matters of Article III requirement.

The matter was explored in *Honig v. Doe*. There, the Court held that the challenge of an emotionally handicapped child to a school district's violation of the Education of the Handicapped Act was not moot. This was so even though the plaintiff, after 7 years of litigation, was now 20 years old and no longer resided in the school district that had excluded him. Justice Brennan noted that the child remained eligible for educational services under the Act, and there was a reasonable probability that he would again enroll and be subjected to improper exclusion for disruptive conduct unless state-wide injunctive relief was issued. Justice Brennan wrote in *Honig*:

Under Article III . . . this Court may only adjudicate actual, ongoing controversies. . . . 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. . . . In the present case we have jurisdiction if there is a reasonable likelihood that respondents will again suffer the deprivation of EPA-mandated rights that gave rise to this suit. We believe that, at least with respect to respondent Smith, such a possibility does in fact exist and the case therefore remains justiciable.

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533 *Id.* at 317-18.
Chief Justice Rehnquist, concurring, urged the Court to consider carefully what part of the doctrine concerning dismissing cases for mootness was premised on constitutional constraints. Rehnquist said that if Article III underlies all aspects of mootness doctrine, the exception for cases "capable of repetition, yet evading review" would be incomprehensible. He continued:

[W]hile 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 seek an injunction. . . . 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. . . . [U]nique 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.534

Disagreeing with the Chief Justice that the mootness doctrine is based on prudential considerations to this extent, Justice Scalia, dissenting in Honig v. Doe, with Justice O'Connor, sought to explain the “evading review” exception within the confines of Article III constitutional doctrine. He said:

Jurisdiction on the basis that a dispute is "capable of repetition, yet evading review" is limited to the "exceptional situatio[n] . . . 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." . . . 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 non-surviving 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. 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.535

534  Id. at 331-332.

535  Id. at 333.
Justice Brennan replied to Justice Scalia’s conclusion that the second requirement was not met in the case by stating in footnote 6 of his opinion:

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.536

Honig v. Doe provides a good opportunity to observe how decisionmaking style is reflected in judicial opinions. Liberal instrumentalists, such as former Justices Douglas, Brennan, Marshall, and Warren, and present-day Justice Stevens, tend to give greater weight to protecting the rights of individuals than they do to preserving structural policies such as the separation of powers. Justice Brennan conceded in Honig v. Doe that the doctrine is based in part on Article III concerns. However, along with other instrumentalist Justices, Justice Brennan was quick to find that an issue was capable of repetition, yet evading review, as in Honig, or voluntarily ceased conduct could reoccur. For example, in DeFunis, Justice Brennan concluded that it was possible that Mr. DeFunis would have to withdraw from his last term at law school because of any “number of unexpected events – illness, economic necessity, even academic failure.” Thus, although the law school had voluntarily admitted him, he might have to face the affirmative action policy again.537

Formalists, such as Justices Scalia and Thomas, prefer clear, bright-line rules that are capable of logical and predictable application. They call for a strict application of separation of powers doctrine. In Honig v. Doe, Justice Scalia approved a rigorous, constitutionally based test for determining when a situation is capable of repetition, yet evading review. The only portion of the mootness doctrine that he finds outside constitutional requirements is when the Court decides whether a kind of case is likely to evade review. Because he requires a “demonstrated probability” that a case could reoccur to satisfy Article III, he is quite ready to dismiss cases for being moot.

Holmesians judges emphasize the need for judicial restraint and deference to the legislative and executive branches. This suggests a relatively strict approach to the mootness doctrine, particularly among conservative Holmesians. On the other hand, as a functional approach, Holmesians are willing to apply doctrine in light of purpose and practical considerations. Justice Rehnquist’s opinion in Honig v. Doe involves this respect for Holmesian, practical considerations, in that he would relax mootness requirements once the Court has taken certiorari. This may reflect an agenda Rehnquist has promoted as Chief Justice: the need for effective use of limited federal judicial resources. Reflecting his liberal Holmesian predisposition, Justice White often voted with the instrumentalists in mootness cases, as he did in DeFunis and Honig, in order to advance his liberal predisposition for vigorous enforcement of federal court remedies, as discussed at § 10.3.3 nn.63-78.

Natural law Justices seek reasoned elaboration of the law in light of its purposes and history, fidelity to precedent, and respect for consistent legislative or executive practice. They believe the framers and ratifiers were motivated by a sharing of powers, checks-and-balances philosophy, rather than

536 Id. at 318, n 6.

537 416 U.S. at 349 (Brennan, J., joined by Douglas, Marshall & White, JJ., dissenting).
a strict separation of powers approach. They also tend to decide constitutional law cases narrowly, with a facts-of-this-case orientation. Given this general orientation, they should be more willing to find cases moot than instrumentalists, but less willing than formalist or conservative Holmesian Justices.

A typical example is *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*[^538^] In this case, Justices O'Connor, Kennedy, and Souter all joined Justice Ginsburg’s majority opinion which held that in deciding whether behavior could “reoccur” under the “voluntary cessation” exception to mootness doctrine, the burden is on the defendant to meet the “formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to reoccur.” Justice Ginsburg noted that this burden is different than under standing doctrine where the plaintiff has the burden, as in the *Lyons* chokehold case, of demonstrating that some behavior may reoccur in order to establish a non-speculative threat of future injury to justify declaratory or injunctive relief. For this reason, Justice Ginsburg concluded, “The plain lesson of these cases is that there are circumstances in which the prospect that a defendant will engage in (or resume) harmful conduct may be too speculative to support standing, but not too speculative to overcome mootness.” Formalist Justice Scalia and Thomas dissented from this analysis, stating, “[T]he Court suggests that to avoid mootness one needs even less of a stake in the outcome than the Court’s watered-down requirements for initial standing. I dissent from all of this.”[^539^]

On the other hand, while natural law Justices may be less willing to find cases moot than formalists, it is important to note that Justice O'Connor joined Justice Scalia's dissent in *Honig v. Doe.*[^540^] Justice Kennedy was not on the Court at the time *Honig* was argued, and Justice Souter was not on the Court at the time *Honig* was decided. Thus, it remains somewhat speculative how they would have decided that case. Further, it is useful to note that Justice Powell joined with the majority in *DeFunis* to find that case moot, and did not join Justice Brennan’s dissent in the case.[^541^]

§ 17.3.4 Political Question Doctrine

§ 17.3.4.1 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.[^542^]


[^539^]: Id. at 198 (Scalia, J., joined by Thomas, J., dissenting).


[^541^]: 416 U.S. 312 (1974) (per curiam opinion).

Justice Marshall also indicated in *Marbury v. Madison*\(^{543}\) 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*.\(^{544}\) 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.

\section*{\textbf{\textsection 17.3.4.2 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.\(^{545}\) In a case involving Oregon's initiative and referendum process, the Court held broadly that the question of whether a state has a republican form of government is political in character.\(^{546}\) 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.\(^{547}\) 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*\(^{548}\) 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 women the right to vote in 18th- and 19th-century America, as in other democracies of the time, discussed at \textsection 26.3.1.1.

\section*{\textbf{\textsection 17.3.4.3 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, such as deciding which government validly represents a foreign state, present a political question. For example, in *United

\begin{footnotes}
\item[543] 5 U.S. (1 Cranch.) 137, 164 (1803).
\item[544] 48 U.S. (7 How.) 1, 42-43 (1849).
\item[546]  Pacific States Telephone & Telegraph Co. v. Oregon, 223 U.S. 118, 143-51 (1912).
\item[547]  Leser v. Garnett, 258 U.S. 130, 137 (1922).
\item[548]  88 U.S. 162, 175-78 (1874).
\end{footnotes}
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.

§ 17.3.4.4 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. 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 wrote for the Court in Baker that malapportionment of congressional districts is not a political question. His 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 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.

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, as did Justice Powell in his concurrence in Goldwater v. Carter:

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549 315 U.S. 203, 229 (1942).
552 328 U.S. 549, 556 (1946).
553 369 U.S. 186 (1962).
554 Id. at 209-17.
555 Id. at 217, cited in 444 U.S. 996, 998-1002 (1979) (Powell, J., concurring in the judgment).
(1) does there exist (a) a textually demonstrable constitutional commitment of the issue to a coordinate branch of government; 
(2) the core separation of powers concerns with whether (b) there are judicially manageable standards or (c) does the issue call for an initial non-judicial policy decision; and 
(3) general separation of powers concerns dealing with whether prudential considerations counsel 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.

Justice Brennan said that unless one or more of these factors is "inextricable" from the case at bar there should not be a dismissal for non-justiciability on the ground 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 characteristic of the formalist and Holmesian-era judicial styles, 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*.\(^{556}\) 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*, discussed at § 17.2.2.1.A nn.101-07, that Congress cannot add cases to the Supreme Court’s original jurisdiction. In both cases, the constitutional text is determinative.

Another decision applying the *Baker v. Carr* factors is *Davis v. Bandemer*.\(^{557}\) 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, as discussed at § 10.3.3, and by moderate natural law Justice Powell.

Formalist Chief Justice Burger called the question political, along with Justices who lean toward conservative Holmesian deference to state government actions, Justices Rehnquist, and in her early


years on the Court, Justice O’Connor. In her opinion, 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. 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, discussed at § 26.2.1.5, where the Court has been able to adopt agreed-upon standards of review. Reflecting the difficulty in determining a test for the constitutionality of a political gerrymander, a 4-Judge 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.

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 deprived them of their constitutional role in making law. The Court dismissed without a majority opinion. The question, narrowly viewed, was whether the President alone may recognize or withdraw recognition from foreign governments. Viewed more broadly, the question was the authority of the President in the conduct of foreign relations, and the extent to which the Senate or the Congress is authorized to negate actions of the President in that area. For four Justices, Justice Rehnquist reasoned broadly in a pre-\textit{Baker v. Carr} style and, relying on the Holmesian-era case \textit{Coleman v. Miller}, said these were political questions. \textit{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 \textit{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.\textsuperscript{563}

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.\textsuperscript{564} 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.\textsuperscript{565}

\section*{§ 17.3.4.5 Modern Political Questions Doctrine: 1986–Today}

Two relatively easy cases involving the political questions doctrine decided since 1986 are \textit{United States v. Munoz-Flores} and \textit{New York v. United States}. In \textit{Munoz-Flores},\textsuperscript{566} 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 \textit{Powell v. McCormack} to determine

\textsuperscript{563} \textit{Id.} at 996-97, 998-1002 (Powell, J., concurring in the judgment).

\textsuperscript{564} \textit{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).

\textsuperscript{565} \textit{Id.} at 997, 1006 (Blackmun, J., joined by White, J., would grant the petition for certiorari and set the case for oral argument); \textit{id.} at 996 (Marshall, J., concurs in the result).

\textsuperscript{566} 495 U.S. 385, 389-93, 397-401 (1990).
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, as noted at § 17.1.3.4.

In New York v. United States, 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, as discussed at § 18.4.5.

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.

For example, in Vieth v. Jubelirer, a four-Justice plurality of formalist Justices Scalia and Thomas, Holmesian Chief Justice Rehnquist, and natural law Justice O’Connor departed from Davis v. Bandemer and held that all questions involving political gerrymandering are political questions not appropriate for court review. They based this conclusion largely on the fact that no judicially manageable standards had been developed by the Supreme Court or the lower federal courts during the 18 years between Davis and Vieth to guide resolution of the issue. To give some greater guidance in applying the Baker v. Carr factors, they also noted that in their view the six factors of Baker v. Carr are “probably listed in descending order of importance and certainty.”

Reflecting the natural law predisposition for case-by-case adjudication, Justice Kennedy concurred in Vieth, but indicated that he would not foreclose the possibility that in the future judicially manageable standards could be developed reflecting “some limited and precise rationale” to guide court resolution of political gerrymandering cases. The difficulty in developing such standards was underscored by the four Justices in dissent in Vieth, who adopted three different standards to test the constitutionality of political gerrymandering.


Id. at 306 (Kennedy, J., concurring in the judgment).

Id. at 317-19 (Stevens, J., dissenting); id. at 343-47 (Souter, J., joined by Ginsburg, J., dissenting); id. at 355-60 (Breyer, J., dissenting).
An easier case for deciding something is a political question was *Nixon v. United States.* In *Nixon*, the Court held that whether Congress could have testimony taken before a Committee in an impeachment trial was a political question. Chief Justice Rehnquist’s opinion was joined by formalist Justices Scalia and Thomas and natural law Justices O'Connor and Kennedy. Applying *Baker v. Carr*, Rehnquist said that the Constitution’s text, which grants the Senate the "sole power" to try impeachments, indicates that the Constitution left to the Senate alone the authority to decide how the individual should be tried. Further, the word "try" lacks sufficient precision to afford a judicially manageable standard of review. Also counseling against justiciability were prudential concerns about lack of finality and the difficulty of fashioning relief. The concern that the Senate be checked was met by two safeguards: the division of impeachment power, with the House having the sole power to accuse, and the two-thirds vote in the Senate required to convict.

Adopting a perspective more typical of the instrumentalist-era Court, Justice White, joined by Justice Blackmun, said that not every question regarding trying impeachments was a political question. In their view, the framers intended for judicial review to ensure that the Senate adhered to a minimal set of procedural standards in conducting impeachment trials. On the merits, they concluded that the use of a fact-finding committee was compatible with the Constitution's command that the Senate "try all impeachments." In a separate concurrence, Justice Souter also concluded that not every issue regarding trying impeachments is a political question. He noted that although the Constitution contemplates that the Senate can provide for issues relating to process, the Court should interfere if the Senate's actions seriously threaten the integrity of its results, as if it used a coin-toss.

Justice Stevens concurred with the majority’s conclusion that all questions relating to the Senate trying impeachments are political questions, but he reached the result on different grounds. Justice Stevens concluded that “the Framers decided to assign the impeachment power to the Legislative Branch”; that “respect for a coordinate branch of government forecloses any assumption that improbable hypotheticals like those mentioned by Justice White or Justice Souter will ever occur”; and that “wise policy of judicial restraint” supports this view.

Based on similar reasoning of an issue being committed to the discretion of another branch, the Ninth Circuit has held whether to place particular 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.”

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572 *Id.* at 239-52 (White, J., joined by Blackmun, J., concurring in the judgment); *Id.* at 252-52 (Souter, J., concurring in the judgment).

573 *Id.* at 238 (Stevens, J., concurring).

574 914 F.2d 1215, 1223 (9th Cir. 1990). *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 actions supporting 1970 Chilean coup and kidnapping and murder of Chilean general by plotters raised foreign policy questions committed to the executive branch of
§ 17.3.4.6 General Principles Underlying Political Questions Doctrine

The most complete statement by the Court on the political question doctrine is the six-factor analysis of *Baker v. Carr*. Justice Brennan there said the doctrine is primarily a function of the separation of powers, but he did not state any principles to explain why each factor is relevant to the doctrine. In *Goldwater v. Carter*, Justice Powell did not offer any theory, but did usefully group the *Baker v. Carr* factors into three categories, as indicated at § 17.3.4.4 n.555. These categories group the six factors under three of the six general sources of constitutional meaning: text (the first *Baker* factor), contextual considerations of separation of powers (*Baker* factors two and three), and prudential considerations (*Baker* factors four, five, and six).

In practice, the other three sources of constitutional meaning – history, legislative and executive practice, and precedents – are also used in political questions cases. Where relevant, the Court has resorted to arguments of history, such as the history discussed in *Nixon v. United States* surrounding impeachment provisions. The nature of legislative and executive practice concerning foreign relations was important to Justice Rehnquist in his opinion in *Goldwater v. Carter*. Prior court precedents on political questions are always relevant in deciding each new case.

Scholars have struggled to provide a general theory of political questions doctrine. Since the matter includes prudential concerns, it is unlikely that the Court will tie its hands by any general theory. Even so, an effort to identify a theory may help in case analysis. From an analytic perspective, several professors have written that there is nothing more to the political question doctrine than ordinary constitutional interpretation. For example, Professor Wechsler has said that the only acceptable use of the doctrine is when the Court decides that the Constitution commits a question to another branch using standard analytical reasoning and normal rules of construction. To the contrary, a functional analysis of the role of the Court has been proposed by Professor Sharpf. He said that in determining whether to decide a certain issue or case the Court should consider factors such as the difficulty of understanding the broad picture in foreign relations cases; the need for uniformity of decision; and the wider responsibilities of other branches, as where President Roosevelt dealt with Russian debts in connection with recognizing the Soviet government. However, reflecting the perspective of an instrumentalist functional view, Professor Sharpf also suggested that the doctrine should not be applied if important individual rights are at stake.

government, there exist no judicially manageable standards to determine propriety of executive actions, and adjudication would require non-judicial policy determinations) [S]


576 444 U.S. at 1004-05.


Applying a functional analysis from a Holmesian deference to government perspective, Professor Bickel contended that the political question doctrine does not involve normal constitutional interpretation. Instead, there is “something different about it, in kind, not in degree, from the general 'interpretative process,' something greatly more flexible, something of prudence, not construction and principle.” The political questions doctrine, he said, ultimately rests on “the Court's sense of lack of capacity, compounded in unequal parts of (a) the strangeness of the issue and its intractability to principled resolution; (b) the sheer momentousness of it, which tends to unbalance judicial judgment; (c) the anxiety, not so much that the judicial judgment will be ignored, as that perhaps it should be but will not be; (d) finally, [the] inner vulnerability, the self-doubt of an institution which is electorally irresponsible and has no earth to draw strength from.”

Other authors have adopted variations of these views. One coursebook on Constitutional Law suggests, "[T]he result in *Goldwater* may be an appreciation by the Court of the need in a complex, changing and dangerous world for immediate presidential action. *Goldwater* may thus be seen as less a political question case than as another chapter in the steady accretion of executive power in the field of foreign relations." Professor Tribe has said that the doctrine does not put any provisions of the Constitution off-limits to judicial interpretation. However, "it does require federal courts to determine whether constitutional provisions which litigants would have judges enforce do in fact lend themselves to interpretations as guarantees of enforceable rights." Tribe continued, "[U]ltimately, the political question doctrine, like other justiciability doctrines, at bottom reflects the mixture of constitutional interpretation and judicial discretion which is an inevitable by-product of the efforts of federal courts to define their own limitations.

A possible explanation for the paucity of theory is that the Court changed its rationale for the political question doctrine in *Baker v. Carr* during the instrumentalist era and only now is beginning slowly to return to pre-instrumentalist approaches. During the formalist period, the Court tried to lay down some rules as to which clauses of the Constitution, in their application, presented only political questions. The Court also undertook to state what particular kinds of issues, such as the President's power in foreign relations, present only political questions. However, *Baker v. Carr*, decided in 1962, said the Court had been overgeneralizing and, in a case-by-case inquiry, should consider whether one or more of a list of factors was inextricable from the case at bar. Under that approach, any clause of the Constitution which might reasonably be interpreted as granting an individual right would probably not be held to raise a political question.

The Court still cites the *Baker* factors, as organized by Powell in *Goldwater*. Today, however, a majority of the Court is likely to give somewhat greater weight to separation of powers concerns and be prepared to allow other branches to decide questions that the instrumentalists would have

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582  *Id.* at 107.
decided. Further, it is significant that only three Justices – White, Blackmun and Souter – sought in *Nixon v. United States* to use a rather narrow fact-oriented approach in order to preserve some remnant of judicial review over the Senate's trial of impeachment cases.583

Another factor that should be considered in evaluating the political question cases is the influence of judicial style. Instrumentalists, such as former Justices Douglas, Brennan, Marshall, and Warren, and present-day Justice Stevens, seek to advance sound social policies whenever leeways exist in the law. Thus, they are the least likely to find that a case includes a political question, particularly if avoiding that conclusion creates an opportunity to protect an individual right that a constitutional clause might reasonably be construed to create.

At the opposite extreme, formalists, such as Justices Scalia and Thomas, prefer clear, bright-line rules that are capable of logical and predictable application. With respect to the political questions doctrine, they would tend to prefer the pre-instrumentalist approach whereby certain categories of cases, and certain clauses, were held to present political questions. For cases which are viewed as falling outside these categories, however, formalist judges might be more willing than Holmesian judges, who focus more on functional and prudential considerations, to view the case as justiciable. For example, formalist Justices Butler and McReynolds dissented from the 1939 Holmesian-era case of *Coleman v. Miller*,584 based upon their view that whether a constitutional provision was ratified within a reasonable time was not a political question, but could be guided by court standards of reasonableness. Justice Butler noted that the case fell outside the core holdings of the formalist-era cases concerning certification of ratification being a political question, and was consistent with *Dillon v. Gloss*, which had held in 1921 that the seven-year period for ratification of the 18th Amendment regarding Prohibition was reasonable.

Holmesians emphasize the need for judicial restraint and deference to legislative and executive practice. With respect to political questions, that deferential posture would tend to support finding a question political, particularly for an extreme Holmesian, such as Professor Alexander Bickel, or Justices Frankfurter and Brandeis during the Holmesian era of the Court. On the other hand, the functional aspect of the Holmesian approach would support an analysis based on a range of prudential considerations, as in *Baker v. Carr*, rather than a rigid formalist, categorical approach. Chief Justice Rehnquist has written many opinions which evidence this style. His opinion in *Nixon v. United States* used the concepts introduced by Justice Brennan in *Baker v. Carr*, as reformulated by Justice Powell in *Goldwater v. Carter*, but in applying that doctrine he is more likely than an instrumentalist to find political questions. Indeed, as noted above, in *Nixon* he found that all three of the categories noted by Powell were present: a commitment to Congress, the lack of judicially manageable standards, and prudential reasons suggesting nonjusticiability.

The natural law predisposition for reasoned elaboration of the law, but deciding cases narrowly, with a facts-of-the-case orientation, discussed at § 12.2.2.2, makes them likely to follow the *Baker v. Carr*


approach, but to give it more structured understanding. This supports, for example, embracing the language in *Vieth*, cited at § 17.3.4.5 n.568, that the six factors of *Baker v. Carr* are “probably listed in descending order of importance and certainty.” At a minimum, it suggests that Justice Powell’s grouping of the six *Baker* factors are listed in descending order of importance: first, text (the first *Baker* factor); second, contextual considerations of separation of powers (*Baker* factors two and three); and third, prudential considerations (*Baker* factors four, five, and six). In particular, consistent with *Vieth* and a focus on reasonable elaboration of the law, a natural law approach will take very seriously, after consideration of whether there exists a textually demonstrable commitment, the second *Baker* factor of whether judicially manageable standards exists. Both Justices O’Connor and Kennedy focused quite heavily on this factor in their opinions in *Vieth*.585

Such a natural law approach would be consistent with current doctrine, discussed above throughout § 17.3.4, where questions of a “republican form of government” under the Guarantee Clause; the circumstances regarding “valid ratification” of constitutional amendments or “political gerrymandering”; military matters of “proper” training of troops or “valid declarations of war”; foreign policy issues regarding matters like “valid termination of treaties”; issues of legislative discretion, such as what conduct is a “high crime or misdemeanor” for purposes of impeachment or “valid procedures” to try impeachments; and issues of executive discretion, like placing names on a “commodity control list,” are regarded as political questions.586

§ 17.4 Consequences of Having a Justiciable Claim

§ 17.4.1 As Applied Versus Facial Challenges

Litigants can attack the constitutionality of government action in two ways: they can bring a facial challenge to the law, alleging that it is unconstitutional in all of its applications, or they can bring an as-applied challenge, alleging that the law is unconstitutional as applied to the particular facts of their case. However, because standing doctrine requires a litigant to demonstrate an injury-in-fact, caused by the challenged conduct, redressable by the Court, discussed at § 17.3.1, it has been noted:


586 See also Motion Systems Corp. v. Bush, 437 F.3d 1356 (Fed. Cir. 2006) (President's discretionary decision to deny import relief under U.S.-China Relations Act to the United States industry manufacturing pedestal actuators was political question, and not subject to judicial review as outside the scope of authority delegated to him by Congress); Whiteman v. Dorotheum GmbH & Co. KG, 431 F.3d 57 (2nd Cir. 2005) (suit stemming from Nazi confiscation of property from Austrian Jews, which is last suit of its kind to be filed in United States district courts, is non-justiciable political question in light of United States government assertion of foreign policy interests embodied in executive agreements with Austria to establish fund to settle such claims once all related suits are dismissed).
There is no single distinctive category of facial, as opposed to as-applied, litigation. All challenges to statutes arise when a litigant claims that a statute cannot be enforced against her [or him]. In the course of as-applied litigation, rulings of facial validity sometimes occur, but they do not reflect trans-substantive rules governing a purported general category of facial challenges. Rather, rulings that a statute is facially (or partly) invalid are the consequence of the particular doctrinal tests that courts apply to resolve particular cases.587

In United States v. Salerno,588 the Supreme Court stated that to succeed on a facial challenge the challenger labors under a “heavy burden” and “must establish that no set of circumstances exists under which the Act could be valid.” In practice, two kinds of facial challenges appear to exist:

First, a facial challenge may be asserted as an “overbreadth facial challenge,” which predicates facial invalidity on some aggregate number of unconstitutional applications of an otherwise valid rule of law. Second, and quite distinctly, a facial challenge may be asserted as a “valid rule facial challenge,” which predicates facial invalidity on a constitutional defect inhering in the terms of the statute itself, independent of the statute’s application to particular cases.589

Although the issue is not without dispute, the best reading of the Court’s cases suggests that Salerno’s “no set of circumstances” language applies only to the “valid rule facial challenge” cases, thus permitting a finding of unconstitutionality in the “overbreadth” cases based on a “substantial” number of invalid applications, even though some set of circumstances exist where the statute might be valid.590 In such cases, an individual is permitted to bring the lawsuit even if the statute might be constitutional as applied to that individual’s activities, based on a concern with “chilling” the rights of others whose behavior might be affected by the statute’s substantial overbreadth.

As has been noted, when the Court permits such cases to go forward, the Court is really granting third-party standing to an individual to vindicate the rights of other parties not before the Court whose behavior might be affected by the statute under consideration.591 Because this “substantial overbreadth” doctrine is most prominently applied in First Amendment free speech cases, the “substantial overbreadth” doctrine is discussed at § 29.6.1.5, despite formally being a Fifth and 14th Amendment due process issue.


590  See generally id. at 371-85.

591  Id. at 369-70; Fallon, supra note 587, at 1359-64.
§ 17.4.2  The Severability Issue

If a particular provision in a statute is determined by a court to be unconstitutional, the court must decide whether to "sever" that provision from the statute, and then enforce the rest of the statute as written, or whether to hold that the entire statute is unconstitutional. Regarding this issue of severability, the Supreme Court stated in *INS v. Chadha}*592 that "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, independent of that which is not.’" The Court similarly noted in *United States v. Raines*593 a preference for enjoining only the unconstitutional applications of a statute while leaving other applications in force.

Three interrelated principles inform this approach to remedies. First, the Court tries not to nullify more of a legislature's work than is necessary, for "[a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people."594 As the Court noted back in 1921, it is axiomatic that a "statute may be invalid as applied to one state of facts and yet valid as applied to another."595 Accordingly, the Court has indicated that the "normal rule" is that "partial, rather than facial, invalidation is the required course," such that a "statute may . . . be declared invalid to the extent that it reaches too far, but otherwise left intact."596 Second, reflecting the divide between legislative and judicial mandates and institutional competencies, the Court usually refrains from "rewrit[ing] state law to conform it to constitutional requirements" even as the Court strives to salvage it.597 Third, "the touchstone for any decision about remedy is legislative intent, for a court cannot ‘use its remedial powers to circumvent the intent of the legislature.’"598 On the other hand, the Court has noted that it is wary of legislatures who would rely on its intervention, for "‘[i]t would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside’ to announce to whom the statute may be applied. ‘This would, to some extent, substitute the judicial for the legislative department of the government.’"599

599  *Ayotte*, 126 S. Ct. at 968, citing United States v. Reese, 92 U.S. 214, 221 (1876).
Taken together, these principles create a presumption of severability, or partial invalidity, which in practice is difficult to rebut. On the other hand, where the invalid provision in the statute is sufficiently central to, or a dominant part of, the entire statutory scheme, a court may conclude that the legislature would not have enacted the statute absent that part of the provision. This is particularly true if the offending provision is an exception to, or limitation on, a general grant of power. A court may conclude that Congress would not have passed the statute absent the limitation being valid. Of course, the presumption of severability can be supported by language in the statute that addresses directly the issue of severability. For example, in Chadha, the relevant statute provided, “If any particular provision of this Act, or application thereof to any person or circumstance, is held invalid, the remainder of the Act and the application of the Act to other persons or circumstances should not be affected thereby.”

Where the statute does not have such a severability provision, the Court will resort to statutory interpretation methods to determine congressional intent. For example, the Court noted in United States v. Booker that to determine whether Congress would have preferred “the excision of some of the Act” to the “total invalidation of the statute” the Court will examine “the consequences of the Court’s constitutional requirement in light of the Act’s language, its history, and its basic purposes.” This approach follows the modern approach to statutory interpretation discussed at § 6.2.3.1.

Normally under severability analysis the Court merely excises the offending provision and then enforces the remainder of the statute. To preserve a constitutional statutory scheme, the Court has indicated a willingness, however, as in Booker, to adjust other provisions in the statute to make the overall statute constitutional, as long as the Court determines that would be Congress’ intent.

§ 17.4.3 The Retroactivity Issue and the Standards Used to Consider a Valid Claim

In each case, the Court must decide what is the appropriate doctrine to apply. This could involve a balancing test, discussed at § 7.2.1, or a categorical approach, discussed at § 7.2.2. As discussed at § 21.2.2.1, in most cases the Court applies the so-called "minimal rational review" level of scrutiny. That approach traces from McCulloch v. Maryland, where Chief Justice Marshall wrote, “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.” Applying this standard today, the Court requires that parties who attack the constitutionality of governmental action must show that the challenged action was not rationally related to a legitimate governmental purpose. In addition to this base level of minimum rational review, there are a range of additional kinds of scrutiny that the

600 462 U.S. at 932.


602 Id. at 758-59.

603 17 U.S. (4 Wheat) 316, 421 (1819).

Court will apply in various cases. All of these kinds of scrutiny are discussed at §§ 21.2.2.1-21.2.2.4. A summary of these balancing tests appears at § 7.2.1 in Table 7.2.

In each case where the litigant is determined to have a valid claim, the Court must consider whether to make the ruling retroactive, as to the existing case or all cases not yet decided on appeal, or whether to make the ruling prospective only. Before the instrumentalist era, the common law and the Court had recognized a general rule of retrospective effect for the constitutional decisions of the Court, subject to certain limited exceptions. Despite this tradition, during the instrumentalist era, the Supreme Court held that the Constitution neither prohibits nor requires retrospective effect, treating the matter as one of policy. The post-instrumentalist Court has reverted to traditional theory. As stated in 1995 in Reynolds v. Hyde,605 “[W]hen (1) the Court decides a case and applies the (new) legal rule of that case to the parties before it, then (2) it and other courts must treat the same (new) legal rule as ‘retroactive,’ applying it, for example, to all pending cases, whether or not those cases involve predecision events.” This retroactivity doctrine is discussed at § 7.3.4.1.

§ 17.4.4 Remedial Issues

The Supreme Court stated in 1803 in Marbury v. Madison,606 “[E]very right, when withheld, must have a remedy, and every injury its proper redress. 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 violation of a vested legal right.”

The Court phrased this point more precisely in 1977 in Milliken v. Bradley.607 In Milliken, the Court said that the remedy should be determined by the nature and scope of the constitutional violation. The decree must be remedial in nature, that is, it must be designed “as nearly as possible ‘to restore the victims . . . to the position they would have occupied in the absence of such [unconstitutional] conduct.’ . . . [T]he federal courts in devising a remedy must take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution.”

In deciding what would be an appropriate remedy, the Supreme Court is mindful of its limited role in the system of separation of powers. Thus, the Court noted in Missouri v. Jenkins608 that “although the ‘remedial powers of an equity court must be adequate to the task, . . . they are not unlimited,’ and one of the most important considerations governing the exercise of equitable power is a proper respect for the integrity and function of local governmental institutions.” Nonetheless, where court action is necessary to protect constitutional rights, the Court has been willing to countenance extensive remedial action. For example, federal courts engaged in vigorous remedial action in dealing with the school redistricting cases of the 1960s and 1970s to implement the Court’s decision

606 5 U.S. (1 Cranch) 137, 163 (1803).
in *Brown v. Board of Education* striking down racially segregated school systems, discussed at § 26.2.1.3. Federal courts have also been somewhat vigorous dealing with unconstitutional behavior in prison systems, in state mental health facilities, and with respect to police misconduct.609

Remedies involving these kinds of injunctive or specific performance remedies must be contrasted with remedies involving damage actions. Principles of executive immunity limit damage actions unless the executive official knowingly violates clearly established constitutional rights, as discussed at § 20.1.4.2. State sovereign immunity principles limit damage actions against states, as discussed at §§ 17.2.4.1-17.2.4.3. It has also been noted that “the limitation on money damages shifts societal resources away from reparation for past harms and [through injunctive relief] toward investment in future welfare, continually redistributing societal resources from older to younger citizens.”610

In each of these cases, the court must decide what role they have to play. As Professor Abram Chayes noted in his classic article, *The Role of the Judge in Public Law Litigation*:

In our received tradition, the lawsuit is a vehicle for settling disputes between private parties about private rights. The defining features of this conception of civil litigation are:

1. The lawsuit is bipolar. Litigation is organized as a contest between two individuals or at least two unitary interests, diametrically opposed, to be decided on a winner-takes-all basis.
2. Litigation is retrospective. The controversy is about an identified set of completed events: whether they occurred, and if so, with what consequences for the legal relations of the parties.
3. Right and remedy are interdependent. The scope of the relief is derived more or less logically from the substantive violation under the general theory that the plaintiff will get compensation measured by the harm caused by the defendant’s breach of duty – in contract by giving plaintiff the money he would have had absent the breach; in tort by paying the value of the damage caused.
4. The lawsuit is a self-contained episode. The impact of the judgment is confined to the parties. If plaintiff prevails there is a simple compensatory transfer, usually of money, but occasionally the return of the thing or the performance of a definite act. If defendant prevails, a loss lies where it has fallen. In either case, entry of judgment ends the court’s involvement.
5. The process is party-initiated and party-controlled. The case is organized and the issues defined by exchanges between the parties. Responsibility for fact development is theirs. The trial judge is a neutral arbiter of their interactions who decides questions of law only.


if they are put in issue by an appropriate move of a party.611

In contrast, in public law litigation, the role of the judge may be quite different. As stated by Professor Chayes:

The public law litigation model portrayed in this paper reverses many of the crucial characteristics and assumptions of the traditional concept of adjudication:

(1) The scope of the lawsuit is not exogenously given but is shaped primarily by the court and parties.
(2) The party structure is not rigidly bilateral but sprawling and amorphous.
(3) The fact inquiry is not historical and adjudicative but predictive and legislative.
(4) Relief is not conceived as compensation for past wrong in a form logically derived from the substantive liability and confined in its impact to the immediate parties; instead, it is forward looking, fashioned ad hoc on flexible and broadly remedial lines, often having important consequences for many persons including absentees.
(5) The remedy is not imposed but negotiated.
(6) The decree does not terminate judicial involvement in the affair: its administration requires the continuing participation of the court.
(7) The judge is not passive, his function limited to analysis and statement of governing legal rules; he [or she] is active, with responsibility not only for credible fact evaluation but for organizing and shaping the litigation to ensure a just and viable outcome.
(8) The subject matter of the lawsuit is not a dispute between private individuals about private rights, but a grievance about the operation of public policy.612

These two models of adjudication are presented by Professor Chayes as bipolar opposites. In many cases litigation may involve aspects of each. For example, in public interest litigation, a remedy may have to be imposed if the parties cannot agree upon a negotiated “consent decree.” Further, some public interest cases may begin as a dispute by a private individual seeking traditional compensatory damage relief or an injunction against some governmental action based on an “as applied” challenge, but may morph into a broader classic public interest case during the course of litigation.

As might be expected, instrumentalist judges tend to be the most willing to have judges take on the public interest litigation model of judicial activism. Formalist judges are most comfortable with the traditional lawsuit model, followed closely by Holmesian judges, with their deference to government posture. Given their analytic, but normative decisionmaking background, natural law judges can be expected to try to balance the appropriate role for each kind of litigation consistent with a desire for reasoned elaboration of the law.


612 Id. at 1302.
Whether in any case, any particular judicial decree, or consent decree entered into by parties against the backdrop of the public law litigation model of adjudication, is a good or bad idea, can be a matter of some dispute. Details of the various judicial decisions on constitutional law issues are discussed in the remaining Chapters 18-32 of this book. Summarizing the position of those who are concerned about some of these Court decisions, it has been noted:

[In 1976,] Chayes concluded that the anti-democratic consequences were acceptable because the outcomes as he saw them had been good, and because judges who would be in charge of reforms would be restrained by institutional factors within the judicial culture, such as the general expectation as to competence and conscientiousness, professional traditions, and accepted canons of office.

More than a quarter century later, it is clear that the judges are not really in charge and the outcomes are sometimes strikingly bad. Under many consent decrees, effective control of the state or local governmental institution is shifted from elected officials to an ad hoc group of lawyers that writes and administers the judicial regime – we call them the “controlling group.” Consent decrees are plagued by unintended consequences, yet are difficult to modify in light of experience and changing circumstances. \(^{613}\)

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CHAPTER 18: FEDERALISM

§ 18.1 National Power: Its Nature and Scope

As noted at the beginning of Part IV, 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.”

As noted at § 5.2.1 nn.25-27, in his 1953 treatise, Politics and the Constitution,¹ 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,² Justice Story discussed more limited inferences to be drawn from the Preamble. He stated 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.”³ Justice Story then indicated, consistent with a natural law focus on “purpose” and “mischiefs to be remedied,” discussed at § 12.2.1.1 nn.8-12, how each of the various clauses of the Preamble were related to various mischiefes which had arisen under the Articles of Confederation that needed to be remedied.⁴ Various purposes behind constitutional doctrine, organized consistent with the Preamble, are discussed in Chapter 8, which is entitled, “The Purposes or Ends of Constitutional Interpretation.”

With regard to the specific issue of federal versus state power, as with any constitutional issue, this subject can be studied in terms of the literal text of a constitutional provision; arguments of purpose; arguments of context, particularly related provisions within the Constitution and theories of federalism which structured the Constitution; the history leading up to a constitutional provision’s ratification; legislative, executive, and social practice under that provision; the Supreme Court’s precedents in interpreting that constitutional provision; and prudential considerations. Over time, legislative and executive practice and Court precedents have become the most important elements. However, it is worthwhile to start by considering text, structure, and history.

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² Joseph Story, Commentaries on the Constitution of the United States § 462 (1833).

³ Id § 459.

⁴ Id. §§ 463-68 (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).
§ 18.1.1  Background for Studying the Nature of Federal Power: Text, Structure of the Constitution, and History

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 seventeen clauses to list powers, concluding in clause 18 with the Necessary and Proper Clause. That clause provides that 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. The political background for much of this time was: (1) slavery and the racial problems that developed in the aftermath of slavery; (2) economic policy, particularly regarding tariffs and the protection of manufacturing in the United States from foreign competition; and (3) the role of the federal government, as opposed to state governments, in the promotion of 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 Jefferson’s views on this matter are summarized at § 7.1 nn.5-8.

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

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.7

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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).

7 Id. at 391-94.
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.

This broader view has never been adopted by the Supreme Court. Instead, in cases like *United States v. Butler, Steward Machine Co. v. Davis, and Helvering v. Davis*, 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.

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 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.

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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, cl. 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 give 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).

As discussed at § 18.2.5, 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 regulatory power under the Commerce Clause extends to any subject which, in the aggregate, “substantially affects” interstate commerce between the states.\textsuperscript{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, as discussed at § 15.4.1 nn.57-58, 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 in the aftermath of the Revolutionary War. Such protectionist legislation, passed by a number of states to protect their own state’s commerce from competition, had the effect of retarding economic growth in the United States generally.\textsuperscript{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.\textsuperscript{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

\textsuperscript{11} See, \textit{e.g.}, United States v. Lopez, 514 U.S. 549, 558-60 (1995).


\textsuperscript{14} I Farrand, Records of the Federal Convention of 1787, at 18-19 (1911).
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.\(^\text{15}\)

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. Gouvernour 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.\(^\text{16}\)

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."\(^\text{17}\) 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 appointed on August 22.\(^\text{18}\) 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.

\(^\text{15}\) \textit{Id.} at 53-54. This was part of the "Virginia Plan" to amend the Articles of Confederation.

\(^\text{16}\) II Farrand, Records of the Federal Convention of 1787, at 21, 25-27 (1911).

\(^\text{17}\) \textit{Id.} at 181-82. These actions clearly rejected the more states' rights "New Jersey" plan.

\(^\text{18}\) \textit{Id.} at 374.
Also, "and with the Indian tribes" was added to the Commerce Clause.\textsuperscript{19}

On September 12, the Committee of Style reported a full draft of the proposed Constitution, according to the above decisions.\textsuperscript{20} 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.\textsuperscript{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. Further, as discussed at § 18.2.2, from 1873-1937, the Supreme Court adopted doctrines significantly limiting Congress’ power to regulate commercial activity as part of a Republican pro-business majority on the Supreme Court. As discussed at § 18.2.5, under modern Supreme Court doctrine the internal police power of the states can be infringed by Congress in most cases, and Congress can legislate in economic matters in almost all cases for the general interests of the Nation. However, Congress’ power in non-economic matters is limited to the other powers listed in the Constitution independent of the Commerce Clause. This result is confirmed in \textit{United States v. Lopez}, discussed at § 18.2.5 nn.100-15, decided in 1995, and \textit{United States v. Morrison}, discussed at § 18.2.5 nn.116-18, decided in 2000.

\section*{§ 18.1.2 The Natural Law Approach: The Nature of Federal Power as Spelled Out in \textit{McCulloch v. Maryland}}

The story of what has happened to Congress' power under the Necessary and Proper Clause, the Commerce Clause, and the General Welfare Clause is a great lesson in jurisprudence and American legal history. In 1791, a debate arose involving the constitutionality of Congress creating a national bank. As discussed at § 7.1 nn.5-14, President Washington’s Secretary of State, Thomas Jefferson, counseled Washington that incorporating a bank was not authorized by 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,

\begin{itemize}
  \item \textit{Id.} at 497.
  \item \textit{Id.} at 585, 590 et. seq.
  \item \textit{Id.} at 614.
\end{itemize}
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, is one of the finest ever written in any field of law. It has had more long-lasting influence than any other decision in constitutional law except, perhaps, Marbury v. Madison. The most fruitful way to consider 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

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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. 25 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.” 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 of text, context, and history, discussed at § 7.1 nn.5-9. However, for Madison, reflecting the natural law theory of interpretation, discussed at §§ 12.2.2.1-12.2.2.2, later legislative and executive action, and judicial precedents, can change the meaning of the Constitution, and had done so in this case, as noted at §§ 5.3.2.1 n.92 & 6.3.1 n.107. 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, static view of constitutional interpretation merely interpreting in light of new knowledge 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 focused on later legislative, executive, judicial, and social practice, as noted at § 6.3.1 n.107, nor is it consistent with Madison’s support throughout his life that such later action (“usus”) can fix the meaning of the Constitution, as discussed at § 6.3.1 nn.105-06.

For the same reason, while Madison initially adopted a narrow view regarding the General Welfare Clause, as noted at § 18.1.1 n.5, it would be inaccurate to characterize this view as the “Madisonian view,” as some commentators have done. 27 The legislative, executive, and judicial practice since 1819, which conform to Hamilton’s and Story’s views, fix that interpretation as proper under the natural law theory of interpretation in which Madison believed. Only if Madison were a formalist, with a “static” focus on text, context, and history, and limited impact of practice and precedent, would Madison today support the views he stated in 1791. As noted at §§ 6.3.4 & 7.1, Thomas Jefferson supported more of a formalist model of interpretation, but not James Madison.

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

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26 Id. at 401.
27 See, e.g., Natelson, supra note 10, at 10.
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.”

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, although consistent with the natural law interpretation practice at the time, discussed at §§ 6.2.3.1 nn.64-66 & 12.2.1.3 nn.25-27, Marshall did not make use of this piece of legislative history in his opinion. Based on the comparison of the enacted text of the two documents, however, Marshall similarly 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 government’s powers, including the powers to levy taxes, borrow money, regulate commerce, declare and conduct war, and raise armies and navies.

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.”

Marshall continued his opinion in *McCulloch* by saying that where a law is not prohibited and is calculated to effect any object entrusted to the government, all questions about the degree of necessity for choosing a means are for the legislature. It is sufficient that the law be “appropriate.”

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28 17 U.S. at 407.


30 17 U.S. at 406-09.

31 *Id.* at 409-21.
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.32

After making this observation, 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.”33 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.”34

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 “proper” does impose, as Marshall noted, a requirement that the legislation advance legitimate government objects.35

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, discussed at § 7.1 nn.5-9, 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

32 Id. at 423.

33 Id.


35 See generally Gary Lawson & Patricia B. Granger, The “Proper” Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause, 43 Duke L.J. 267, 270 n.10 (1993) (use of the phrase “Sweeping Clause); id. at 280-311 (discussion of the independent requirements that the legislation be “necessary” and “proper”).

36 17 U.S. at 413-15.

37 Madison’s concerns on this score are well summarized in Randy E. Barnett, The Original Meaning of the Necessary and Proper Clause, 6 U. Pa. J. Const. L. 183, 190-94 (2003).
bank in 1816, Madison criticized this aspect of Marshall’s opinion after *McCulloch* was decided.\textsuperscript{38}

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.”\textsuperscript{39}

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,” as discussed at § 21.2.2.1 nn.49-50, is consistent with a concern regarding a “lack of judicially manageable standards” in the political questions doctrine, discussed at § 17.3.4.6 nn.585-86. 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.\textsuperscript{40}

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 §§ 18.1 n.1 & 18.1.1 nn.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.

Following the prevailing mode of interpretation at the time, which prevented resort to legislative or constitutional history, as discussed at § 6.2.3.1 nn.64-66, Marshall made no reference in his opinion to the internal 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, in part out of a fear that this would give the federal government the power to

\textsuperscript{38} See id. at 201-02.

\textsuperscript{39} Id. at 203-08.

incorporate a bank. The Convention also rejected a more limited proposal to give Congress the power to incorporate companies for the building of canals.\textsuperscript{41} Without such a general incorporation power in the Constitution, 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.\textsuperscript{42} Further, unlike the great weight placed upon subjective specific historical intent, as in the interpretation theory of Raoul Berger, discussed at § 9.3.4, under the natural law theory of interpretation, the sources of interpretation other than history would override this historical evidence in any event.\textsuperscript{43}

Chief Justice Marshall also touched in \textit{McCulloch} on the general question of the relationship between the federal government and the states in terms of the “dual theory of sovereignty.” As this part of the opinion is directly related to interpretation of the 10\textsuperscript{th} Amendment, the discussion of this part of the \textit{McCulloch} opinion is reserved for § 18.4.5 nn.23-38, and its discussion of 10\textsuperscript{th} Amendment issues. Finally, regarding taxation, Marshall said that states have no power, by taxation or otherwise, to burden the operation of federal laws because this would be to act upon a government created by others as well as themselves, a government whose law is supreme.\textsuperscript{44} However, states can tax the real property owed by a national bank or the interests Maryland citizens have in the bank. This aspect of intergovernmental immunities doctrine is discussed at § 20.2.1.

\textit{McCulloch v. Maryland} has remained a vital precedent in constitutional law. Recurring to reasoned deductions from the general purpose of the Constitution, its structure, history, legislative and executive practice, and judicial precedents, the Chief Justice created a relatively deferential approach toward 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.

As discussed at § 21.2.2.1 nn.49-50, this requirement is phrased in modern doctrine as legislation having to be “rationally related to a legitimate governmental interest.” While \textit{McCulloch}'s holding, and most of its reasoning, have rarely been questioned by later Supreme Court majorities, during


\textsuperscript{44} 17 U.S. at 425-37.
the formalist era, between 1873 and 1937, the Court did not always leave questions of the degree of necessity to Congress. As discussed at § 27.3.2.1 nn.149-66, during the Lochner era 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, or the post-1937 phrasing of a “rational relationship” between means and ends.

§ 18.2 Congressional Power to Regulate Under the Commerce Clause

§ 18.2.1 The Natural Law Approach: Broad Power to Regulate Commercial Activity Which Concerns More States Than One

§ 18.2.1.1 The Marshall Court: The Concurrent Power Approach

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 Hamilton’s and Story’s views on the spending power of the General Welfare Clause, which the Supreme Court has adopted, as noted at §§ 18.1.1 n.9 & 18.3.2.1 nn.158-61.

The first major Commerce Clause case decided by the Supreme Court was Gibbons v. Ogden. That case involved whether Congress could pass laws regulating navigation in New York Harbor.

45 See generally Arthur M. Schlesinger, Jr., The Age of Jackson 115-31 (1945).

46 30 Annals of Cong. 211, 211-12 (1817) (Madison’s veto); 46 Annals of Cong. 1838, 1849 (1822) (Monroe’s veto).

47 Quoted in 1 Warren, The Supreme Court in United States History 596-97 (1926).

48 22 U.S. 1 (1824).
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.

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

49 Id. at 190-91.


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 Gibbons 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 “no direct general power over these objects,” the “legislative power of the Union can reach them . . . for national purposes,” and the federal government under a theory of concurrent jurisdiction “may use means also employed by a State, in the exercise of its acknowledged power.”

On the other hand, 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 major 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 alone. 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. The Interstate Commerce Commission was not created until 1887. 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.

After the Civil War, the closest the Supreme Court came to discussing the issue during the natural law era was in 1868 in Paul v. Virginia. 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 dicta that the purchase of

52 22 U.S. at 192-95.


54 22 U.S. at 203.


56 75 U.S. (8 Wall.) 168, 182-85 (1868).
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 *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 *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 it is not necessary to interfere, for the purpose of executing some of the general powers of the government.”

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, *The Daniel Ball*, 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.”

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. For example, states can pass inspection or quarantine laws because no exclusive power over these objects is granted to Congress, although national power can also reach them for national purposes under its implied powers. Marshall concluded in *Gibbons* that the Court need not decide between the Johnson

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57 22 U.S. at 195.

58 77 U.S. (10 Wall.) 557, 565 (1871).
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.59

A few years later, in Willson v. Black Bird Creek Marsh Co.,60 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.61 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.62

§ 18.2.1.2 The Taney Court: Areas of Exclusive Federal Commerce Power and Exclusive State Commerce Power Under The Cooley Subject-Matter Approach

Even under the concurrent power theory of Gibbons and Willson, there might be some areas where the purpose of the Commerce Clause to ensure national economic solutions to national economic problems might require exclusive federal regulation, leaving nothing for the states to act upon. This was not true in 1847 in The License Cases,63 where the Court upheld state power to require a license for the sale of imported liquor. Indeed, one Justice suggested some subjects, such as port of entry regulation, were exclusively for the states since Congress could not enact the necessary details. However, the idea that some powers are exclusively in the federal government gained strength in 1849 in The Passenger Cases.64 Here, a 5-4 Court held invalid a New York tax on arriving aliens, saying that Congress had exclusive power to regulate foreign commerce.

59 22 U.S. at 204
60 27 U.S. 245, 252 (1829).
61 See Barnett, supra note 50, at 139-46 (questioning Congress’ ability to prohibit commerce).
62 See, e.g., Gibbons, 22 U.S. at 17-18 (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).
63 Thurlow v. Commonwealth of Massachusetts (The License Cases), 46 U.S. 504 (1847); id. at 606 (Catron, J., opinion).
64 Smith v. Turner (The Passenger Cases), 48 U.S. 283 (1849).
In 1851, in *Cooley v. Board of Wardens*, the Court upheld a state statute requiring local pilots on arriving or departing vessels. This result in *Cooley* accords with *Gibbons* and *Willson*, as the state law, passed to protect local interests, did not conflict with any federal law. However, Justice Curtis added, "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 claimed the power in *Cooley* to identify subjects as exclusively for federal or state law-making. This was a modification of Marshall's theory of concurrent power, with Congress excluded only from "exclusively internal commerce" affecting only one state with which it was not necessary to interfere for federal purposes.

One reason that it might have seemed plausible in 1851 that the Constitution reserved exclusively to the states certain subjects of regulation is that the Court by that time had narrowly interpreted several constitutional limits on state power to regulate commerce and, thus, the states appeared to have more power to regulate commerce than might otherwise have been perceived. For example, in 1798 the Court had held in *Calder v. Bull* that the Ex Post Facto Clause is limited to criminal law and does not bar all retroactive civil legislation. This helped make it clear that Congress, also restrained by the clause, could pass a national bankruptcy statute. In 1827, a 4-3 Court held in *Ogden v. Saunders* that the Contracts Clause is limited to legislating retroactive changes in contracts previously entered into. With repeal of the United States bankruptcy law in 1803, pressure had increased for state bankruptcy laws which this holding made possible. And, in 1833, the Bill of Rights was held in *Barron v. Baltimore* to restrain only the federal government.

The *Cooley* analysis led to decisions holding that a subject exclusively for state power was "intragate commerce." The federal government could regulate "interstate commerce" and subjects that "directly affect" interstate commerce. The first opinion which used the phrase "interstate commerce" was *Woodruff v. Parham* in 1869. The determination of what was interstate commerce and what directly affected interstate commerce was for the Court to decide. As discussed at §14.2.1, the Taney Court used this doctrine to approve many state economic regulations. This was a useful power at the time because Congress was not acting forcefully to protect persons from negative consequences of the new economic activity, such as industrial injuries and injuries to persons caused by railroads. After the Civil War, however, the pro-business Supreme Court used the doctrine more to strike down state regulations, as in *Wabash, St. Louis & Pacific Railway Co. v. Illinois*, which held unconstitutional an Illinois railroad regulation as interfering with the

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65 53 U.S. 299, 319 (1851).
66 3 U.S. 386, 390-91 (1798).
69 75 U.S. 123, 137 (1869).
70 118 U.S. 557, 575-77 (1886).
exclusive power of Congress to regulate interstate railroad commerce under the *Cooley* doctrine. Until 1937, as detailed at § 18.2.2, the Court also substantially restricted Congress' power to regulate commerce under a revised interpretation of the terms “commerce” and “among the states.”

§ 18.2.2 The Formalist Era: The Diminution of Federal Power to Regulate Commerce

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*. This formalist mode of interpretation also advanced the pro-business perspective of many of the Justices appointed to the Supreme Court during this period, as discussed at § 14.2.2 nn.36-55.

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*, 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*, 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 indirectly inhibited by cases upholding state laws that suggested that the states had exclusive power over the subjects involved.

As noted at § 18.2.1.1 n.55, until late in the 19th century Congress was not very active in regulation of the economy. Since business was expanding very rapidly as the national railroad system came into being toward the middle of the 19th century, there was a strong tendency on the Court to want to uphold state regulation of the economy. This could have been achieved, even under the *Cooley* case, by finding that most subjects of regulation were not exclusively for either the states or the federal government, and thus states could regulate as long as their regulations were not inconsistent with federal law.

Instead, during the formalist era, from 1873 to 1937, the Court adopted a formalist literal mode of interpretation, holding that agriculture, manufacturing, mining, and other such economic activities do not fall within a literal definition of commerce, which involves buying and selling. Thus, the Court held these other activities to precede commerce, or having come to rest after commerce, but not to be commerce at all. In addition, exclusively for the states, as state subject matter, became all intrastate commerce, including transactions not yet in commerce and transactions after interstate movement had ended – so long as the subject did not directly affect interstate commerce.

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71 116 U.S. 517, 528-29 (1886).

72 128 U.S. 1, 9-12 (1888).
Exclusively for Congress was interstate commerce, defined as commerce between the states, and transactions that directly affected interstate commerce. Thus, the test for "directly affecting" interstate commerce became critical.

Under this approach to defining commerce, 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.\(^\text{73}\) 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,\(^\text{74}\) 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. 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.\(^\text{75}\) These rulings were all inconsistent, of course, with legislative and executive practice, including that during the natural law era, where Congress created the Agriculture Department 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,\(^\text{76}\) “Transportation is essential to commerce, or rather it is commerce itself.” Indeed, these precedents were extended in cases like Champion v. Ames,\(^\text{77}\) which involved transporting a lottery ticket across state lines; Hipolite Egg Co. v. United States,\(^\text{78}\) transporting impure food and drugs across state lines; and Hoke v. United States,\(^\text{79}\) transporting women across state lines for the purpose of prostitution. As noted at § 9.3.2 nn.64-65, in Ames,\(^\text{80}\)

\(^{73}\) 156 U.S. 1, 12-14 (1895).

\(^{74}\) 247 U.S. 251 (1918); id. at 277-81 (Holmes, J., joined by McKenna, Brandies & Clarke, JJ. dissenting).

\(^{75}\) 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).

\(^{76}\) 95 U.S. 465, 470 (1878).

\(^{77}\) 188 U.S. 321 (1903).

\(^{78}\) 220 U.S. 45 (1911).

\(^{79}\) 227 U.S. 308 (1913).

\(^{80}\) 188 U.S. at 371 (Fuller, C.J., joined by Brewer, Shiras & Peckham, JJ., dissenting).
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.”

The moderate formalist view also prevailed with the doctrine that federal regulations could be upheld by finding that the regulated activity "directly affected" commerce, even if the activity itself was not “commerce.” For example, the Sherman Act could be applied to a railroad holding company because “the constituent companies ceased, under such a combination, to be in active competition for trade and commerce along their respective lines.” The moderate formalist majority also held that Congress could consent to state regulation of interstate commerce by adopting as part of a federal rule whatever state laws were enacted on a subject.

With regard to the second issue of defining the phrase “among the several States,” the Court also adopted a moderate formalist view, as noted at § 9.3.2 n.70. The extreme view would have been that only activity literally crossing state lines could be defined as commerce among the states. Some Justices during this period held that view. However, in The Shreveport Rate Cases, 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." Similarly, in Swift Co. v. United States, 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.”

§ 18.2.3 The Holmesian Era: The Post-1937 Broadening of Federal Commerce Power

As discussed at § 14.2.3 nn.59-63, between 1937 and 1954 the formalist analysis of the Commerce Clause 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. 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 on the Court – Justices Van DeVanter, McReynolds, Sutherland, and Butler – with non-formalist Justices.

81 Northern Securities Co. v. United States, 193 U.S. 197, 326 (1904).

82 In re Rahrer, 140 U.S. 545, 562-65 (1891).

83 Houston, East & West Texas Railway v. United States (The Shreveport Rate Cases), 234 U.S. 342, 355 (1914). See also 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).

84 196 U.S. 375, 397, 399 (1905).
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, met the first part of the Commerce Clause test that the regulation be a regulation of “commerce.” Thus, in 1937, in NLRB v. Jones & Laughlin Steel Corp., the Court held that Congress can regulate any activity, not merely railroad transportation at issue in The Shreveport Rate Cases, even though it has an intrastate character, if the activity 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 being regulated was commerce “among the States” as long as the affects upon interstate commerce were “substantial.” Thus, in 1937, in Jones & Laughlin, the Court made much of the fact that the business was engaged in nationwide operations. In 1939, the Court held in 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, and strikes in the industry could have a substantial effect on interstate commerce. In 1941, the Court held in United States v. Darby that a motive or purpose to control some aspect of local activity is irrelevant, and Congress can exclude from interstate commerce all goods produced in substandard conditions, overruling Hammer v. Dagenhart, because Congress can choose means reasonably appropriate to a legitimate end even though that involves control of intrastate activities.

In 1942, in Wickard v. Filburn, 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 Wickard, the Court upheld the Agricultural Adjustment Act’s wheat allocation provisions, as applied to a wheat farmer who grew 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.” Finally, 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, noted at § 18.2.1.1 n.56, 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.

85 301 U.S. 1, 36-40 (1937).
86 Id. at 41-43.
88 312 U.S. 100, 113-19 (1941).
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 and activities directly affecting interstate commerce. Congress could not regulate intrastate activities such as agriculture, manufacturing, and mining that affect interstate commerce only indirectly because of the manner in which the effect is brought about, such as shipment after production or transactions after goods have come to rest. By 1944, however, as a result of the above cases and others, Congress could regulate local 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* principle, discussed above, at § 18.2.3 n.89, 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* aggregation 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.

This similarity between the natural law and Holmesian approach to the Commerce Clause underscores that the Court’s rejection of the formalist model of interpretation in 1937 was not a shift from all pre-1937 constitutional doctrine, but rather was merely an example of the kind of shift from one style of interpretation to another style that has happened many times in our Nation’s history. First there was the shift from the natural law to the formalist model of interpretation, beginning with the *Slaughter-House Cases* in 1873, discussed at § 25.3 nn.59-64, but foreshadowed in Commerce Clause cases between 1868 and 1873 in *Paul v. Virginia* and *Woodruff v. Parham*, discussed at §§ 18.2.1.1 n.56 & 18.2.1.2 n.69, and *United States v. Dewitt*, discussed at § 18.2.5 n.105. Next, there was the shift in 1937 from the formalist to the Holmesian model of interpretation, foreshadowed between 1934-37 in cases like *Home Building & Loan Association v. Blaisdell*, discussed at § 22.1.2 nn.18-23, and *Nebbia v. New York*, discussed at § 27.3.2.1 n.161. Next there was the shift from Holmesian to instrumentalist interpretation, most clearly indicated in *Brown v. Board of Education* in 1954, but foreshadowed by cases like *Sweatt v. Painter* and *McLaurin v. Oklahoma State Regents* in 1950, all discussed at § 26.2.1.1.C. Finally, there was the shift from an instrumentalist mode of interpretation predominating in Court decisionmaking which began in 1954 to the modern natural law Justices holding the controlling votes, which occurred most clearly beginning with the Rehnquist Court in 1986, but was foreshadowed by the transition from the instrumentalist Warren Court decisions of the 1960s to the Burger Court decisions of the 1970s and 1980s. In addition, because the formalist-era Court majority adopted a moderate version of formalism, which paid some attention to purpose, practice, and precedent, as noted at §§ 9.3.2 & 18.2.2, the shift from that moderate version of formalism to the Holmesian approach in 1937 was not as extreme as it might otherwise have been.

For this reason, the shift in interpretive methodology of a majority of the Supreme Court in 1937 is not a unique kind of moment in American constitutional history, viewed as a *de facto* amendment
of the Constitution analogous in some ways to the de jure 13th, 14th, and 15th Amendments to the Constitution following the Civil War. Rather, it is just an evolution in interpretation, although an important one, with President Roosevelt’s Court-Packing Plan of 1937, discussed at § 14.2.3 nn.61-65, another of the many examples of executive or legislative frustration with certain Supreme Court rulings that ultimately do not get passed, like Senator La Follette’s plan to permit 2/3 both Houses of Congress to overrule the Court on the constitutionality of federal statutes, or proposals to require a 2/3 majority on the Court to render a statute unconstitutional, both discussed at § 17.1.4 n.62, or proposals to restrict Supreme Court jurisdiction, discussed at § 17.2.3.1 nn.154-58.

Admittedly, some commentators, and most prominently Professor Bruce Ackerman, have viewed the shift in 1937 as a “constitutional moment” of major status, akin to the Civil War Amendments, and have built a theory of interpretation to justify such a de facto amendment process.91 Without regard to the appropriateness of such a theory of constitutional interpretation,92 under the approach adopted in this book no such theory is needed to understand the evolution in constitutional interpretation that occurred in 1937, as it was just one example of a number of shifts in interpretation style in our Nation’s constitutional history.

§ 18.2.4 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 separate 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 what had previously been regarded as the second part of a two-pronged test. Thus, in Heart of Atlanta Motel v. United States,93 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, and this would affect how much those individuals would spend in interstate commerce. Similarly, in Perez v. United States,94 a criminal law banning extortionate

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91 See generally Bruce Ackerman, We the People: Foundations (1991).


94 402 U.S. 146, 150-57 (1971). In his opinion, Justice Douglas said that the broader view of the Commerce Clause announced by Justice Marshall in Gibbons had been restored. Justice Douglas quoted Marshall’s statement in Gibbons that “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
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\(^{95}\) 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.\(^{96}\) In addition, the instrumentalist cases made clear, in cases like Katzenbach v. McClung,\(^{97}\) that the test for "affecting interstate commerce" 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, affects interstate commerce. In addition, the particular intrastate activity need not itself affect commerce where the activity, in the aggregate, may affect commerce.\(^{98}\) 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.”\(^{99}\)

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.

\(^{95}\) 494 U.S. 1, 17-19 (1990).

\(^{96}\) Hodel, 452 U.S. 314, 324 (1981); id. at 310-11 (Rehnquist, J., concurring in the judgment); Russell, 471 U.S. 858, 862 (1985).

\(^{97}\) 379 U.S. 294, 303-04 (1964).


§ 18.2.5  The Modern Natural Law Era: A Recent Curb on Congress' Commerce Power

In 1995, in *United States v. Lopez*, 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.”

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 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 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* aggregate 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, Holmesian-era and 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.

As a matter of Court decisions, the precedents are split, with the traditional natural law and late instrumentalist-era precedents using the “affects” language, while the Holmesian and early instrumentalist-era precedents used the “substantial affects” language. The purpose of the Commerce Clause to have national economic solutions to national economic problems is not determinative, since one could argue there is no national economic problem until there is a substantial affect on interstate commerce. The structure of our federal system also suggests that there needs to be some practical distinction between what things are truly national and truly local. Congressional practice has also been to regulate only where there have been substantial affects, in part because congressional inertia is hard to overcome for local economic problems that do not have substantial economic affects.

In *United States v. Lopez*, a 5-4 Court held in 1995 that Congress violated its Commerce Clause powers in adopting the Gun-Free School Zones Act of 1990. In an opinion authored by Chief Justice Rehnquist, the Court required in *Lopez* that the congressional legislation must apply to

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101 Id. at 557-59.
activity that "substantially affects" interstate commerce. Justices O'Connor and Kennedy joined Chief Justice Rehnquist and Justices Scalia and Thomas in this holding. This is consistent with the practice of O'Connor and Kennedy, discussed at § 12.3.2, to follow the core holdings of instrumentalist-era precedents, but not their general reasoning. As noted above, the core holdings of the instrumentalist-era cases all involved commercial activity that did substantially affect interstate commerce.

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.” Id. at 615-16. The fact that Justice Souter joined this dissent is consistent with his practice, discussed at § 12.3.2, to follow the general reasoning of instrumentalist-era precedents, not merely their core holdings. That general reasoning, as noted above, had suggested a broader power in Congress to regulate any activity that affects interstate commerce.

In a separate concurrence, Justice Thomas questioned in *Lopez* whether even the Holmesian-era “substantial affects” test should be used. Reflecting his usual formalist style of decisionmaking, Justice Thomas called for a return to the formalist-era vision of more limited congressional power under the Commerce Clause. This was based on the formalist-era distinction between commerce, which Congress can regulate, and other commercial activities, such as agriculture, manufacturing, and mining, which Congress cannot regulate. Id. at 585-93 (Thomas, J., concurring).

Justice Thomas also suggested that the "affects" language, as interpreted by Chief Justice Marshall in *Gibbons v. Ogden*, supports this view by stating that *Gibbons* at most permits Congress to regulate only intrastate commerce that substantially affects interstate and foreign commerce, not manufacturing, mining, or agriculture. Id. at 593-96. Given Marshall’s consistently held view of broad federal power, as reflected in cases like *McCulloch v. Maryland* and *Gibbons v. Odgen*, this attempt to limit the general reasoning of *Gibbons* to conform to formalist-era doctrine is not persuasive. Justice Thomas did note, however, that one case near the end of the original natural law era in 1870, *United States v. Dewitt*, did adopt a more limited understanding of commerce “among the states” in denying Congress the power to ban the sales within a state of “naphtha and illuminating oils.”

Despite his analysis, Justice Thomas admitted that many believe it is too late to undertake a fundamental reexamination of the last 60 years of precedents, and that considerations of *stare decisis* and reliance interests may convince the Court that it cannot wipe the slate clean. As Justices

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102 Id. at 615-16.

103 Id. at 585-93 (Thomas, J., concurring).

104 Id. at 593-96.

105 Id. at 597, discussing United States v. Dewitt, 76 U.S (9 Wall.) 41 (1870).
Kennedy noted in his concurrence in Lopez, joined by Justice O’Connor, “Stare decisis operates with great force in counseling us not to call into question the essential principles now in place respecting 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 . . . . 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.” Justice Thomas would have the Court at least to "temper" its Commerce Clause jurisprudence. Despite Thomas’ plea, the reality of sustained legislative and executive practice, and Supreme Court precedents, mean that the real debate on the Court is between the “substantial affects” test of Chief Justice Rehnquist’s opinion in Lopez and the “significant affects” test of Justice Breyer’s dissent.

This conclusion is valid whether or not Justice Thomas’ views are correct as a matter of historical understanding, which is not at all clear, given Chief Justice Marshall’s views in McCulloch v. Maryland and Gibbons v. Odgen. In addition, Justice Thomas said that if Congress could regulate all matters that substantially affect interstate commerce, there would have been no need for many of the specific grants of power in Article I, § 8. This analysis ignores the fact that the framers and ratifiers may have wanted to make clear that Congress was being granted certain powers, and not leave them to implication by the Court as part of a general Commerce Clause analysis. Further, as discussed at § 18.1.1 n.8, Professor Crosskey noted that many of the items in the enumeration of powers in Article I, § 8 may well have been included to make sure that powers that had been in England the prerogative of the executive branch, the King, were transferred explicitly to Congress, and thus could not be understood as part of the President's power.

Regarding the precise facts in Lopez, Chief Justice Rehnquist concluded in his opinion that there were no “substantial affects” on interstate commerce from the mere possession of a gun around a school. The government alleged that possession of a gun in a school zone may result in violent crime, which could impact the insurance rates in the community or reduce the willingness of individuals to travel to that community and thus spend money in that community. Further, the government argued that the presence of guns around schools might handicap the learning environment, resulting in less educated graduates, which might result in a less productive citizenry, which would have a substantial affect on the Nation’s economic well-being over the long-term. Faced with such attenuated chains of causation, Rehnquist concluded in Lopez that “it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where states historically have been sovereign. Thus, if we were to accept the Government’s arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate.”

106 Id. at 574 (Kennedy, J., joined by O’Connor, J., concurring).

107 Id. at 601 & n.8 (Thomas, J., concurring).

108 Id. at 588-89.

109 See generally Crosskey, supra note 1, at 411-43.

110 514 U.S. at 563-64.
In his dissent, Justice Breyer did not directly challenge this last assertion, but did note that on these facts there was a significant connection between gun-related school violence and interstate commerce. Reports and hearings had made clear that the problem of guns around schools is widespread and dangerous; it significantly interferes with the quality of education in schools; and education today is intertwined with the Nation's economy because more jobs now demand greater educational skills and many firms base location decisions on the presence, or absence, of a work force with a basic education. Further, Justice Breyer noted that under the Court's doctrine the relevant question is whether Congress has a rational basis for making such a finding, not independent de novo review by the Court. Given this, Justice Breyer concluded that Congress did have a rational basis for finding that gun possession around schools would have a significant, or even substantial, affect on interstate commerce.\footnote{Id. at 618-25 (Breyer, J., joined by Stevens, Souter & Ginsburg, JJ., dissenting).}

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 \textit{Lopez}. Justice Rehnquist noted in \textit{Lopez} that the statute had nothing to do with “commerce” or any sort of economic enterprise.\footnote{Id. at 561.} 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.\footnote{Id. at 628-29 (Breyer, J., joined by Stevens, Souter & Ginsburg, JJ., dissenting).} 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.\footnote{Id. at 564-65.}

Justice Kennedy, concurring with Justice O'Connor, noted in addition that of the various structural elements in the Constitution, the framers had made a unique contribution to political science and political theory by their insight that freedom was enhanced by the creation of two governments, rather than one. If the federal government could take over the regulation of entire areas of traditional state concern, such as education, that are beyond the realm of commerce, in the ordinary and usual sense of that term, the boundaries between the spheres of federal and state authority would blur, and political responsibility would become illusory. Local programs for the prohibition of guns would be in danger of displacement by federal authority, and the ability of states to experiment with various forms of regulation would be preempted by a uniform federal rule.\footnote{Id. at 574-83 (Kennedy, J., joined by O'Connor, J., concurring).}
All of these arguments were underdeveloped in *Lopez*, however, because of the Court’s conclusion that the regulated activity 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*. *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.”

With regard to the particular facts in *Morrison*, Chief Justice Rehnquist noted that gender-motivated crimes are not in any sense economic activity and that the law contained no jurisdictional element linking it to the commerce power. The plaintiff had sued two college football players who had allegedly raped her. Rehnquist said, “If the allegations here are true, no civilized system of justice could fail to provide her a remedy. . . . But under our federal system that remedy must be provided by the Commonwealth of Virginia, and not by the United States.” Under the laws of Virginia, the plaintiff did have redress through laws against rape and laws against assault and battery.

Looking to the future, it seems clear that *Lopez* and *Morrison*, while important, do not represent a major shift from the Court’s basic Commerce Clause doctrine. In their concurrence in *Lopez*, Justice Kennedy and O’Connor noted that the result in *Lopez* should not call into question the core holdings of the instrumentalist-era cases. 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

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117 *Id.* at 613, 617-18.

118 *Id.* at 627. The Court also held that the law was not valid under § 5 of the 14th Amendment, because § 5 provides no shield against private conduct and there were no findings that a sufficient problem existed of state discrimination against victims of gender-motivated violence. This aspect is discussed at § 28.3 n.36, concerning Congress’ power to enforce the Civil War Amendments.
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 and protecting the instrumentalities of interstate commerce, noted at § 18.2.5 n.100. For example, five days after Lopez was handed down, the Court issue a unanimous per curiam decision in United States v. Robertson.119 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.” This satisfied both the Constitution and the “interstate commerce” element of the Racketeer Influenced and Corrupt Organizations Act (RICO). Similarly, Congress’ amended statute, following Lopez, which regulates the possession of guns around schools as long as the gun moved in interstate commerce, probably is constitutional.120

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.121 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, as in Wickard v. Filburn, that Congress could 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.” Congress acted rationally in determining that none of the characteristics making up the purported class of marijuana users compelled an exemption from CSA.122

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


121 545 U.S. 1 (2005).

122 Id. at 14-33.
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.” That was true here, since the use of even homegrown drugs, like the medical marijuana in this case, would have a necessary affect on the demand for the interstate market in marijuana. Thus, Congress could rationally conclude that application of the CSA to homegrown medical marijuana was a “necessary and proper” aspect of regulating the interstate commercial drug market.\textsuperscript{123}

Justice O’Connor was joined in dissent by Chief Justice Rehnquist and Justice Thomas. Justice O’Connor concluded that “the homegrown cultivation and personal possession and use of marijuana for medicinal purposes has no apparent commercial character.” She noted that even *Wickard* did not specifically approve of federal control over small-scale, noncommercial wheat farming, since the federal law exempted the planting of less than 6 tons of wheat and, when the wheat was harvested, federal law exempted plantings of less than 6 acres. 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.”\textsuperscript{124}

This conclusion that it would be irrational for Congress to conclude that all homegrown medical marijuana users in all states would pose no substantial affect on the interstate marijuana market even under the *Wickard* aggregation principle reflects a very states’ right-oriented application of *Wickard*. That is consistent with Justice O’Connor’s strong predisposition toward states’ rights, discussed at § 12.4.2, along with Chief Justice Rehnquist’s similar strong conservative predisposition toward states’ rights, discussed at § 10.3.3, and Justice Thomas’ similar conservative predisposition, discussed at § 9.3.3.

Justice Thomas also penned a separate dissent in which he took issue with fellow formalist Justice Scalia’s interpretation of *The Shreveport Rate Case* and its Necessary and Proper Clause analysis. Justice Thomas said that the intrastate ban was not “necessary and proper” as applied to medical marijuana users like respondents. Justice Thomas applied an understanding of the terms “necessary and proper” reflecting the kind of heightened scrutiny approach proposed by Madison at the time of *McCulloch v. Maryland* in 1819, used occasionally by formalist-era Courts between 1873-1937, and supported by Professor Randy Barnett today, as discussed at § 18.1.2 nn.37-40. A majority of the Supreme Court during the original natural law era, 1789-1873, and a majority of the Court since 1937, including Justice Scalia, have rejected this heightened scrutiny approach in favor of minimum rational review under the Necessary and Proper Clause. Given the spirit or purpose of heightened scrutiny to limit federal power under the Necessary and Proper Clause, Justice Thomas concluded in *Raich* that federal regulation was not “necessary” or “proper” here, and that our federalist system “properly understood, allows California and a growing number of other states to decide for

\textsuperscript{123} *Id.* at 33-42 (Scalia, J., concurring in the judgment).

\textsuperscript{124} *Id.* at 49-56 (O’Connor, J., joined by Rehnquist, C.J., and Thomas, J., as to all but Part III, dissenting).
themselves how to safeguard the health and welfare of their citizens.\footnote{Id. at 57-66, 74 (Thomas, J., dissenting).}

Recent cases in the United States Courts of Appeals, even before \textit{Raich}, applied \textit{Lopez} and \textit{Morrison} in the narrow manner suggested above. 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.\footnote{\textit{See, e.g.}, Rancho Viejo, LLC. \textit{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); GDF Realty Investments, Ltd. \textit{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 \textit{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 \textit{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 carries with it the authority to regulate non-navigable waters when necessary to achieve congressional goals). On court of appeals decisions after \textit{Morrison}, see generally Daniel J. Lowenberg, \textit{The Texas Cave Bug and the California Arroyo Toad “Take” on the Constitution’s Commerce Clause}, 36 St. Mary’s L. Rev. 149 (2004).} However, by a 2-1 vote, an Eighth Circuit Court of Appeals panel held that it was not a valid exercise of Congress’ Commerce Clause power to apply the Americans with Disabilities Act to prohibit a state from assessing a $2 annual fee for windshield placards authorizing the use of reserved parking spaces by physically disabled persons. The court pointed out in \textit{Klingler v. Director, Department of Revenue}\footnote{366 F.3d 614 (8th Cir. 2004), \textit{judgment vacated}, 125 S. Ct. 2899 (2005), \textit{on remand}, 433 F.3d 1078, 1079, 1082 (2006).} 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 \textit{Katzenbach} and \textit{Heart of Atlanta}. This approach is consistent with the Justice O’Connor’s dissent in \textit{Raich}. The third judge on the Eighth Circuit panel, more consistent with the majority in \textit{Raich}, said that in the absence of express findings the court should assume the existence of any state of facts reasonably conceivable by the legislature and reminded the majority that the burden of proving the contrary is on the challenger. In response to \textit{Klingler}, the Supreme Court vacated the judgment in light of \textit{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.

 Courts have also struggled with the question of the impact of \textit{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 such statutes.\(^{128}\) However, in *United States v. Maxwell*,\(^{129}\) 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 *Raich*, and on remand the Eleventh Circuit upheld the constitutionality of the prosecution.

Despite the limited impact of *Lopez* and *Morrison* in cases involving economic regulation, these cases nonetheless send a message to Congress that it should consider federalism concerns 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 under *Lopez* such findings are not constitutionally required, a prudent Congress would indicate its view of that 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*,\(^{130}\) the same 5-4 majority as in *Lopez* and *Morrison*, in an opinion again by Chief Justice Rehnquist, 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. This concern is heightened, he said, where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power.

\(^{128}\) 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 and stimulates demand); *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).

\(^{129}\) 386 F.3d 1042 (11th Cir. 2004), judgment vacated, 126 S. Ct. 321 (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.131 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 causation connection between the filling of wetlands and the decline of commercial activities associated with migratory birds was not attenuated. Rather, it was direct and concrete.132

*Solid Waste Agency* does provide a good reminder that in each of these Commerce Clause cases 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.

The Court returned to the Clean Water Act in *Rapanos v. United States*.133 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, which was the controlling vote in the case, 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 his formalist style of interpretation, Justice Scalia strongly criticized Justice Kennedy for letting that focus on purpose trump his focus on literal meaning. Reflecting the liberal predisposition to uphold grants of federal power, noted at § 6.2.2.3, 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.

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

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132 531 U.S. at 693-96 (Stevens, J., joined by Souter, Ginsburg & Breyer, JJ., dissenting).

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 need to be authorized under some provision of the Constitution other than the Commerce Clause given the reasoning of *Lopez* and *Morrison*. This may be difficult, both for generic 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, discussed at § 18.3.10, could more easily be upheld.  

This result is 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.

§ 18.2.6 Congress' Commerce Power With Foreign Nations and the Indian Tribes

§ 18.2.6.1 Congress' Commerce Power With Foreign Nations

As Chief Justice Marshall indicated in *Gibbons v. Ogden*, cited at § 18.2.1.1 n.52, it is “universally admitted” that the text of Article I, § 8, cl. 3 giving Congress’ power to “regulate Commerce with foreign Nations” comprehends “every species of commercial intercourse between the United States and foreign nations.” This power is augmented, of course, by the power of the federal government to enter into treaties with foreign countries pursuant to presidential negotiation and ratification by 2/3 of the Senate, and the power of the president to enter into executive agreements with foreign countries, with implementing legislation, where necessary or prudent, passed by Congress, discussed at § 18.3.9; and the general federal power over foreign relations matters, discussed at § 19.3.2.

Given these constellation of powers, litigation regarding federalism issues in this area has mostly been concerned with whether state laws that arguably conflict with federal foreign policy, such as state laws barring state or local governments’ procuring goods or services from persons doing business with pariah governments, are preempted by Congress, discussed at § 20.3.1.2, or violate a dormant commerce clause analysis, discussed at § 20.3.2.2.C. Federal power over commerce with foreign nations, foreign corporations, or persons in foreign countries is usually understood to be plenary, although a formalist analysis could limit that power through a literal interpretation of phrase “Commerce with foreign Nations.”

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For example, in *United States v. Clark*, a Ninth Circuit panel ruled that Congress could criminalize the activity of a United States citizen traveling abroad to engage in illegal commercial sex with a minor under the foreign commerce clause power, because that activity involved the immoral use of the channels of foreign commerce. In support of this ruling, the court noted that the Supreme Court had stated in *Japan Line, Ltd. v. Los Angeles County*, “Although the Constitution, Art. I, § 8, cl. 3, grants Congress the power to regulate commerce ‘with foreign Nations’ and ‘among the several States’ in parallel phrases, there is evidence that the Founders intended the scope of the foreign commerce power to be greater.” In contrast to this analysis, a formalist dissent argued in *Clark* that since the illegal commercial sex act was not with a foreign country, but with a person in a foreign country, it could not constitute “commerce with foreign nations.”

§ 18.2.6.2  Congress' Commerce Power with the Indian Tribes

The Court’s view regarding congressional power under Article I, § 8, cl. 3 to “regulate commerce . . . with the Indian Tribes” has shifted according to the same eras of judicial decisionmaking as in the other areas of the law. During the original natural law era, in cases like *Cherokee Nation v. Georgia*, the Marshall Court adopted the customary and traditional way of viewing Indian tribes as “domestic, dependent nations.” Based on the then-prevalent natural law view of “discovery,” Native American tribes were held to “lose” their rights to the land given European discovery of the New World, but the precise rights “reserved” to the tribes were the subject of treaty negotiations, the tribes being viewed as sovereign nations for that purpose.

While this conclusion is logically inconsistent with the “discovery” doctrine, which would make tribal rights dependent on delegated federal authority, since the tribes had “lost” rights upon discovery, the “reserved-rights” theory and the canons of interpretation associated with it had profound implications for tribal authority. As held in *Worcester v. Georgia*, under the “reserved-rights” theory, a treaty should be interpreted as the tribe would have understood it. This is because the treaty was negotiated and written in a language foreign to Native Americans, who could not be expected to understand nuance; the purpose of the treaty was to establish a peaceful relationship between sovereigns, not to "annihilat[e] the political existence of one of the parties"; and thus a tribe could be held to have abdicated its sovereignty only if that result had "been openly avowed" in the treaty. Further, because tribal sovereignty was understood as being retained from a tribe's inherent, pre-constitutional sovereignty, rather than consisting of delegated power as consistent with the “discovery” doctrine, the exercise of sovereignty did not entail any federal or state action that would trigger the Constitution. Finally, Native Americans were not viewed as citizens of the United States, and thus not accorded citizenship rights. Control over the destiny of the Native American tribes

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135  435 F.3d 1100, 1116-17 (9th Cir. 2006), citing *Japan Lines*, 441 U.S. 434, 448 & n.12 (1979); *id.* at 1117-21 (Ferguson, J., dissenting).

136  30 U.S. (5 Pet.) 1, 16-20 (1831).

137  31 U.S. (5 Pet.) 515, 554, 559-61 (1832).

was held to be exclusively in the control of the federal government, pursuant to the “Indian Commerce Clause” and the federal government treaty power, as held in *Worcester*.

Toward the end of the natural law era, and at the dawn of the formalist era, in 1871, Congress altered this understanding by stating that treaties would no longer be used to regulate Native American tribes, but that such regulation would be done pursuant to congressional statutes and executive implementation only. This was done to ensure that the House of Representatives would have an equal say in making policy, rather than policy made by the President and 2/3 of the Senate under the treaty power. Consistent with a Stage 4 focus on a “melting pot” approach to society, discussed at § 15.4.1 nn.65-66, the congressional actions during the formalist era focused most of its attention on “assimilation” of Native Americans into United States society, rather than respect for different tribal cultures, with a culmination of the “assimilation policy” in 1924 with all Native Americans who had not already been granted citizenship under various agreements with particular tribes given citizenship rights. Under *Lone Wolf v. Hitchcock*, most congressional or executive decisions regarding Native Americans were viewed as political questions not justiciable by the courts.139

During the Holmesian deference-to-government era of judicial decisionmaking, from 1937-1954, court deference to Congress and the President remained intact. However, starting near the end of the formalist era in 1934, and continuing through the Holmesian era, congressional action began to respond toward granting tribes greater control over their own governance, and greater respect for tribal cultures. This change is consistent with a Stage 4½ understanding that the dominant values in society merely reflect the dominant interest groups, but that other individuals may have different customs and traditions, discussed at § 15.4.1 n.70-71. This respect was uneven, however, until the Stage 5 instrumentalist era began in 1954 with its respect for diversity, discussed at § 15.4.1 nn.75-76. For example, in 1953, Congress adopted “a draconian policy of terminating the sovereignty of some Indian tribes” and “also adopted Public Law 280, requiring several states, and authorizing others, to exercise jurisdiction in Indian country.”

During the instrumentalist era, from 1954-1986, the more activist liberal instrumentalists on the Court cut back on the view that questions regarding Native American policy were political questions. In interpreting 19th-century treaties, or later congressional statutes, as well as deciding on Equal Protection, Due Process, or Takings Clause challenges, the Court decided cases utilizing canons of interpretation reflecting respect for tribal sovereignty and, more broadly, based on a “common law” judicial activist approach to interpretation, reflected liberal social policy considerations that favored Native American interests in most cases.140

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140 *See id.* at 445-60.
Since 1986, the Court has begun to consider Native American cases, as in *Duro v. Reina*,\(^{141}\) authored by Justice Kennedy, from the perspective of a natural law theory of legitimate government being based upon a social contract and consent of the governed. Thus, in *Duro*, non-tribal Native Americans, as well as United States citizens, could not be tried by tribal courts, since they had not consented to the tribe’s social contract. Following *Duro*, Congress enacted the "*Duro* fix," which specified that the tribes' "powers of self-government" include "the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians."\(^{142}\)

In *United States v. Lara*,\(^{143}\) the Court was faced with the question of whether to view tribal exercises of criminal jurisdiction as based on inherent tribal sovereignty or delegated federal power. Based on a logical elaboration of the natural law theory of “discovery,” Justices Souter, in dissent, concluded that any power exercised by tribal authorities must derive from delegated federal authority, not inherent tribal authority. Thus, a criminal proceeding by a tribal court should trigger the double jeopardy clause of the Fifth Amendment, and prohibit a subsequent trial in a federal court.\(^{144}\) Because the literal text of the Commerce Clause distinguishes between “foreign nations” and “Indian tribes,” formalist Justices tend to side with this view that tribal authority is not “inherent,” as it is for foreign nations, but dependent on federal delegation. In *Lara*, Justice Scalia joined Justice Souter in dissent, and Justice Thomas indicated in his concurrence a need to resolve the conflict in the cases between viewing Native American tribes as dependent or sovereign.\(^{145}\)

In contrast, for Justice Kennedy, based on the “reserved-rights” branch of natural law doctrine, tribal exercises of jurisdiction could be based on inherent power unless altered by Congress, which had not been done in this case. Indeed, the congressional statute granting tribes the authority to exercise criminal jurisdiction in the case was explicitly phrased as confirming inherent tribal authority, not delegated federal power.\(^{146}\) A modern natural law approach, transcending the limitations of Stage 3 natural law’s reliance on custom as a component of reason, and relying instead on granting equal concern and respect to all individuals, as discussed at § 15.4.1 nn.53-56, would similarly reject the logical implications of the “discovery” doctrine. It would treat Native American tribes as sovereigns with “inherent power” over their affairs, subject to treaty limitations and constitutional congressional statutes. On the other hand, reflecting his natural law view in *Duro* regarding social contract theory, Justice Kennedy remained skeptical whether Congress could constitutionally authorize tribal

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144 *Id.* at 228-29 (Souter, J., joined by Scalia, J, dissenting).

145 *Id.* at 214-15 (Thomas, J., concurring in the judgment); *id.* at 226 (Souter, J., joined by Scalia, J., dissenting).

146 *Id.* at 211-12 (Kennedy, J., concurring in the judgment).
jurisdiction over non-tribal members, an issue not directly before the Court in *Lara*.\footnote{147}{Id. at 212-14.}

Reflecting their more functional and prudential approach to doctrine, discussed at §§ 3.2-3.3, Holmesian and instrumentalist Justices have been willing, as has Congress, to consider Native American tribes as having “inherent power” over their affairs, similar to that of foreign nations, and for Congress to so acknowledge that in statutes and treaties. Thus, in *Lara*, instrumentalist Justices Stevens, Ginsburg, and Breyer, along with Holmesian Chief Justice Rehnquist and occasionally Holmesian-leaning Justice O’Connor, had no trouble concluding that the tribe’s exercise of criminal jurisdiction was based on inherent tribal authority that raised no double jeopardy problems for a subsequent prosecution in federal court for the same offense.\footnote{148}{Id. at 210 (Breyer, J., for the Court).}

While matters of Native American affairs were viewed as exclusively in the control of the federal government in *Worcester* in 1832, as noted at § 18.2.6 n.137, cases since then have indicated a more nuanced approach. This is similar to the blanket statement of Chief Justice Marshall in *McCulloch v. Maryland* that states have no power to tax the federal national bank, noted at § 18.1.2 n.41, but later doctrine reflecting a more nuanced approach to intergovernmental tax immunities, discussed at § 20.2.1.

Justice Scalia has stated, in passing, in *Nevada v. Hicks*,\footnote{149}{533 U.S. 353, 365 (2001).} that states have “inherent jurisdiction on reservations” which can, of course, “be stripped by Congress.” While the Court has clearly indicated that states have power to enforce their own laws against tribal members for acts committed off a reservation, and to enter reservations for purposes of serving process, as involved in *Hicks*, the extent of state authority beyond that is unclear. It has been noted that traditional formalist arguments of text, context, and history, as well as early congressional practice, provide little support for such inherent state authority.\footnote{150}{See, e.g., Gloria Valencia-Weber, *The Supreme Court’s Indian Law Decisions: Deviations from Constitutional Principles and the Crafting of Judicial Smallpox Blankets*, 5 U. Pa. J. Const. L. 405, 413-65 (2003).} Since Congress has regulated so heavily in this area, sometimes giving states regulatory authority anyway, the issue of inherent state authority may be of little practical import. The predisposition of conservative Justices to favor states’ rights versus the contrary predisposition of liberal Justices may determine outcomes in any litigated cases.

### § 18.3 Congrressional Power Under Clauses Other Than Commerce Clause

The New Deal and later federal programs created a mass of federal economic regulations. From *Jones & Laughlin* in 1937 to *Lopez* in 1995, the Court did not declare any federal law invalid under the Commerce Clause. Judicial review of other provisions in Article I, § 8 is at least as deferential as modern Commerce Clause review. Thus, practical limits on congressional power under these clauses must usually be sought in other prohibitions in the Constitution, such as the Bill of Rights,
rather than direct limits on these powers. When combined with the Necessary and Proper Clause, these clauses also give the federal government power to pass criminal laws to protect the effective functioning of these granted powers, as discussed throughout §§ 18.3.1-18.3.10.

§ 18.3.1 The Taxing Power

By its terms, the language of Article I, § 8, cl.1 stating that “Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises” grants to Congress broad power to tax. If a law appears to be a tax, does not describe 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.\(^{151}\) Laws regarding punishment for income tax evasion are constitutional as a “necessary and proper” means to make effective this taxing power.\(^{152}\)

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 be not only a tax, but also 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,\(^{153}\) the Court invalidated a 10% tax on goods produced by child labor because the Court held that the tax was a coercive attempt to regulate child labor indirectly, and thus evade the Supreme Court’s 1918 decision in Hammer v. Dagenhart. As discussed at § 18.2.2 n.74, Hammer v. Dagenhart had held that Congress did not have the power to regulate manufacturing, since manufacturing was not literally commerce. 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 discussed at § 18.2.3, since 1937 Congress has been granted broad regulatory power over economic activity that substantially affects interstate commerce. Thus, regarding element (2) of the test stated above, there are few areas today where the Child Labor Tax Case reasoning could apply. Further, Justice Stone noted in 1937 in Sonzinski v. United States\(^{154}\) that it is beyond judicial


\(^{154}\) 300 U.S. 506, 513-14 (1937). See also United States v. Kahriger, 345 U.S. 22 (1953) (tax on persons engaged in business of accepting wagers upheld 5-4 even though it discouraged the activities taxed and produced only negligible revenue).
competence to inquire into the "hidden motives" of Congress to determine whether a tax is an attempt to exercise forbidden regulatory power.

The formalist-era Court held in 1895 in *Pollock 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 therefore 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 *Pollock* 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.”

§ 18.3.2 The Spending Power

§ 18.3.2.1 Basic Doctrine

During the formalist era, in 1936, the Court held in *United States v. Butler* that Congress could not raise and spend money in order to regulate indirectly any interstate 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.* There, a 5-4 Court, limiting *Butler*, upheld an employer tax used to fund unemployment

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156 *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).

157 297 U.S. 1, 72-78 (1936).

158 301 U.S. 548, 592-98 (1937).
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 illegitimate coercion.

The second step was taken in Helvering v. Davis, 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 Buckley v. Valeo 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 Supreme Court has adopted the views of Hamilton and Story, noted at § 18.1.1 n.9, 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 Sabri v. United States, 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.

§ 18.3.2.2 Indirect Regulation of States by Conditions in Federal Spending Programs

The only whispers of 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. 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. In Dole, the Court held that conditions on federal grants are unconstitutional if 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.

In South Dakota v. Dole, 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

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159 301 U.S. 619, 640-45 (1937).
160 424 U.S. 1, 91 (1976).
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 *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.

In support of this conclusion, Chief Justice Rehnquist stated:

1. The spending must be for the General Welfare, although perhaps this limit is not a judicially enforceable restriction, but a political question, and the condition must be unambiguous, as required by *Pennhurst*. Here the money was spent for the General Welfare, that is, highway construction and safety, and the condition was unambiguous.

2. The condition could be challenged if it was unrelated to the federal interest in particular national projects or programs. Here, teenage drinking relates to safe interstate travel, a goal of Congress, because there is evidence that the lack of uniformity in drinking age has created an incentive to commute to border states where the drinking age is lower. So this condition on the receipt of funds was reasonably calculated to address a particular impediment to a purpose for which the funds were expended.

3. A financial inducement offered by Congress might in some circumstances be so coercive as to be compulsion, and thus would be unconstitutional. Here, however, only a small percentage of highway funds were being withheld and this was not coercive.

4. The condition must not violate a prohibition in the Constitution. In this case, the question was whether the 21st Amendment barred indirect achievement of objectives that Congress is not empowered to achieve directly. Rehnquist said that the rule is that the power to condition expenditures must not be used to induce states to engage in activities that would themselves be unconstitutional. Raising the drinking age to 21 does not violate anyone's constitutional rights.\(^{164}\)

Justice O'Connor, dissenting, said the condition was not reasonably related to spending federal funds. The condition in the law was overinclusive in that it stopped non-drivers from drinking, and it was underinclusive in that teenage drinkers were only part of the problem. It was simply an attempt to regulate the sale of liquor, a subject not within the power of Congress given the 21st Amendment. Justice Brennan, dissenting, agreed with Justice O'Connor regarding the 21st Amendment analysis, concluding that since states have power to set the drinking age, Congress cannot condition a federal grant to abridge this right. Justice Brennan did not address her Spending

\(^{164}\) *Id.* at 207-12.
The fact that only two Justices dissented in *Dole*, and only one dissented on a Spending Clause analysis, suggests that the Court will give Congress great leeway in terms of deciding on conditions in federal spending programs. For example, in the No Child Left Behind Act, Congress conditioned rather large federal educational grants to the states on the states adopting a panoply of educational testing requirements. 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 recent case, 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. 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.\footnote{School Dist. of the City of Pontiac v. Spellings, 2005 WL 3149545, 2005 U.S. Dist. LEXIS 29253 (E.D. Mich. 2005) (not reported in F. Supp. 2d).}

Some commentators have expressed concern that this broad spending power gives Congress too much power to affect matters of traditional state concern and undermines recent limits on federal power under the Commerce Clause, discussed at § 18.2.5; 10th Amendment, discussed at § 18.4.5; 11th Amendment, discussed at § 17.2.4.3; and Congress’ 14th Amendment enforcement power, discussed at § 28.3.\footnote{See, e.g., Lynn A. Baker, *The Spending Power and the Federalist Revival*, 4 Chapman L. Rev. 195 (2001).} However, that power is implicit in Court doctrine, and lower courts have similarly read *Dole* as giving Congress virtually unreviewable power in this area.\footnote{Rebecca E. Zietlow, *Federalism’s Paradox: The Spending Power and Waiver of Sovereign Immunity*, 37 Wake Forest L. Rev. 141 (2002) (Supreme Court cases); Lynn A. Baker & Mitchell N. Berman, *Getting Off the Dole: Why the Court Should Abandon Its Spending Doctrine, and How a Too-Clever Congress Could Provoke It to Do So*, 78 Ind. L.J. 459, 464-69 (2003) (lower courts).}

§ 18.3.3 Fiscal Powers

Under Article I, § 8, cl.s. 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.\footnote{See Norman v. Baltimore & Ohio R. Co., 294 U.S. 240, 303-06 (1935).}
§ 18.3.4 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.\footnote{See United States v. Macintosh, 283 U.S. 605, 615-16 (1931).} 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 as a natural concomitant of powers inherent in national sovereignty.\footnote{See generally Sarah H. Cleveland, Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs, 81 Texas L. Rev. 1, 81-163 (2002).} The Court has stated that over no other subject is Congress' power more complete.\footnote{Kleindienst v. Mandel, 408 U.S. 753, 765-68 (1972).} However, aliens are entitled to due process in the application of immigration and naturalization rules, as the Due Process Clause applies to any “person,” not only “citizens.”\footnote{Mathews v. Diaz, 426 U.S. 67, 77-80 (1976).} This aspect of Due Process is discussed at § 27.4.4.8 nn.381-84. Aliens also have limited rights under the Equal Protection Clause, discussed at § 26.2.2.2.

§ 18.3.5 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.\footnote{On mail and wire fraud, see generally Ryan Y. Blumel, Mail and Wire Fraud, 2 Am. Crim. L. Rev. 677 (2005). On the trademark and copyright powers, see generally Gerald N. Magliocca, From Ashes to Fire: Trademark and Copyright in Transition, 82 N. Car. L. Rev. 1009 (2004); Edward Lee, The Public’s Domain: The Evolution of Legal Restraints on the Government’s Power to Control Public Access Through Secrecy or Intellectual Property, 55 Hastings L.J. 91 (2003).}

In \textit{Eldred v. Ashcroft},\footnote{537 U.S. 186, 199-208 (2003).} 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 followed the minimum rational review approach used for analyzing congressional power under Article I, § 8, and 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-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. 176

§ 18.3.6 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.” As discussed at §§ 17.2.1 & 17.2.3.1, 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.”

§ 18.3.7 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. 177 However, modern Commerce Clause power over commerce “with foreign nations, and among the several States” would likely sustain any regulations Congress would wish to make in this area in any event.

§ 18.3.8 The War Powers

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, 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.’” 178 On this understanding, Congress is granted

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176 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-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).

177 See, e.g., Detroit Trust Co. v. The Barlum, 293 U.S. 21, 42-45 (1934).

the power to initiate both major and minor military actions, not the President, because Congress is
granted both powers over “war” and “reprisal.” A conservative formalist separation of powers
argument, granting the President greater war-making power by restricting the “letters of marque and
reprisal” power of Congress to authorizing only private reprisals, not reprisals by the United States
government, which could then be authorized by the President alone, is discussed at § 19.3.3 nn.54-55.

Under Article I, § 8, cls. 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.179 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

views of 17th and 18th century natural law philosophers, such as Hugo Grotius, Samuel Pufendorf,
and Emmerich de Vattel, on the subject of war).

As with other government powers, including the treaty power, discussed at § 18.3.9 n.188, and the property power, discussed at § 18.3.10 n.200, the war 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 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.\(^{181}\) While this exception was of greater importance during the formalist era, when fewer Bill of Rights provisions were viewed as “fundamental,” discussed at § 27.2.2, 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 § 27.2.4, and remain “fundamental” today, discussed at § 27.2.5.1.

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. 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, such as the Gulf of Tonkin Resolution in 1964, which provided authority for military personnel to defend themselves against attack in the Vietnam theater of operations, or have been based only on implied congressional authorization through Congress continuing to fund Department of Defense requests for money to continue the military action.

A classic example of this issue arising in the Supreme Court occurred in 1862 in *The Prize Cases*.\(^{182}\) 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, 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 13th.

It has been noted that Congress’ power over state Militias 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 more unlikely the framers would have given the President the greater power to order the United States military into action. A similar separation of powers issue involves the War Powers Act of 1973, which was passed by Congress over the veto of President Nixon. That Act limits the President’s ability to commit military personnel into circumstances of “imminent hostilities” for more than a brief period of time. As a core separation of powers issue, the constitutionality of this Act is discussed at § 19.3.3 nn.51-53. A similar separation of powers issue regarding congressional versus presidential power over “enemy belligerents” as part of the war on terrorism after 9-11 is discussed at § 19.3.3 nn.56-57.

§ 18.3.9 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. With Senate “Advice and Consent” the President "shall appoint Ambassadors, other public ministers and Consuls." Also, in Article II, § 3, the President is to "receive Ambassadors and other public ministers." Congress can influence foreign affairs with its powers in Article I, § 8 to regulate commerce with foreign nations; to establish a uniform rule of naturalization; to refuse to ratify treaties; and to define and provide punishment for piracies and felonies committed on the high seas and offenses against the law of nations.

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. An executive agreement between the President and a foreign power also supersedes conflicting state policy. The Court has stated, “If state action could defeat or alter our foreign policy, serious consequences might ensue.” 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 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 § 20.3.1.2, or violate a dormant commerce clause analysis, discussed at § 20.3.2.2.C. 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.


184 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).

In addition to these textual references to foreign power in the Constitution, even a formalist-era Court, which placed great emphasis on literal text, noted in 1936 that not all federal power over foreign relations depends on constitutional text. The Court said in dicta in United States v. Curtiss-Wright\textsuperscript{186} that federal power over matters of external sovereignty does not depend on affirmative grants in the Constitution because such power is a necessary aspect of nationality. Domestic powers were carved from powers the states had before the Constitution, but the states severally never possessed international powers. While arguments from history suggest some moderation in this broad statement, the broad statement does reflect Court precedents today.\textsuperscript{187}

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.\textsuperscript{188} 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.\textsuperscript{189}

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.”\textsuperscript{190} 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.”\textsuperscript{191} Similar to court deference to agency interpretation of statutes,
courts typically give the *Skidmore* kind of deference, though not *Chevron* deference, that difference noted at § 9.2.2.1 nn.48-51, to executive interpretations of treaties.\(^{192}\)

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.\(^{193}\) 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 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.\(^{194}\) Depending on what enforcement mechanism are present, and few direct enforcement mechanisms exists at international law,\(^{195}\) the United States government would have to decide how to proceed if met with conflicting rulings from the different tribunals. It would be good in theory to follow international law, but domestic political pressures might counsel a different practice.\(^{196}\)

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.\(^{197}\) The Supreme Court has never


indicated any interest in developing doctrine along those lines. In practice, many sovereignty concerns are mitigated, although not resolved, by viewing the treaties or executive agreements as non-self-executing, and thus enforceable only if Congress supports the delegation by passing enabling legislation. Particularly for executive agreements, where no Senate ratification by a 2/3 majority is required, such as many trade agreements, like NAFTA (North American Free Trade Agreement) and GATT (General Agreement on Tariffs and Trade), implementing legislation by Congress is usually essential.

To implement a treaty, the question has arisen whether Congress may pass a law it could not enact in the absence of the treaty. In Missouri v. Holland, per Justice Holmes, 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. Of course, the Court’s jurisprudence with respect to treaties, discussed here at § 18.3.9, or the powers of Congress and the President regarding military matters, discussed at §§ 18.3.8 & 19.3.3, is circumscribed by the Court’s reluctance to decide political questions, discussed at § 17.3.4.

§ 18.3.10 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 have 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 such constitutional limitations recognized in The Insular Cases, discussed at § 18.3.8 n.181.

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200 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).
Despite this conclusion, at least one author has argued that a textual reading of the Constitution, supported by arguments of 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 of Article I, § 8, cl. 17 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. Currently, the United States owns 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%.

§ 18.4 Tenth Amendment Limits on Congressional Power

§ 18.4.1 The Original Natural Law Era

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.”


202 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).

203 312 U.S. 100, 124 (1941).

204 Id. On this understanding of the 10th Amendment, see generally Crosskey, supra note 1, at 675-708.
A similar understanding of the 10th Amendment appeared in an early 10th Amendment case, *Livingston v. Van Ingen*[^205] 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 power either. This was the same position taken by the Supreme Court in 1819 in *McCulloch v. Maryland*, discussed at § 18.1.2. In *Houston v. Moore*,[^206] 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*, discussed at § 18.2.1.1.

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.[^207]

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*[^208] that states have a field of exclusive power in their internal police. In 1851, the Court said in *Cooley v. Board of Wardens*[^209] that some subjects of regulation might be exclusively for the states. In *Lane County v. Oregon*,[^210] 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*,[^211] also decided in 1869, the Court stated, “The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.”

### § 18.4.2 The Formalist Era

Cases during the formalist era rarely raised the 10th Amendment explicitly. The formalist Court’s doctrine regarding the Commerce Clause, discussed at § 18.2.2, 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, and other formalist-era decisions.

[^205]: 9 Johns 507 (N.Y. 1812).
[^206]: 18 U.S. 1, 48-50 (1820) (Story, J., opinion).
[^207]: See generally James B. Staab, *The Tenth Amendment and Justice Scalia’s “Split Personality,”* 16 J.L. & Pol. 231, 244-51 (2000).
[^208]: 36 U.S. 102, 138 (1837).
[^210]: 74 U.S. 71, 76 (1869).
[^211]: 74 U.S. 700, 725 (1869).
Despite this approach toward the 10th Amendment, a moderate formalist majority did note in 1936 in *United States v. Butler*\(^{212}\) 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 discussed at § 18.2.2.

\section*{§ 18.4.3 The Holmesian Era}

Cases after 1937 recognized such great federal commerce power that by 1941, in *United States v. Darby*,\(^{213}\) 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*,\(^{214}\) 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, discussed at § 6.2.2.3.

\section*{§ 18.4.4 The Instrumentalist Era}

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, discussed at § 18.2.4. 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*.\(^{215}\) 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*.\(^{216}\) In 1975, in *Fry v. United States*,\(^{217}\) the Economic Stabilization Act was applied to limit wage increases of state employees.

\begin{itemize}
\item\(^{212}\) 297 U.S. 1, 65-70 (1936).
\item\(^{213}\) 312 U.S. 100, 124 (1941).
\item\(^{214}\) 327 U.S. 92, 101-03 (1946).
\item\(^{215}\) 377 U.S. 184, 190-93 (1964).
\item\(^{216}\) 392 U.S. 183, 193-99 (1968).
\item\(^{217}\) 421 U.S. 542, 547-48 (1975).
\end{itemize}
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."218 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 instrumentalist approach, a 5-4 Court held in *National League of Cities v. Usery*219 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, as noted § 12.4.2, 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.220 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.221

The critical fifth vote in *National League* belonged to Justice Blackmun. As noted at § 11.4, 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."222

This approach is reminiscent of Chief Justice Marshall’s approach in 1824 in *Gibbons v. Ogden*, where Justice Marshall also carved out an area for state sovereignty, but noted that federal power should not be outlawed unless the activity is “exclusively internal commerce,” which Marshall defined as “completely within a particular State, which do not affect other States, and with which

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218 *Id.* at 547 n.7.


220 *Id.* at 856, 867-68 (Brennan, J., joined by White & Marshall, JJ., dissenting).

221 *Id.* at 880-81 (Stevens, J., dissenting).

222 *Id.* at 856 (1976) (Blackmun, J., concurring).
it is not necessary to interfere for the purpose of executing some of the general powers of the government.\footnote{223} Reflecting Justice Blackmun’s balancing approach, several later cases limited the potential impact of \textit{National League}.\footnote{224} Further, the \textit{National League} doctrine was never held to limit Congress’ power to spend for the General Welfare.\footnote{225} Nor was congressional power to enforce the 14\textsuperscript{th} Amendment limited by the 10\textsuperscript{th} Amendment.\footnote{226}

In 1985, nine years after \textit{National League}, Justice Blackmun abandoned his balancing approach in \textit{Garcia v. San Antonio Metropolitan Transit Authority}.\footnote{227} In \textit{Garcia}, he joined with liberal instrumentalists Justices Brennan, Marshall, and Stevens, and liberal Holmesian Justice White, to overrule \textit{National League} in favor of a strong pro-federal power decision. As discussed at § 7.3.3.1 nn.149-52, 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 10\textsuperscript{th} 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.\footnote{228}

Justice Powell dissented in \textit{Garcia}, joined by Chief Justice Burger, and Justices Rehnquist and O'Connor. Justice Powell said that the Court was improperly withdrawing from expected difficulties

\footnote{223}{223} \textit{22 U.S. (9 Wheat.)} 1, 195 (1824) (Marshall, C.J., for the Court).

\footnote{224}{\textit{See, e.g.,} Hodel v. Virginia Surface Mining and Reclamation Ass’n, Inc., 452 U.S. 264 (1981) (\textit{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); Federal Employment Opportunity Comm’n v. Wyoming, 460 U.S. 226 (1983) (federal Age Discrimination Act can be applied to state and local employees). In the last two cases, there were dissents by Chief Justice Burger and Justices Powell, Rehnquist, and O’Connor. They argued that federal law in these situations was impairing state ability to structure integral operations.


\footnote{227}{\textit{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).

\footnote{228}{\textit{Id.} at 547-54.
in drawing lines, was ignoring the essence of federalism which required federal respect for legitimate state interests, and was mistaken in its evaluation of the strength of state involvement in federal processes.\textsuperscript{229} Justice Rehnquist wrote separately to emphasize that his opinion in \textit{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.\textsuperscript{230} In an attempt to save something of \textit{National League}, Justice Scalia later said in \textit{South Carolina v. Baker}\textsuperscript{231} that Blackmun's opinion in \textit{Garcia} had noted constitutional structure as the source of some limits on federal action affecting states.

Despite the 10\textsuperscript{th} Amendment doctrine of \textit{Garcia}, state rights have been indirectly enhanced after \textit{Garcia} in two ways. First, in \textit{Gregory v. Ashcroft},\textsuperscript{232} Justice O'Connor set forth policy reasons why the 10\textsuperscript{th} 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. This last reason makes federalism complement the separation of powers and gives to the people a power to make one side or the other preponderate. Based on this analysis, the Court held in \textit{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 10\textsuperscript{th} Amendment have also been indirectly enhanced after \textit{Garcia} by cases that have limited Congress’ power to impose remedies on states by exercise of power under § 5 of the 14\textsuperscript{th} Amendment. As noted at § 17.2.4.2 nn.217-24, in \textit{Seminole Tribe of Florida v. Florida},\textsuperscript{233} the Court overruled \textit{Pennsylvania v. Union Gas Co.} and held that Congress has no power under the Commerce Clause to abrogate a state’s 11\textsuperscript{th} Amendment sovereign immunity. Then, the Court held in \textit{City of Boerne v. Flores}\textsuperscript{234} that the power to abrogate immunity under § 5 of the 14\textsuperscript{th} Amendment required any statute to be congruent and proportional to the injury to be prevented or remedied. For example, in \textit{Kimel v. Florida Board of Regents},\textsuperscript{235} the federal Age Discrimination in Employment Act of 1967 could not abrogate state sovereign immunity because the legislative record did not show sufficient instances of unconstitutional state discrimination because of age.

\begin{itemize}
\item \textsuperscript{229} \textit{Id.} at 557-60 (Powell, J., joined by Burger, C.J., and Rehnquist & O’Connor, JJ., dissenting).
\item \textsuperscript{230} \textit{Id.} at 579-80 (Rehnquist, J., dissenting).
\item \textsuperscript{231} 485 U.S. 505, 528 (1988) (Scalia, J., concurring in part and concurring in the judgment).
\item \textsuperscript{232} 501 U.S. 452, 460-61 (1991).
\item \textsuperscript{234} 521 U.S. 507, 527-36 (1997).
\item \textsuperscript{235} 528 U.S. 62, 82-92 (2000).
\end{itemize}
As discussed at § 28.3, when considering Congress’ enforcement powers under the Civil War Amendments, each of these cases were decided on a 5-4 basis, with conservative Holmesian Chief Justice Rehnquist, and conservative formalists Justices Scalia and Thomas, being joined by conservative natural law Justices O’Connor and Kennedy. As discussed at § 6.2.2.3, during the modern Holmesian, instrumentalist, and natural law eras, conservative judges have had more of a predisposition to defer to states rights, while liberal judges have had more of a predisposition to defer to the federal government. Thus, not surprisingly, centrist natural law Justice Souter, and moderate liberal instrumentalists Justices Stevens, Ginsburg, and Breyer, dissented in each of these cases.

§ 18.4.5 Modern Doctrine: Ban On Federal Commandeering of State Legislative, Executive, or Administrative Agencies

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 and Holmesian Justices being willing to vote to overrule its holding and reinstate the approach of National League. However, the modern natural law Justices have carved out some meaning for the 10th Amendment independent of National League and Garcia and whether Congress can directly regulate the states in their sovereign capacities by banning federal commandeering of state legislative, executive, or administrative agencies.

In New York v. United States,236 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.” Under that theory, as explained by Justice Kennedy in U.S. Term Limits, Inc v. Thornton,237 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, the founding generation established dual systems of government – states and federal government – each deriving its authority independently from the consent of the people. The Constitution, after all, was adopted, as stated in the first three words of the Constitution, 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, and states can regulate individuals and the federal government under their own state constitutions and the United States Constitution consistent with doctrines of intergovernmental immunity, discussed at §§ 20.2.1-20.2.4. 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. For this reason,

despite the strong federal interest involved, it can been argued that congressional statutes, first

passed in 1842, requiring states to elect members to Congress in single-member districts represent

a commandeering of state authority to determine how to elect members to Congress. Under the text

in Art. I, § 4, Congress could “make or alter” state regulations and draw single-member districts

itself, but Congress cannot tell the states how to organize their voters into districts. Of course, given

political realities, no state would likely wish to depart today from single-member districts, and such

congressional statutes may well be viewed as constitutional anyway as a matter of “settled law.”

Reflecting the liberal predisposition to favor more the federal government, Justice White, dissenting

with Justices Blackmun and Stevens, questioned how this case could be distinguished from

*Garcia*. He pointed out that in no previous case had the Court rested its holding on a distinction between a

federal statute's regulation of states and private parties for general purposes, as opposed to a

regulation solely on the activities of states. He continued, “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.” 239  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, and commandeering a state how to regulate its own citizens, was extended in the 5-4
case of *Printz v. United States*. 240  There the Court held that Congress could not require state officials
to conduct a background check on persons who had applied to purchase a gun. Relying on the dual
theory of sovereignty, history, and legislative and executive practice, the Court concluded that just
as Congress could not commandeer the state legislature in *New York*, Congress cannot commandeer
state executive or administrative officials. The holding has potentially broad applications, as it has
been used by state officials following *Gonzales v. Raich*, discussed at § 18.2.5 nn.121-25, for the
proposition that local law enforcement officers do not have to enforce 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 no requirement that Congress create lower federal courts, noted at § 17.2.1, was

238  *New York*, 505 U.S. at 161-66 (commandeering not phrased as a balancing test); Paul E.
McGreal, *Unconstitutional Politics*, 76 Notre Dame L. Rev. 519 (2004) (discussing the single-
member district requirement from the perspective of commandeering under *New York*).

239  *Id.* at 201-02 (White, J., joined by Blackmun & Stevens, JJ., concurring in part and
dissenting in part).

that state courts would be the primary initial enforcers of federal constitutional and statutory rights.\textsuperscript{241} In addition, Article VI, § 2 of the Constitution provides that “the Judges in every State shall be bound thereby.” Even without regard to these views, the change in the balance of power between the states and the federal government caused by the outcome of the Civil War, and represented in the Civil War Amendments, would mean that any states’ rights argument that state courts are not bound to follow federal law, which was raised in some Southern state courts before the Civil War, discussed at § 25.3 nn.56-62, would no longer be valid today, as the Court noted in 1947 in \textit{Testa v. Katt}.\textsuperscript{242}

The \textit{Printz} majority was made up of the same Justices who formed the majority in \textit{New York v. United States}, minus Justice Souter. In his dissent in \textit{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 \textit{New York}, Justice Souter read \textit{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 passage from Hamilton stated 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 majority in \textit{Printz} disagreed with this meaning, viewing the passages as only requiring state officials not to obstruct the operation of federal law, and permitting auxiliary aid, if they wished.\textsuperscript{243} 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 \textit{Printz}. They limited their dissent to questioning the rationale of \textit{New York} as applied to state judicial or executive officers, thus inducing Justice Souter to join their dissent.\textsuperscript{244} In a later case it is likely that Justices Stevens, Ginsburg, and Breyer might be willing to question the entire rationale of the “commandeering” language in \textit{New York} and \textit{Printz}, just as Justice Stevens, along with Justices White and Blackmun, had questioned that rationale in \textit{New York}.

The Court has made it clear that the \textit{New York} and \textit{Printz} cases 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 \textit{Reno v. Condon},\textsuperscript{245} a federal act barring unconsented disclosure of driver’s license information was applied to both the

\begin{itemize}
  \item \textsuperscript{241} \textit{Id}. at 903-08.
  \item \textsuperscript{242} 330 U.S. 386, 389-94 (1947), \textit{citing} Claflin v. Houseman, 93 U.S. 130, 136-42 (1876).
  \item \textsuperscript{243} 521 U.S. at 911-18; \textit{id}. at 970-76 (Souter, J., dissenting).
  \item \textsuperscript{244} \textit{Id}. at 939-40 (Stevens, J., joined by Souter, Ginsburg & Breyer, JJ., dissenting).
  \item \textsuperscript{245} 528 U.S. 141, 148-51 (2000).
\end{itemize}
states and private persons. The Court stated that New York and Printz did not apply where the federal exercise of Commerce Clause power regulated state activities directly, rather than seeking to control or influence the manner in which the states regulated private parties. In Condon, since the federal statute regulated state workers at the state’s Department of Motor Vehicles, and did not tell those workers how to regulate their own citizens, the federal 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, as noted at § 18.3.2.2 n.166, Congress could likely use its conditional spending power under the Spending Clause 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 officials from voluntarily providing federal authorities with information about the immigration status of aliens unless certain conditions were met. Since the federal statutes did intrude on the city’s management of its local officials regarding how to deal with aliens, they would likely be ruled unconstitutional under Printz. The Second Circuit case, however, upheld the statutes. On the other hand, the case involved a facial challenge to the federal statutes, in the absence of any showing of injury by the city of New York, despite the fact that 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

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246 179 F.3d 29, 35-37 (2nd Cir. 1999).

247 Printz, 521 U.S. at 916-18. See generally Jim Rossi, Dual Constitutions and Constitutional Duels: Separation of Powers and State Implementation of Federally Inspired Regulatory Programs and Standards, 46 Wm. & Mary L. Rev. 1343, 1355 (2005) (“So long as some state or local official
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.”

§ 18.5 Additional Limitations on Federal Power

Article I, § 9 of the Constitution 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 aspects of the slave trade prior to 1808, discussed at § 25.1;
2. Writ of habeas corpus shall not be suspended, unless when in cases of rebellion or
invasion the public safety may require it, discussed at § 23.2.2.3;
3. No bill of attainder or ex post facto law shall be passed, discussed at §§ 23.2.2.1-
23.2.2.2;
4. No tax shall be laid unless in proportion to census or enumeration, amended by the 16th
Amendment to the Constitution, discussed at § 18.3.1;
5. No tax 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, though
who would have standing to bring such a case is unclear, as discussed at § 17.3.1.2.D
n.373 concerning lack of standing for generalized grievances; 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.

§ 18.6 Additional Limitations on State Power

A range of additional limitations on state power appear in the Constitution. These appear principally
in two places in the Constitution, Article I, § 10 and Article IV. The Article I, § 10 limitations are
discussed at § 18.6.1. The Article IV provisions dealing with Admittance of New States, State
Power over Property, and the Guarantee Clause, are discussed at § 18.6.2.

voluntarily attempts to assume federal duties, Congress has not forced state or local action, and no
commandeering threat is present.”).

248    Ara B. Gershengorn, Private Party Standing to Raise Tenth Amendment Commandeering
Challenges, 100 Colum. L. Rev. 1065, 1066 (2000).
The remaining provisions of Article IV are discussed in this book at the following places: Privileges and Immunities Clause, § 2, cl.1, discussed at § 20.3.3; Full Faith and Credit Clause, § 1, discussed at § 23.1.4; Extradition Clause, § 2, cl.2, discussed at § 23.2.2.4; and Fugitive Slave Clause, § 2, cl.3, discussed at § 25.1.

§ 18.6.1 Article I, § 10 Limitations on State Power

Article I, § 10 of the Constitutions contains three clauses providing for specific textual limitations on state power. As with the limitations on federal power in Article I, § 9, these clauses also 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, discussed at § 18.3.9; coin money, discussed at § 18.3.3; pass any bill of attainder, discussed § 23.2.2.1, or ex post facto law, discussed § 23.2.2.2, or law impairing the obligation of contracts, discussed at § 22.1; 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, noted at § 18.3.9, 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, discussed at § 20.3.2.1.A; or engage in war unless actually invaded, or in such imminent danger as will not admit of delay, discussed at § 18.3.8.

§ 18.6.2 Article IV Limitations on State Power

§ 18.6.2.1 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, with 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 by the Court as a political question. This would be particularly true for the first clause dealing with admission of new states into the Union being done by Congress, which seems a clear textually demonstrable constitutional commitment to Congress under Baker v. Carr, discussed at § 17.3.4.4.

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, discussed at § 5.2.2.1.A n.37, and the use of semicolons, 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 be formed from parts of one existing state only. This would make
the states of West Virginia, Kentucky, Maine, and possibly Vermont, all unconstitutional.\textsuperscript{249} 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?\textsuperscript{250}

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 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."\textsuperscript{251}

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. . . .

The Texas five-state provision raises three interpretive questions. First, does the Clause allow


\textsuperscript{250} \textit{Id.} at 294-95.

\textsuperscript{251} Paul E. McGreal, \textit{There is No Such Thing a Textualism: A Case Study in Constitutional Method}, 69 Fordham L. Rev. 2393 (2001), \textit{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 \textit{id.} at 2398-2401.
division of an existing state? The middle part of the Clause provides, "no new State shall be formed or erected within the Jurisdiction of any other State," which suggests that no division is allowed. But, the last part of the Clause . . . allows certain actions with the consent of Congress and the states involved. The interpretive question is whether the consent provision leaps back across the second semi-colon to allow division of a state with proper consent.

Second, if states can be divided, can Congress "consent" to division in the same legislative act that admits the state into the Union? The Statehood Clause speaks of creating new states "within the Jurisdiction of any other State." Until Congress approved the resolution admitting Texas into the Union, Texas was not yet "any other State" that could be divided. So, we must determine whether Congress could simultaneously create a state and consent to its division.

Third, is there any time limit within which Congress and a state must consent to division? Congress passed the five-state provision in 1845. One hundred fifty-six years later, however, the Texas legislature has yet to consent to the division. Is it too late for Texas to do so? Is there some statute of limitations on consent? If so, the five-state provision will have lapsed into history.252

Of course, these three questions are 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 of interpretation, 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, as discussed throughout § 9.2, and summarized in Table 9.3, 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,” discussed at § 9.2.2.2, or possibly “political questions” not appropriate for Court review, discussed at § 17.3.4.

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 Virginia (at Wheeling) and the proposed government of the new State of West Virginia (at

252 *Id.* at 2395-96.
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."253

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 new amendments to the Constitution, and that ratification of amendments are typically viewed as political questions, discussed at § 17.3.4.6, including ratification of the 14th Amendment, which raised similar concerns of whether meaningful consent was given, discussed at Chapter 25 nn.1-2.

§ 18.6.2.2 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.” The federal power over property is discussed at § 18.3.10. The language in this clause regarding claims of states not being prejudiced by the Constitution, and thus permitting states to sue under the Constitution to protect their property rights, is discussed here.

As noted at § 17.2.2.1.A nn.100-06, state versus state cases involving property rights 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.254

As noted at § 17.3.1.4.D, states also have the power under regular principles of standing to sue to support the state’s own property rights against individuals or the federal government, and to be sued by individuals consistent with state sovereign immunity principles, discussed at § 17.2.4, or by the United States, where no sovereign immunity applies. For example, in United States v. Louisiana,255 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

253 Kesavan & Paulsen, supra note 249, at 293-94.


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 preliminary determination of submerged lands owned by Louisiana in Gulf of Mexico.

§ 18.6.2.3 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 §§ 17.3.4.1-17.3.4.3, 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.256 It has similarly been noted:

The 1787 Northwest Ordinance required it for new states, and it was axiomatic for the Philadelphia Convention. Introducing the eleventh resolution of Virginia's plan for the proposed union, Governor Randolph stated that the resolution had "two objects: first, to secure a republican government [and] secondly, to suppress domestic commotions." Later, Randolph proposed, with James Madison's second, to state even more clearly that "no State be at liberty to form any other than a republican government," a principle that James Wilson then rephrased with their consent as a guarantee.257

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. Some state judges have decided such cases, not viewing them as political questions. 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.


No one argues that initiatives always work better than the ordinary legislative process, or that states should abandon lawmaking by legislatures in favor of lawmaking by initiative. Indirect lawmaking has major advantages, especially the benefit of specialization of labor. The legislature can set up committees, gather information, and develop expertise. There is much to be said for a system of government in which a relatively small number of citizens stand in for the polity as a whole in conducting day to day affairs.

But we don't confront an either/or proposition. We can benefit from the advantages of a representative system, subject to the availability of initiatives when citizens find representation inadequate. As Woodrow Wilson said, direct democracy is intended "to restore, not destroy, representative government." Even when they fail to produce laws, initiatives may put issues on the agenda that otherwise suffer neglect from politicians. Many landmark reforms, eventually enacted by national legislation or constitutional amendment, originated as initiatives in the states: women's suffrage, and abolition of poll taxes, among others.258

Without regard to the policy merits of any system of citizen referendum or initiative, 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.259 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.”260

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:

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


259 74 P. 710 (Or. 1903), reh'g denied, 75 P. 222 (Or. 1904).

260 Linde, supra note 257, at 958.
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, discussed at § 16.2.4 n.70, 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 on the facts of the case.262

261 Id. at 953 (citations omitted).

262 Largess v. Supreme Judicial Court for State of Massachusetts, 373 F.3d 219, 226-29 (1st Cir. 2004).
CHAPTER 19: THE SEPARATION OF POWERS

§ 19.1 The General Nature of the Separation of Powers Doctrine

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, as discussed at § 19.2, the doctrine bars Congress from delegating 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. As noted at § 8.1 n.2, 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 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, discussed at § 19.4.3.1 nn.99-104. Justice Powell, concurring in INS v. Chadha,4 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 doctrine of the separation of powers, Justice Story said in 1833 in his book Commentaries on the Constitution of the United States:

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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).

[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.  

Modern natural law Justices agree that the framers and ratifiers were motivated by such a sharing of powers, checks-and-balances view of government, rather than a strict separation of powers approach. At the same time, of course, where the Constitution expressly provides for a particular allocation of power, that text should be followed. Reflecting these two principles, Justice Kennedy cautioned the Court in Public Citizen v. United States Department of Justice both against adopting a strict separation of powers approach and against rewriting the balance of power provided in the Constitution. He noted:

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.

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, in Bowshar v. Synar, discussed at § 19.4.3.2 n.120, instrumentalist Justices Marshall and Stevens joined other members of the Court to hold 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, 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, discussed at § 19.4.2.1 nn.81-82, Holmesian Justice White dissented from the

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5 J. Story, Commentaries on the Constitution of the United States § 525 (1833).


Court’s striking down legislative vetoes of executive actions. In Bowsher v. Synar,\(^9\) discussed at § 19.4.3.2 n.122, Justice White dissenting 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,\(^10\) discussed at § 19.4.4 n.136, 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.

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, as noted at § 6.2.2.4. 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,\(^11\) although that view can be challenged on structural, historical, practice, and precedent grounds.\(^12\) Justice Scalia has called for a strict separation of powers approach, dissenting in Mistretta v. United States, discussed at § 19.2 nn.21-22, and dissenting in Morrison v. Olson, discussed at § 19.4.3.1 n.104.\(^S\)

\(\text{§ 19.2} \quad \text{Congressional Delegation of Legislative Power to the President, Administrative Agencies, or Special Commissions}\)

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 from the legislative branch. To prevent this, the Court has required Congress to provide the delegated agent with congressionally developed standards or policies to guide application of the delegated power. This helps ensure that the ultimate policy choice is made by the legislature.


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 the constitutionality of 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.” In reviewing this Act, 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, as discussed at § 9.3.2, 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

14 293 U.S. 388, 418 (1935).
15 *Id.* at 421.
16 276 U.S. 394, 401-02, 406-11 (1928), and cases cited therein.
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:

> 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

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18 *Id.* at 372 (citations omitted).
19 *Id.* at 374-75.
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 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. Related questions concerning appointment, removal, and powers given under any particular delegation, are handled as general separation of powers concerns, and are discussed at § 19.4.

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,

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20  *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”).

21  *Id.* at 419.


“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.”

On the other hand, regarding agency practice, the Court held in *Whitman v. American Trucking Associations* that an agency cannot cure a perceived unlawful delegation by adopting in its discretion a limiting construction of the statute. The Court stated, “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.” Of course, in interpreting a statute, the Court will give some deference to agency interpretations under the *Chevron, Mead/Skidmore,* and *Auer* principles, discussed at §§ 6.2.3.1 nn.83-84 & 9.2.2.1 nn.48-51.

In addition to these kind 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. 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 to be served, or (2) the availability and extent of any agency or court review process of decisions initially made by the private actor. As an aspect of procedural due process, these issues are discussed at § 27.4.4.9. 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 in its entirety from some outside group, such as local fire codes or licensing requirements for practicing medicine or law. This due process issue is discussed at § 27.4.4.10.

§ 19.3 Presidential Power Over National Policy

§ 19.3.1 General Observations

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.” Other aspects regarding the election of Presidents, particularly right to vote for President and operation of the electoral college, are discussed at § 20.1.2.1.

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. 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 the powers of Congress 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*, 28 decided in 1952. In *Youngstown Sheet*, the Court ruled that the President cannot make policy by seizing steel mills to avert a nation-wide strike during wartime. Adopting a formalist strict separation of powers approach, Justice Black said that the President cannot make national policy at all. Justice Black said that the President’s powers are limited to the textually enumerated powers, such as faithfully executing the laws and serving as Commander-in-Chief. Although acknowledging that the “theater of war” may be “an expanding concept,” Justice Black stated that the Commander-in-Chief power cannot be used to give the President power to take possession of private property to keep “labor disputes from stopping production. This is a job for the Nation’s lawmakers, not for its military authorities.” Further, the requirement that the President “faithfully execute” the laws “refutes the idea that he is to be a lawmaker. . . . The Founders of this Nation entrusted the lawmaking power to the Congress alone in both good times and bad.”

Based upon legislative and executive practice, and Court precedents, no other Justice agreed in *Youngstown Sheet* that the President's power was that limited. Focusing on arguments addressed to legislative and executive practice, Holmesian Justice Frankfurter noted in his concurrence, “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.”

Holmesian Justice Jackson's analysis in the case also suggested that Presidential power is dependent upon a functional analysis based upon prior legislative and executive action. 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.

Cases have also discussed presidential power 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 with presidential decisionmaking. Indeed, as discussed below, at § 9.3.1 n.31, Justice Frankfurter discussed aspects of subsequent congressional ratification in his concurrence in Youngstown Sheet.

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. Further, there are a few cases, particularly from the formalist era, that speak in terms of broad presidential power in the foreign affairs realm, as discussed at § 19.3.2 nn.40-44. 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’ policymaking 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, the following Table 19.3 summarizes these “Justice Jackson” factors that the Court considers under the post-1937 non-formalist approach to presidential powers, in addition to Justice Black’s formalist focus on literal text, and Justice Frankfurter’s focus on “glosses” on executive power, that focus on “glosses” shared by Holmesian, instrumentalist, and natural law judges. 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

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29 Id. at 610-11 (Frankfurter, J., concurring).
30 Id. at 635-38 (Jackson, J., concurring); id. at 662 (Clark, J., concurring in the judgment).
Those facts did not demonstrate the kind of “consistent, unbroken, executive practice” necessary for triggering a strong “gloss on meaning” argument on these facts.\(^{31}\)

Where the case involves a category nearer the top of Table 19.3, the President’s authority to act will be greater than when the case involves a case near the bottom of the Table:

**Table 19.3**

**Basic Factors Used to Predict Results in Determining Constitutionality of Exercises of Executive Power Based Upon Justice Jackson’s Non-Formalist Approach**

<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., <em>Curtiss-Wright</em>)</td>
<td>2. Subsequent Congressional Ratification</td>
</tr>
<tr>
<td>3. Mixed Foreign/Domestic (e.g., <em>Dames &amp; Moore</em>)</td>
<td>3. Action Taken Pursuant to Congressional Silence</td>
</tr>
<tr>
<td>4. Primarily Domestic (e.g., <em>Youngstown Sheet</em>)</td>
<td>4. Subsequent Congressional Disapproval of Action</td>
</tr>
<tr>
<td>5. Pure Domestic (e.g., Impounding Funds Passed Pursuant to Cong. Enactment)</td>
<td>5. Action Taken Pursuant to Implied or Express Congressional Disapproval</td>
</tr>
</tbody>
</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 Taft-Hartley Act of 1947 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.\(^{32}\)

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\(^{31}\) *Id.* 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.*

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. 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, at least where the President informs Congress and states an intention to abide by legislative will.

Chief Justice Vinson’s opinion reflects the general predisposition of more 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. 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.’”

In contrast, as discussed at § 6.2.2.4 n.62, and noted in Table 6.4.2, 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 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.”

§ 19.3.2 International Matters

As a textual matter, presidential authority over foreign affairs is limited by the constitutional directive in Article I, § 3 that the President shall “take Care that the Laws be faithfully executed.” This insures that the President will not have the power of dispensation, i.e., the power to set laws aside, which the King had in England regarding foreign affairs at the time the Constitution was drafted.


33 343 U.S. at 670-72 (Vinson, C.J., joined by Reed & Minton, JJ., dissenting).

34 *Id.* at 682-83, 702-04.

35 *Id.* at 683.

This is important as many of the enumerated powers relating to foreign affairs are granted to Congress. As discussed at §§ 18.3.1-18.3.10, Congress has power to tax and spend for the common defense of the United States, deal with all aspects of rules and regulations for the armed forces, and declare war. Congress also has power to provide for the general welfare, regulate commerce with foreign nations, regulate foreign coin, deal with naturalization, and make all laws necessary and proper for executing those and all other powers vested in the government of the United States or any department. Under Article II, § 2, cl. 2, the Senate can refuse to consent to treaties by less than a 2/3 vote of those present.

In his treatise, *Politics and the Constitution*,37 Professor Crosskey argued that the purpose of enumerating these various powers in Congress relating to foreign affairs was not to vest a limited power in Congress in order to reserve power to the states, but rather to transfer to Congress a set of powers which in England were considered executive powers and, hence, belonged to the King. The most popular legal writer at the time, Blackstone, had written that all of the above powers relating to foreign affairs belonged to the King, as well as many other powers enumerated for Congress, e.g., the power to coin money, over patents, and to constitute inferior tribunals, discussed at § 18.1.1 n.8.

Although the President typically takes the lead in foreign affairs, the President cannot make policy in that realm contrary to congressional enactments because the President cannot set laws aside. Further, Congress always has the background power of impeachment, since the President's power to grant pardons does not extend to cases of impeachment, as discussed at § 19.3.5. It therefore seems that, in theory at least, Congress has more power than the President in cases involving foreign affairs.

In practice, Congress has frequently allowed the President to take the lead in foreign affairs. After all, the President “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors” under Article II, § 2, cl. 2. 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.”38 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.39

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.*40 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.”

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*41 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, 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, an instrumentalist Court stated in *Dames & Moore v. Regan*42 in 1981 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.”

Nonetheless, many cases from the instrumentalist era suggest broad Presidential power over foreign affairs matters.43 Even those commentators who tend to have a bias more toward the legislative

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40 299 U.S. 304, 320 (1936).

41 *Pink*, 315 U.S. 203 (1942); *Belmont*, 301 U.S. 324 (1937).


branch in separation of powers issues acknowledge the growth of presidential power in foreign affairs and resulting changes as a matter of legislative and executive practice in constitutional practice.44 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, as noted at § 17.3.4.4 nn.562-65. 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.

Regarding the President’s power unilaterally to terminate a treaty, scholars have predictably 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."45 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."46 Reflecting the pro-Presidential power approach, on December 13, 2001,

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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. 47

These foreign affairs separation of powers cases, of course, raise different issues than the Supreme Court’s role in deciding foreign affairs cases under international law, either law generated by United States ratification of treaties, discussed at § 18.3.9 nn.188-199, or the general law of nations, discussed at § 20.3.4.1.B nn.325-28.

§ 19.3.3 War and National Defense

As discussed at § 18.3.8 n.182, the 1863 opinion of the Supreme Court in the Prize Cases48 can be read as limited to holding that President Lincoln was authorized by early 1800s 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. 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. Four dissenters said that the power to declare war cannot be delegated by Congress to the President and that the attempted ratification was an invalid ex post facto law.

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 declared, the military action of the United States was "illegal."49 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.50

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

47 Id. at 226.


49 See, e.g., Mora v. McNamara, 387 F.2d 862 (D.C. Cir.) (case dismissed on political questions grounds), cert. denied, 389 U.S. 934 (1967).

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.\footnote{See Pub.L. No 93-148; H.J.Res. 542, 93rd Cong., 1st Sess., 97 Stat. 555 (1973), codified at 50 U.S.C. § 1541 et. seq.}

There is continuing controversy over the constitutionality of the War Powers Act of 1973, 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, discussed at § 19.4.2.1 nn.76-86, 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, the presence of American troops in South Korea, Bosnia, Saudi Arabia, Kosovo, Afghanistan, and Iraq have been approved by Congress, so troop presence there 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 permitted by the Act, as part of a 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.\footnote{Campbell v. Clinton, 52 F. Supp. 2d 34, 40 (D.D.C. 1999), aff’d, 203 F.3d 19 (D.C. Cir. 2000), citing Raines v. Byrd, 521 U.S. 811 (1997), discussed § 17.3.1.4.D nn.482-84.}

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.53

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. As noted at § 18.3.8 nn.178-80, this is the traditional view of congressional power in this area, and is consistent with 18th-century political doctrine. For example, as phrased by 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.”54

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 diminished 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.55

This formalist literal result would be consistent with a conservative predisposition to favor executive power, discussed at § 6.2.2.4. 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


54 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).

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.

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, now 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.

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 President’s ability to create military commissions to oversee the occupation and prosecute various individuals held by military forces. As in Dames & Moore v. Regan, discussed at § 19.3.2 n.42, the Court held in Rasul v. Bush that the military incarcerations following 9-11 and the War in Afghanistan were authorized by Congress, thus avoiding a separations of powers issue. The same conclusion would be reached regarding events in Iraq in 2003, and thereafter, based on congressional authorization for that military action.

For this reason, the primary questions involved in such detentions are statutory concerns (does the procedure comply with relevant congressional provisions, such as the Uniform Code of Military Justice (UCMJ)), Fifth Amendment Due Process Clause concerns (relating to procedural due process), and concerns with whether any treaty provisions apply (such as the Geneva Conventions). As discussed at § 27.4.4.8 nn.409-16, the Supreme Court held in 2006 in Hamdan v. Rumsfeld that


57 126 S. Ct. 2749 (2006). On the issues involved with such military commissions, see John R. Torruella, On the Slippery Slopes of Afghanistan: Military Commissions and the Exercise of
the initial set of procedures adopted by the Bush Administration to try detainees at Guantanamo Bay were not expressly authorized by any congressional act, did violate the UCMJ, and did not satisfy the Geneva Conventions, although a conservative formalist dissent by Justice Thomas, joined by Justices Scalia and 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. This dissent is consistent with the conservative predisposition in separation of powers cases to favor broader grants of executive power, discussed at § 6.2.2.4.

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. Similarly, unilateral action by a President to evade procedures regarding warrantless wiretaps in the Foreign Intelligence Surveillance Act of 1978 would raise serious constitutional concerns. These concerns would be solved, of course, by congressional action, which had not occurred as of October, 2006, but which in some form is likely to occur in the next session of Congress subsequent to the November, 2006 elections.

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 Merryman69 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.

§ 19.3.4 Domestic Policymaking

Presidential power in domestic policymaking cases is more circumscribed than in cases of foreign policy. Thus, unless Congress has delegated to the President the power to pass executive orders in various areas, the President has very limited inherent executive power to promulgate executive orders. The most important sources of inherent power would be executive orders related to the President’s “Commander-in-Chief” power or executive orders directed to other federal officials under the President’s duty to “take Care that the laws be faithfully Executed.” Of course, even these kind of executive orders must comply with the Constitution. Outside of these areas, presidential authority to promulgate executive orders would be substantially limited by the scope of any congressional delegation and preempted if in conflict with a federal statute.

An example of limited presidential power in this area is Sioux Valley Empire Electric Ass’n v. Butz.61

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59 17 F. Cas. 144, 153 (1861).


In this 1973 case, a district court considered the constitutionality of the Secretary of Agriculture, on behalf of the President, impounding funds that were appropriated by Congress to support a low interest rural electric loan program. The President contended that he had the inherent power to impound funds in order to promote sound fiscal policy and reduce the budget deficit. In rejecting this contention, the court stated:

It may be true that Article II embraces a broad grant of executive power, as is contended by the Government. In the related areas of national defense and international relations, that power has been pushed to its hilt since the advent of the nuclear missile age. But that broad grant cannot be said to include the power to nullify Congressional action. It may be true, as contended by the Government, that Congress, as presently organized, is incapable of achieving sound fiscal planning – that necessity demands the President fill the void. Necessity might be the mother of invention, but it does not give birth to constitutional power. The dangers of following the dictates of “necessity” and permitting one branch to encroach upon the powers of another in the name of efficiency are vividly expressed by Justice Brandeis, dissenting in *Myers v. United States*:

The doctrine of 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 government power among three departments, to save the people from autocracy.

. . . . If it is conceded that the President has the power to impound Congressionally-appropriated funds to promote sound fiscal policy, who is to determine whether the impoundment was purposed upon the achievement of sound fiscal policy or upon Presidential disapproval of the Congressional program for which the funds were appropriated. . . . The Constitution rests with Congress the power to declare policy and to appropriate money to carry out that policy.62

Given this decision, Congress decided to delegate to the President the power to impound certain congressionally-appropriated funds for one year according to certain procedures in the Congressional Budget and Impoundment Control Act of 1974. As a congressionally-approved delegation of power to the President, the Impoundment Act is likely constitutional, as discussed at § 19.4.2.2 nn.93-94.

More generally, Congress has been willing to countenance broad use of presidential executive orders in our Nation’s history. Thus, although theoretically presidential power in this area may be limited, practically presidential power to enact valid executive orders is great.63 Absent the substance of the executive order violating some other constitutional limitation, such as an equal protection, due process, or freedom of speech challenge, history suggests the only real limitations on presidential


executive orders rest on the political interplay between the President, Congress, and the states.\textsuperscript{64}

§ 19.3.5 The Pardon Power

Article II, § 2, cl. 1 provides the President with the “Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.” Naturally, reflecting the dual theory of sovereignty, this power applies by its literal text only to federal crimes, not state crimes. For state crimes, the Governor of each state will have a pardon power under the state constitution.

With respect to offenses against the United States, the text literally provides for no limitations on the President’s power to pardon, except for impeachment. However, based on the clear purpose behind the pardon power, and strong history surrounding the pardon power of the King in England, the Court has always interpreted the power to refer to pardoning for criminal offenses only, not civil liability. Even the literal-minded formalist-era Court held in 1925 in \textit{Ex parte Grossman}\textsuperscript{65} that the President could issue a pardon for criminal contempt, but not as to civil contempt. The Court stated:

\begin{quote}
[L]ong before our Constitution, a distinction had been recognized at common law between the effect of the king's pardon to wipe out the effect of a sentence for contempt in so far as it had been imposed to punish the contemnor for violating the dignity of the court and the king, in the public interest, and its inefficacy to halt or interfere with the remedial part of the court's order necessary to secure the rights of the injured suitor. . . . For civil contempts, the punishment is remedial and for the benefit of the complainant, and a pardon cannot stop it.\textsuperscript{66}
\end{quote}

With regard to criminal matters, the President’s pardon power is absolute. As the Court noted in \textit{Ex parte Garland}\textsuperscript{67}, the pardon power “extends to every offence known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment,” and may render the individual “as innocent as if he had never committed the offense.” Alternatively, the pardon may merely reduce the individual’s sentence,\textsuperscript{68} or may be granted subject to certain conditions, as long as those conditions reduce the individual’s punishment, and do not increase it.\textsuperscript{69}

\begin{itemize}
  \item \textsuperscript{64} See \textit{id.} at 298-324.
  \item \textsuperscript{65} 267 U.S. 87 (1925).
  \item \textsuperscript{66} \textit{Id.} at 111-12 (citations omitted).
  \item \textsuperscript{67} 71 U.S. (4 Wall.) 333, 380 (1866).
  \item \textsuperscript{68} Biddle v. Perovich, 274 U.S. 480 (1927) (death sentence reduced to life imprisonment).
  \item \textsuperscript{69} Schick v. Reed, 419 U.S. 256 (1974) (death sentence reduced to life imprisonment, with the condition the person would not be eligible for parole). For an article suggesting implied limitations on the President’s power to impose conditions if they would shock the conscience or violate other constitutional provisions, like the Equal Protection Clause or the First Amendment, see Harold J. Krent, \textit{Conditioning the President’s Conditional Pardon Power}, 89 Cal. L. Rev. 1665 (2001).
\end{itemize}
The pardon may be specific to an individual, or may cover a group of individuals, as did President Andrew Johnson when after the Civil War he pardoned “all who have borne any part therein” or when President Carter granted amnesty for draft dodgers of the Vietnam War. 70 Although the issue has never arisen, a President probably could not pardon himself on general separation of powers, conflict of interest grounds. 71 As a constitutional prerogative of the President, Congress cannot enact laws that deny effect to a presidential pardon. 72

The pardon power refers to reductions or forgiveness in the punishment of crimes. The President cannot provide compensation to an individual as part of a pardon, as appropriation of funds is a matter for congressional action. 73 Except for this limitation, the only real restraints on the President’s pardon power are the political ones of public opinion, continued effective relationships with Congress, including the possibility of impeachment for abuses of the pardon power, and a desire for a place in history. 74 Even with these restraints, many Presidents have made controversial pardons, such as President Ford pardoning in 1974 President Nixon for any crimes Nixon might have committed while President; President Bush pardoning in 1992, in the final days of his presidency, a number of individuals, including Secretary of Defense Caspar Weinberger, for any crimes arising out of the Iran-Contra investigation; and President Clinton pardoning in 2001, in the final days of his presidency, a number of individuals alleged to have been pardoned based on family, personal, or financial connections to Clinton, Clinton family members, or the Democratic Party. Occasionally there have been calls to restrict the President’s ability to pardon, but any such restriction would have to involve a constitutional amendment, and such an amendment is not likely to pass. 75

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72 See United States v. Klein, 80 U.S. (13 Wall.) 128 (1872), discussed at § 17.2.3.1.

73 See Knote v. United States, 95 U.S. (5 Otto) 149, 154 (1877) (the pardon power “cannot touch moneys in the treasury of the United States, except expressly authorized by act of Congress.”).


75 For discussion of congressional attempts to oversee the pardon power, such as use of subpoenas to investigate the circumstances surrounding pardons, see Todd David Peterson, Congressional Power Over Pardon & Amnesty: Legislative Authority in the Shadow of Presidential Prerogative, 38 Wake Forest L. Rev. 1225 (2003).
§ 19.4 Legislative Power Over National Policy

§ 19.4.1 General Observations

Under Article I, § 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.” Under Article I, § 2, cl.1, “The House of Representatives shall be composed of Members chosen every second Year by the People of the several states.” Under Article I, § 3, cl. 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.”

Under Article I, § 2, cl.2, “No Person shall be a representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.” Under Article I, § 3, cl.3, “No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.”

Additional aspects of the election of members of Congress, including discussion of Census Clause, Article I, § 2, cl. 3, which requires a census to be taken every 10 years, and affects the number of representatives each state gets to send to the House, and the 17th Amendment, which provides for the direct election of Senators by the people, ratified in 1913, are discussed at § 20.1.2.2. Provisions regarding the day-to-day running of the House and Senate, including provisions for the choosing of the Speaker of the House, designation of the Vice-President as President of the Senate, choice of President pro tempore of the Senate in the absence of the Vice President, and the requirement that “Each House shall keep a Journal of its Proceedings,” are also discussed at § 20.1.2.2.

With regard to how bills get passed, the Constitution provides in Article I, § 7, cl. 2, the Bicameralism Clause, that every bill “shall have passed the House of Representatives and the Senate.” By federal and state legislative practice, each bill must be passed by both houses during the same legislative session; otherwise, the bill dies. The Presentment Clause of Article I, § 7, cl. 2 provides that after such a bill is passed 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 both the House and Senate.

§ 19.4.2 Unconstitutional Attempts to Change the Veto Power

§ 19.4.2.1 The Legislative Veto

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. By the 1980s, over 300 such statutes had been passed. This practice was declared unconstitutional in INS v. Chadha.76

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Looking to text in the Constitution, Chief Justice Burger found that all legislation must result from the step-by-step deliberative process stated in the Constitution’s Bicameralism and Presentment Clauses. Chief Justice Burger noted that bicameralism was intended to lead to careful consideration of proposed laws and to allay fears of both small and large states by requiring both the House and Senate to pass the same bill. Presentment to the President was required to engraft a national perspective and to check any propensity to enact improvident laws. Based upon such text and purpose, the Court held in *Chadha* that the language of the Constitution should be interpreted to require all “legislative” action changing individuals’ legal rights to comply with bicameralism and presentment requirements.\(^77\)

In *Chadha*, the action of one House of Congress in setting aside the Attorney General’s suspension of Chadha's deportation order, pursuant to a recommendation from an Immigration and Naturalization Service (INS) administrative law judge, changed legal rights, duties, and relations of persons and, therefore, was “legislative” in purpose and effect. Thus, the one-House veto was unconstitutional as failing bicameralism and presentment requirements. Under this doctrine, “one-house resolutions” or “joint resolutions” of both Houses of Congress, which have no legal effect but merely state congressional views on a topic, do not have to comply with bicameralism or presentment, since they do not change anyone’s legal rights.\(^78\)

Because the decision was based on this ground, it applied to all congressional vetoes, whether two-house, one-house, or committee vetoes. The Court also noted that history at the time the Constitution was adopted supported the view that the framers and ratifiers took the bicameralism and presentment limitations imposed on legislative action quite seriously. Further, Chief Justice Burger noted that a one-house veto provision was particularly problematic, because related provisions in the Constitution provide only four specific circumstances where one House of Congress can act to change person’s legal rights by legislative action: the House power of impeachment, the Senate power to try impeachments; the Senate Advice and Consent power for appointments, and the Senate power to ratify treaties. Under the verbal maxim of *expressio unius est exclusio alterius*, discussed at § 5.2.2.1, the inclusion of these specific provisions in the Constitution would exclude additional one-house constitutional powers.\(^79\)

Justice Powell, concurring, said that a narrower ground for decision would be to hold that Congress, when it found that six persons, including Chadha, did not comply with statutory criteria, violated the principle of separation of powers by acting judicially, in violation of the Bill of Attainder Clause. Such legislative action is particularly dangerous, said Powell, because it was unchecked and not subject to procedural safeguards. This result would strike down the particular legislative veto in *Chadha*, but leave open the possibility that other legislative veto provisions more clearly legislative in nature, such as vetoing agency rule-making, could be held to be constitutional. In response, Chief Justice Burger noted that given the legislative delegation to the Attorney General and INS, with a

\(^77\) *Id.* at 946-51, 957-58.

\(^78\) *Id.* at 952-55.

\(^79\) *Id.* at 950-51, 955-56.
reserved congressional veto, the congressional veto was more legislative than judicial.  

Because the constitutional text was so clear on this point, the remaining Justices all joined Chief Justice Burger’s opinion, except Justice White. As a liberal Holmesian, which a strong penchant for deferring to Congress, Justice White looked for a way to make the congressional practice of legislative vetoes consistent with the text of the Constitution requiring bicameralism and presentment. Dissenting in *Chadha*, Justice White said that bicameralism and presentment applied only to new legislation. Congress had complied with those requirements in enacting the Immigration and Nationality Act and had merely delegated some legislative power to itself, as it might have given power to an administrative agency. Further, White added, there was the functional equivalent of bicameralism and presentment here, because for Mr. Chadha’s deportation suspension to be valid, both the President’s agents, the INS administrative law judge and Attorney General, and both houses of Congress, through not exercising a congressional veto, would have to agree.

In addition, 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. Thus, any attempt by the legislative to delegate its lawmaking power to a part of itself, and thereby evade the Bicameralism and Presentment Clauses for later legislation, would be unconstitutional. Furthermore, where the text of the Constitution is so clear, it outweighs any checks and balances arguments of efficiency or of 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

80 *Id.* at 957 n.22 (Burger, C.J., opinion for the Court); *id.* at 960-61, 963-67 (Powell., J., concurring in the judgment).

81 *Id.* at 986-87, 994-96 (White, J., dissenting).

82 *Id.* at 958n.23 (Burger, C.J., opinion for the Court); *id.* at 968-73 (White J., dissenting).

83 *Id.* at 953 n.16, 957-59 (Burger, C.J., opinion for the Court).

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 of disapproval requires the same groundwork as ordinary legislation or appropriations riders.” 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.

In a concluding point in Chadha, the majority said the legislative veto of the Immigration and Nationality Act was severable from the rest of the Act, based upon language in the statute regarding severability, and, in any event, as discussed at § 17.4.2, there is a presumption of severability, which applies “if what remains after severance ‘is fully operative as a law.’” This presumption will only be overcome if “the Legislature would not have enacted those provisions which are within its power, independently of that which is not.” Justices Rehnquist and White, dissenting, said that Congress would never have intended administrative suspension of deportation without having a veto, thus overcoming the presumption of severability.

§ 19.4.2.2 Giving the President a Line-Item Veto

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


88 Chadha, 462 U.S. at 931-34.

89 Id. at 932.

90 Id. at 1015 (Rehnquist, J., joined by White, J., dissenting).
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.91 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 addresses explicitly such presidential action that repeals or amends parts of duly enacted statutes.

In Clinton v. City of New York,92 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. Justice Scalia noted that an executive impoundment of funds, if authorized by Congress, as in the Congressional Budget and Impoundment Control Act of 1974, should be viewed as a proper legislative delegation of power to the President. There is no difference, Justice Scalia said, between authorizing the President to cancel a spending item, as in this Act, and authorizing that money be spent on a particular item or be impounded at the President’s discretion, which has been done since the founding. More generally, Scalia said, the Constitution does not any more categorically prohibit the executive reduction of congressional expenditures in the course of implementing statutes that authorize such reduction, as here, than it categorically prohibits the executive augmentation of congressional dispositions when implementing statutes by substantive rulemaking – a practice long approved by the Court.93 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.94

91 2 U.S.C. § 691a, d.
93 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).
94 Id. at 442-47
Justice Breyer, dissenting, noted there was no violation of the delegation doctrine because the President did not create a new law. He simply executed a power conferred by Congress. The delegation contained an intelligible principle by which the President was authorized to act, i.e., the President had to consider fiscal accountability and the elimination of wasteful federal spending and special tax breaks, and whether preventing the item from having effect would reduce the federal budget deficit and not impair any essential government function. Justice Breyer said that because the law resembles past delegations of power and does not threaten the tripartite structure of government, it does not undermine individual liberty by raising a specter of presidential tyranny. Had Congress passed individual bills for each spending item, the President could clearly veto each individual bill the President opposed consistent with the literal text of Article I, § 7, cl.2. As a functional matter, Justice Breyer concluded that the President should have the constitutional authority to strike out individual items and not force Congress, if it wishes the President to have such a power, to pass thousands of individual spending bills.95 Justices Breyer and O’Connor’s decision in this case represents a good example of their occasional affinity for Holmesian deference to government, as noted at §§ 11.4 nn.107-09 (Breyer) & 12.4.2 (O’Connor).

Justice Kennedy wrote a concurrence explaining why he disagreed with Justice Breyer on whether the liberties of citizens were threatened in this case. Reflecting the natural law predisposition for analytic balancing of separation of powers concerns in every case, and rejecting the Holmesian strong deference to government interpretive model, Justice Kennedy said that the Constitution’s structure requires a stability which transcends the convenience of the moment. Building on this idea, Kennedy noted:

> The idea and the promise [of separation of powers] were that when the people delegate some degree of control to a remote central authority, one branch of government ought not posses 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.

> . . . . The law established 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 envisioned.

> . . . . That a congressional cessation 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. Abdication of responsibility is not part of the constitutional design.96

95 Id. at 469-73 (Breyer, J., joined in part by Scalia & O’Connor, JJ., dissenting).

96 Id. at 450-52 (Kennedy, J., concurring).
§ 19.4.3  Limited Legislative Control Over Appointment and Removal of Officers

§ 19.4.3.1  Limited Legislative Control Over Appointment of Officers

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.”

An officer of the United States is any appointee who exercises "significant authority" pursuant to the laws of the United States. For example, in *Buckley 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 would be making rules, giving advisory opinions, and determining the eligibility of funds for federal elective offices. Under Article II, § 3, the President has the duty to “Commission all the Officers of the United States.”

As the text of the Appointments Clause indicates, the standard role of Congress in the appointment of executive officers is the Senate power of Advice and Consent. In a series of appointments cases since 1986, a majority of the Court has used a non-formalist balancing approach, reminiscent of Justice Story's analysis of the separation of powers, to determine whether certain non-traditional methods of appointment were in violation of the Appointments Clause or the doctrine of the separation of powers. For example, in *Morrison v. Olsen*, Chief Justice Rehnquist held, for a 7-1 Court, Justice Kennedy not participating, that the process for appointing an "independent counsel" did not violate the Appointments Clause, or general separation of powers concepts implicit in the President's authority under Article II of the Constitution, or judicial authority under Article III.

Under the Ethics in Government Act of 1978, which expired in 1998, the Attorney General, upon receipt of information that a federal official covered by the Act may have violated federal criminal law or on request by certain congressional committee members, had to investigate and report to a special court. The main individuals covered by the Act included Cabinet level officers and the President and Vice-President of the United States. If the Attorney General thought there were reasonable grounds for further investigation, the Attorney General had to request the appointment of an independent counsel from a special 3-judge court, the Special Division, the members of which were selected by the Chief Justice of the Supreme Court. The Special Division court selected the counsel and defined the counsel's jurisdiction. Counsel could investigate and prosecute or dismiss.

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Counsel was removable by the Attorney General for good cause and could be terminated on request or on a finding by the Special Division that the investigation is so complete that it would be appropriate for the Justice Department to take over. Counsel had to keep Congress informed. The Act was a response to the “Saturday Night Massacre,” where 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 and subsequent prosecutions.

Justice Rehnquist first held that an independent counsel is an “inferior officer” and, thus, could be appointed by a federal court. Factors leading to this conclusion were that the counsel was removable by the Attorney General, and had limited duties, jurisdiction, and tenure. According to the literal text of the Appointments Clause, therefore, Congress could vest appointment in “the courts of law.” Regarding general checks and balances concern of preventing tyranny, the Court held that the Act was not an attempt by Congress to increase its powers at the expense of the Executive Branch. The Attorney General need not grant a congressional request to appoint an independent counsel. Nor is there judicial usurpation of executive functions. Judges cannot appoint counsel sua sponte. And they cannot supervise or control. The Act merely recognized the inevitable conflict of interest that is created if the Attorney General were authorized to appoint a counsel to investigate another member of the Cabinet, or the President or Vice-President, and tried to provide an appropriate mechanism to ensure an unbiased appointment of that counsel.

The Court also held that the Act does not violate the separation of powers principle that it would be an impermissible delegation of power to impose significant executive or administrative duties of a non-judicial nature on Article III judges. Under Court precedents, as noted at § 19.1 n.1, 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, would clearly not fall into this category of significant extra duties. 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.

Regarding the administrative work actually done by the Special Division in *Morrison*, the Court noted that the appointment itself was authorized by the Appointments Clause; defining counsel's jurisdiction was incidental to the power to appoint; other miscellaneous powers were essentially ministerial; and the removal power, if given a narrow construction, and limited to situations where counsel's duties are truly completed or so substantially completed that there remains no need for

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100 *Id.* at 670-73.

101 *Id.* at 674-77, 693-97.

further action, does not constitute a significant judicial involvement in exercising executive power to oversee the prosecutorial discretion of the independent counsel. Efficiency was advanced since courts are experienced in appointing private attorneys to act as prosecutors and they also appoint United States commissioners, who have certain prosecutorial powers. Thus, there was “no incongruity” between the functions normally performed by courts and carrying out this duty to appoint. The concern with tyranny was also addressed because the judges of the appointing court are ineligible to participate in any matters relating to the counsel they have appointed, and thus impermissible aggrandizement of power was not a concern.103

Adopting a formalist strict separation of powers approach, Justice Scalia, dissenting, said that it was wrong to extend this “balancing test” mode of analysis into interpreting plain language that "the executive power shall be vested in a President of the United States." Just as Justice Scalia concluded in Mistretta that, strictly speaking, no legislative power can be delegated by Congress, as discussed at § 19.2 nn.21-22, Justice Scalia’s view here was that no executive power can be exercised by any individual outside the executive branch. Further, Justice Scalia said that under the Appointments Clause Congress could not vest the appointment in the “courts of law” since the independent counsel is not an inferior officer, because the counsel is not really a subordinate of the Attorney General, but independent. Even if the independent counsel is an inferior officer, Justice Scalia stated that the text of the Clause should be read to mean that only the President or Heads of Departments can appoint executive officials, while the courts of law can only appoint inferior officials in the judicial branch. For Justice Scalia, a strict separation of powers approach should ban all attempts at interbranch appointments, even if the literal text of the Appointments Clause provides otherwise.104

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.

A second case involving use of a non-formalist approach to an appointments issue occurred in Mistretta v. United States.105 In addition to upholding the United States Sentencing Commission as a proper delegation of legislative authority, discussed at § 19.2 nn.17-22, the Court also upheld the Sentencing Commission on general separation of power grounds. 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 for any appointment, the literal text of the Appointments Clause was clearly met.

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103 487 U.S. at 676-85.

104 Id. at 703-23 (Scalia, J., dissenting).

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. Congress could delegate non-adjudicatory functions to the judicial branch if that did not trench on the prerogatives of another branch and was appropriate to the central mission of the judiciary. 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 has held that any attempt to alter the Sentencing Commission by providing that “not more than three federal judges” may sit on the 7-person Commission, but not ensuring that three federal judges sit on the Commission, would aggrandize executive power too much. It would deprive the Sentencing Commission of its judicial character and constitute executive encroachment on the judicial sentencing authority.106 Whether that balancing of executive versus judicial authority would be upheld on appeal is unknown, but the opinion does reflect sensitivity to general separation of powers concerns. The case also makes clear that in each case the courts consider not only specific textual language, like the Appointments Clause, but also general separation of powers concerns with (1) efficiency and the “no incongruity” principle between the functions normally performed and those carried out under any particular congressional act aspect of *Morrison* and (2) the prevention of tyranny and the no impermissible aggrandizement or impermissible delegation of power aspect of *Morrison* and *Mistretta*. A related problem with viewing the sentencing guidelines as mandatory in terms of the Sixth Amendment right to a jury trial, addressed by the Supreme Court, in *United States v. Booker*, is discussed at § 23.2.1.3.A.

Adopting a formalist strict separation of powers approach, Justice Scalia, dissenting in *Mistretta*, said that the Constitution did not permit a body, other than Congress, to exercise a power to make rules which have the effect of laws. He stated further that the improvisation of a constitutional structure on the basis of currently perceived utility will in the long run be disastrous.107

A third case regarding appointment is *Public Citizen v. United States Department of Justice*.108 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

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107 488 U.S. at 413, 422-26 (Scalia, J., dissenting).

constitutional difficulties. Justices Kennedy, Rehnquist and O'Connor thought the Act did apply, but was unconstitutional as interfering with the President's responsibility to nominate federal judges. Justice Kennedy noted that where there was no violation of express constitutional text, a “balancing test” was appropriate in cases like Morrison and Mistretta to deal with general separation of powers concerns. 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 statutory 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 that 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.\textsuperscript{109}

In addition to this basic doctrine regarding appointment, 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 at 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.\textsuperscript{110} Alexander Hamilton’s discussion of the clause in The Federalist Papers No. 67 supports this view. Hamilton wrote:

\begin{quote}
The relation in which [the recess appointments] clause stands to the [previous clause], which declares the general mode of appointing officers of the United States, denotes it to be nothing more than a supplement to the other for the purpose of establishing an auxiliary method of appointment, in cases to which the general method was inadequate. 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."\textsuperscript{111}
\end{quote}

By executive practice, however, 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

\textsuperscript{109} See Donald J. Kochan, The Unconstitutionality of Class-Based Statutory Limitations on Presidential Nominations: Can a Man Head the Women’s Bureau at the Department of Labor?, 37 Loyola U. Chi. L.J. 43 (2005).


\textsuperscript{111} The Federalist No. 67 (A. Hamilton).
Senate is in recess, and congressional acquiescence has fixed this as the accepted view.  

Professor Michael Herz has 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 a straightforward instance of purpose trumping, or at least informing our reading of, the text.

An implicit understanding of purpose comes into play in one other way in this argument. 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." The force of this argument arises from the fact any interpretation that allows the president to make a recess appointment when there is no recess must be wrong, because it is so flatly at odds with the clause's purpose. . . .

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, occasionally for both non-Cabinet level executive appointments, such as John Bolton to be United Nations Ambassador in 2005, and appointment of lower federal court judges, as noted at § 7.4.2 following n.244. Presidents have used the recess power rarely for controversial Supreme Court or Cabinet-level 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 appointing Chief Justice Warren (1953), Justice Brennan (1956), and Justice Stewart (1958) in October to fill a vacancy on the Supreme Court at the start of the Court’s term (those nominees all easily confirmed by the Senate 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 their [the Senate’s] next Session,” which under current practice would mean the end of the next calendar year.

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114 See generally id. at 448-58.
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.115 For many Cabinet-level Departments, executive orders have been promulgated indicating a line of succession to be followed in the absence of contrary Presidential appointment.116

§ 19.4.3.2 Limited Legislative Control Over Removal of Officers

The Constitution contains no explicit text regarding the removal of executive officers, except for the provisions regarding impeachment. In the absence of explicit text, the Court has applied general separation of powers principles to determine the constitutionality of congressional acts regarding removal.

A debate ensued in the First Congress over whether the President had the right to remove, without congressional approval, members of the executive branch that had been appointed subject to Senate Advice and Consent. 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, discussed at § 20.1.3 n.40. Later Court doctrine has upheld the President’s power to fire a member of his Cabinet “at will” without congressional interference in the decision.

The better separation-of-powers argument is that Congress can never exercise removal power over a member of the executive branch. This is consistent with the conclusion reached by the First Congress,117 and clear Supreme Court doctrine.118 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, Professor Saikrishna Prakash has noted:

115 On the Vacancies Act in general, see Brannon P. Denning, Article II, the Vacancies Act and the Appointment of “Acting” Executive Branch Officials, 76 Wash. U.L.Q. 1039 (1998).


[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. As a result, the president would be reduced to "a mere vapor" and the executive officers and the Senate would assume the executive power. 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.\textsuperscript{119}

Applying these general principles, the Court held in 1986 in \textit{Bowsher v. Synar}\textsuperscript{120} 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 \textit{Chadha}, legislative actions must comply with bicameralism and presentment, as discussed at § 19.4.2.1. 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.\textsuperscript{121}

\textsuperscript{119} Prakesh, \textit{supra} note 117, at 795-96.

\textsuperscript{120} 478 U.S. 714, 721-32 (1986).

\textsuperscript{121} \textit{Id.} at 739-41, 748-53 (Stevens, J., joined by Marshall, J., concurring in the judgment).
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.122 Similarly adopting a functional 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.123

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.

In Morrison v. Olsen,124 discussed at § 19.4.3.1 n.99, the Court was faced not with Congress attempting to exercise removal power, but with Congress limiting the President’s ability to remove an executive official. The limited interference with the President's 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, the real issue being 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 core 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

122 Id. at 769-76 (White, J., dissenting).
123 Id. at 776-87 (Blackmun, J., dissenting).
must be removable by the President at will if he is to accomplish his constitutional role." 125 This is particularly true for those policymaking positions typically viewed as part of the President’s team.

This post-1937 doctrine represents an evolution from the way in which removal issues were considered before 1937. Consistent with general observations that pre-1937 doctrine adopted more categorical tests, while post-1937 doctrine has been more functional in adopting balancing tests, discussed at § 4.2.1, the removal doctrine before 1937 adopted more rigid categorical distinctions. For example, in Myers v. United States, 126 the Court declared 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 contrast, in Humphrey’s Executor v. United States, 127 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 decisionmaking 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 such a categorical test as “executive” versus “quasi-legislative” or “quasi-judicial” to determine the outcome, the Court said in 1988 in Morrison that while considerations of the functions involved by the official is not irrelevant to the ultimate decision, they should not be determinative. The Court stated:

> 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. 128

125 Id. at 689-91.

126 272 U.S. 52, 106 (1926).


128 Morrison, 487 U.S. at 689-90.
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, perhaps less likely, similar to 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.

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 undue trammeling and 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.\(^\text{129}\) 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*.\(^\text{130}\) It would also preserve great discretion in the executive branch, consistent with a conservative predisposition toward executive power, discussed at § 6.2.2.4.

For lower level federal employees, who are not in a policy-making role, Congress can provide civil service protection from at-will Presidential firing. Indeed, 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,\(^\text{131}\) 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 or II courts who do not have Article III protections of life-tenure and no diminution of salary while in office.\(^\text{132}\) Sometimes, however, there are proposals to restrict or amend such civil service protection, as in the

\(^{129}\) *Id.* at 723 (Scalia, J., dissenting).


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.

§ 19.4.4 General Separation of Powers Concerns

The Court applies the same kind of separation of power analysis involving balancing concern with preventing tyranny versus the need for governmental efficiency to cases not directly involving appointment and removal issues. For example, because of a concern with legislative tyranny, and no strong arguments on the other side in terms 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 for the decision in Bowsher, in addition to the problem with congressional removal, discussed § 19.4.3.2 n.120, 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, 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, outside the ordinary legislative process, of the activities of state grant recipients charged with executing federal policy.

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. The Court responded that Dole involved only federalism issues of congressional power, not the separation of power issues involved here, and that Bowsher had reflected a categorical rule regarding agents of Congress.

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134  See Williams v. McClellan, 569 F.2d 1031, 1033 (8th Cir. 1978).


exercising executive powers, not a balancing test.\textsuperscript{137}

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, as in \textit{Chadha}, discussed at § 19.4.2.1 nn.76-86; or the President’s veto power, as in \textit{Clinton v. City of New York}, discussed at § 19.4.2.2 nn.91-96; or limitations on the President’s power to nominate, as in \textit{Public Citizen}, discussed at § 19.4.3.1 nn.108-09 – that text will prevail. In other cases, where the text is clear but supports the constitutionality of the government action, as with the Appointments Clause in \textit{Morrison}, discussed at § 19.4.3.1 nn.99-104, or the text is not clear or no text exists, as in \textit{Bowsher v. Synar}, discussed at § 19.4.3.2 nn.120-23, 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 efficiency/no incongruity of action and the prevention of tyranny/no impermissible aggrandizement of power, along with consideration of legislative/executive practice and precedent, as was done in \textit{Morrison} and \textit{Mistretta}, discussed at § 19.4.3.1 nn.101-06. Under this approach, virtually all delegations of legislative power to the President or administrative agencies are viewed as constitutional today, as discussed at § 19.2 nn.17-22. In contrast, unilateral action by the President without express or implied congressional consent outside the core “Commander-in-Chief” power or the power to “take Care that the Laws be faithfully executed” raise more serious separation of powers issues, as discussed at § 19.3.1 nn.28-36 (\textit{Youngstown Sheet} case), § 19.3.2 nn.37-47 (international matters), § 19.3.3 nn.53-58 (war and national defense) & § 19.3.4 nn.60-64 (domestic policymaking).

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 concern from Congress and other groups, such as the American Bar Association.\textsuperscript{S1} & \textsuperscript{S2}

\textsuperscript{137} \textit{Id.} at 270-71; \textit{id.} at 277-93 (White, J., joined by Rehnquist, C.J., and Marshall, J., dissenting).
CHAPTER 20: ADDITIONAL CHECKS AND BALANCES

As noted at § 5.2.2.2, there are four structural elements in the Constitution: judicial review, federalism, separation of powers, and checks and balances. Issues of judicial review, federalism, and core separation of powers concerns dealing with the legislative and executive branches were dealt with in Chapters 17, 18, and 19, respectively. This Chapter discusses the remaining checks and balances issues under the Constitution.

Checks and balances operate in part to improve the effectiveness and quality of governmental decisionmaking, as noted at § 19.1 text following n.2, including the quote from James Madison on enabling “the government to control the governed.” This can be done by providing the option of a broader perspective, such as the presidential power to veto legislation, which itself is subject to a 2/3 override by both Houses of Congress, or by requiring broadly-based consideration, such as the President can be impeached, but the House brings impeachment and trial is by the Senate. The second main function of checks and balances is to guard against abuse of power and tyranny, in Madison’s terms “oblige it to control itself.” For example, the President is Commander-in-Chief, but Congress controls the purse and can make rules for the armed forces.

Some checks and balances can be found in the express text of the Constitution, as when it divides federal power into three branches – legislative, executive, and judicial – and then further subdivides legislative power so that both the House and Senate must approve legislation under the Bicameralism Clause, discussed at § 19.4.2.1. Similar checks and balances are provided for in the process of amending the Constitution, discussed at § 20.1.1.3; the process of election of the President, discussed at § 20.1.2.1; the process of election, and rules regarding running of, the two houses of Congress, discussed at § 20.1.2.2; and the process of congressional impeachment, discussed at § 20.1.3.

In addition, as Justice Story noted in his Commentaries on the Constitution of the United States, discussed at § 19.1 n.5, the framers did not want one branch of government to perform core functions of any other branch, or intrude too greatly into the interworkings of another branch. In addition to the core separation of power examples, discussed at §§ 19.2-19.4, which reflect this principle and are summarized at § 19.4.4, the Court has recognized immunities from judicial action for members of Congress and their staff members under the Speech or Debate Clause of Article I, § 6, cl. 1; has protected the President and other federal executive officials from intrusive judicial review through executive immunities; has developed doctrines regarding judicial immunities; and has adopted sovereign immunity for the federal government. These issues are discussed at § 20.1.4.

Turning to checks and balances even more clearly created by the Court, rather than expressed in constitutional text, the Court has checked state power by recognizing a set of immunities for the federal government from taxation or regulation by the states and the Court has recognized some immunities for states from the federal government. These issues, based on general reasoning from the dual theory of sovereignty, are discussed at § 20.2.

Relationships among the states and the federal government are also checked and balanced by the preemption doctrine which provides, based on the text of the Supremacy Clause, Article VI, § 2, that federal law is supreme in case of a conflict between state and federal law, discussed at § 20.3.1.
National interests in free trade that the Court thinks Congress wants protected are insulated from state action by cases under the dormant commerce clause. These cases typically balance the impact of state action on interstate commerce with the state’s interests and the availability of alternatives which do not discriminate against interstate commerce, discussed at § 20.3.2. The Privileges and Immunities Clause of Article IV, § 2 protects residents of states from certain kinds of discrimination by other states. The clause is connected to the balance between federal and state governments because it applies predominantly to discrimination that has an impact on activities sufficiently basic to the livelihood of the Nation or interstate harmony, discussed at § 20.3.3. Issues regarding the existence of federal common law, which can preempt state law, are discussed at § 20.3.4.

Another balance between federal and state authority concerns determining the limits, if any, on the power given states by the 21st Amendment over the distribution of intoxicating liquors within state borders versus the federal government’s interest in free trade. This issue is discussed at § 20.4.

Cutting across all of these areas are three main issues that have framed Court doctrine regarding general checks and balances analysis under the Constitution. The first issue is whether to give clauses relating to checks and balances predominantly a literal interpretation, as would a formalist, or whether to read the clauses in light of their check and balance purposes. The second issue is the extent to which such clauses should be given a functional understanding, as would a Holmesian or instrumentalist, or whether analytic considerations should predominate. As discussed at § 4.2.1 nn.32-40 & 4.2.2 text following n.48, a functional approach has often meant, post-1937, replacement of a categorical approach involving elements to meet with a balancing test or factor weighing approach. The third consideration relates to the fact, discussed at §§ 6.2.2.3 & 6.2.2.4, that more conservative judges tend to prefer states and the President in checks and balances cases, while more liberal judges tend to prefer the federal government and the legislature. The issues are discussed below in the context of providing details on various kinds of checks and balances.

§ 20.1 Separation of Powers Checks and Balances

§ 20.1.1 Having Some Constitutional Government Structure in Place and Operating

§ 20.1.1.1 Ensuring the Continuity of Government

Prior to September 11, 2001, little attention was paid to ensuring the continuity of government in times of war or terrorist attack, other than ensuring a line of Presidential succession if the President dies of natural causes or is assassinated, becomes incapacitated, resigns, or is removed through the impeachment process. Following 9-11, greater attention has been focused on the fact that ensuring there is an ongoing federal government means ensuring three ongoing branches – legislative, executive, and judicial – each “with a different nature and structure and each with different constitutional, statutory, and administrative rules governing that structure and the continuity of its operations. . . . [T]here can be no continuity of the Federal Government, . . . unless there is continuity of all three branches, in particular both political branches to enact new legislation.”

Professor Wasserman has observed:

Continuity of Congress is an umbrella term for a three-stage process. The first stage is immediate continuity – the hours, days, and first week after a terrorist or military attack directed at Washington, D.C., and the Federal Government. The second stage is repopulation, focusing on filling seats rendered vacant by the deaths of members in both houses of Congress, restoring both houses to full working capacity, and allowing Congress to move forward as a fully functioning bicameral legislature. Repopulation can be divided into two parts: interim and final. Final repopulation is the end stage of continuity, the point at which vacant seats would be filled by replacements chosen by the ordinary means of selection for both houses, direct popular election. Congress is not repopulated in a manner that retains the populist nature of the body, especially the House of Representatives, if a substantial number of seats remain either vacant or occupied by members chosen by means other than popular election.

Interim repopulation bridges the gap between immediate continuity and final repopulation; it places someone in the vacant seat, but via a fundamentally different selection procedure. The importance of the interim repopulation stage turns on how quickly a popular election can be held in the aftermath of a terrorist attack; the more quickly elections can take place, the shorter the interim repopulation period and, perhaps, the less the need for that period. The model for two-stage repopulation is the Senate, where governors have the power to make appointments to vacant seats until an election can be held to fill the seat with a duly elected member. Unfortunately, no similar appointment provision exists in the House, where only a new election can fill a vacant seat.

Executive continuity involves a narrower focus, because the executive power of the United States is reposed in a single individual, the President. Regarding executive succession, Professor Wasserman has noted:

Presidential succession is a mix of constitutional and statutory procedures. The Constitution provides that, in the event of a vacancy in the presidency, the vice president becomes president. The Constitution then grants to Congress the power to provide by law for simultaneous vacancies in both offices by designating the "Officer" who is to "act as president" until the president is able to resume office or a new president is elected. The designation of an officer to "act as president" (as opposed to "becom[ing] President") derives from the Framers' refusal to grant the legislature the constitutional power to appoint the executive; Congress may choose someone to act as executive, to occupy the White House temporarily, but Congress may not appoint a president. The distinction largely is semantic, as it appears that the acting president assumes the whole of the constitutional executive power and may exercise the same Article II powers as a president.

The current succession statute, codified at 3 U.S.C. § 19, was [originally] passed in 1947; it provides for succession by the Speaker of the House of Representatives, followed by the President Pro Tempore of the Senate, followed by cabinet officers, beginning with the Secretary

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2 *Id.* at 953.
of State and proceeding according to the age of the department [Treasury, Defense, Attorney
General – like State, part of Washington’s original cabinet (1789) – Interior (1849), Agriculture
(1862), Commerce (1903), Labor (1913), Health and Human Services (1953), Housing and
Urban Development (1965), Transportation (1966), Energy (1977), Education (1979), Veterans
Affairs (1988), and, with a 2006 amendment, adding the Department of Homeland Security
(2002) at the end]. The statute does not provide for any officer or individual beyond the
cabinet, likely on the 1940s assumption that the death of every cabinet officer was unlikely
and that at least one enumerated officer always would survive to become acting president.3

A useful summary of Cabinet Departments, with links to information about each of the
Departments, appears at “http://en.wikipedia.org/wiki/United_States_Cabinet.” This site also
notes that six officers currently have “cabinet-level” rank, which means they are entitled to
attend Cabinet meetings, although they do not head Cabinet Departments. These individuals
are the Vice President, the White House Chief of Staff, the Administrator of the Environmental
Protection Agency, the Director of the Office of Management and Budget, the Director of the
National Drug Control Policy, and the United States Trade Representative.

Some commentators have criticized the succession statute on both constitutional and policy
grounds because it permits members of the legislative branch to be in the line of succession
to the executive position of the Presidency. This criticism is based not only on general
separation of powers principles, which would be most prominently in play were the House
and Senate controlled by one political party to impeach and convict a President and Vice
President of the other party, but also the literal text of Article II, § 1, cl. 6, which provides
that in the event both the President and Vice President cannot serve through “Removal, Death,
Resignation, or Inability,” Congress may declare “what Officer shall then act as President.”
Under this view, “Officer” means executive officer, not elected member of Congress.4 On
the other hand, long-standing legislative and executive practice in the Speaker of the House
and President Pro Tempore of the Senate being in the line of succession might make this
provision constitutional. In any event, as with issues regarding impeachment, discussed at
§ 17.3.4.5 nn.571-73, the Court might view the issue as a political question not
appropriate for Court review.

There has also been criticism of the current statute in providing for the President Pro
Tempore of the Senate, rather than the majority leader of the Senate, be in the line of
succession. The President Pro Tempore is largely a ceremonial position, elected by the
Senate, to serve as Senate “president” when the Vice President is not presiding over the
Senate. By custom, the President Pro Tempore is the longest serving member of the Senate
from the majority party in the Senate, but that person does not wield primary responsibility
for the direction and control over the legislative agenda.5

3 Howard Wasserman, The Trouble with Shadow Government, 52 Emory L.J. 281, 284-85
(2003).

4 For discussion of all of these congressional succession issues, see John C. Fortier & Norman

5 See Wasserman, supra note 3, at 286 (discussing the President Pro Tempore issue).
One additional provision of the Presidential Succession Act of 1947 that involves congressional leaders is the "bumping procedure." Under the Act:

If the Presidency passes to a Cabinet member, then a newly elected Speaker of the House or a new President pro tempore of the Senate can replace a Cabinet member who has been serving as President. Congress put this provision into the 1947 succession act because of President Truman's belief that elected officials should take priority over nonelected officials in the line of succession.

Several scholars have persuasively argued that this provision is unconstitutional. Leaving aside the involvement of congressional leaders in the line of succession, the "bumping" procedure goes against the language of Article II that states that Congress may specify in law the successor: "declaring which Officer shall then act as President, and such Officer shall act accordingly until the Disability be removed, or a President shall be elected."

The language of Article II is clear that short of one of the two previously mentioned scenarios, the successor will remain in office. Therefore, the bumping procedure, whereby a Cabinet member succeeds to the Presidency only to be subsequently bumped from office by a [newly-elected] Speaker or President pro tempore, violates this provision.6

With regard to the judicial branch, issues of continuity are not as pronounced. Justice Kennedy has noted, "All . . . district and circuit judges are courts of general jurisdiction and can issue writs under the All Writs Act. So we are already dispersed nationwide."7 At the same time, uniformity of federal law depends on the continued functioning of the Supreme Court. As noted at § 7.4.3 n.24, under the current statute, 28 U.S.C. § 1, a quorum of 6 Justices is needed for the Court to function.

Of course, as discussed at § 7.4.2, the Constitution provides for filling vacancies on the Supreme Court – the Appointments Clause mechanism of Presidential nomination and Advice and Consent of the Senate, and, in rare cases, the Recess Appointments Clause. In the event of a disruption in the activities of the President and Congress, however, that process for filing vacancies might be delayed. On the other hand, it is questionable whether any delay in the Court reaching a final resolution on some issue would create or exacerbate a constitutional crisis. Nevertheless, at least one set of authors have proposed a statutory solution to the potential problem of a more significant delay in Supreme Court functioning. They have stated:

[We] recommend that Congress pass a statute creating an intermediate court drawn from any remaining Justices and the chief judges of the courts of appeals. This court would convene in times of national emergency when the Supreme Court lacks a quorum as a result of that emergency, and it would exercise limited discretionary jurisdiction over appeals from the courts of appeals and state supreme courts in cases of immediate, national importance. We believe

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6 Fortier & Ornstein, supra note 4, at 1011-12.

creating an intermediate court with limited jurisdiction would not require a constitutional
amendment because Congress has the power to create inferior courts and, at least prospectively,
the nomination and confirmation of a court of appeals judge would encompass that judge's
potential service on this emergency court.8

§ 20.1.1.2 The 1781 Articles of Confederation and Their Replacement by the 1789
Constitution

On July 21, 1775, Benjamin Franklin presented to the second Continental Congress a draft for the
"Articles of Confederation and Perpetual Union [Between] the several Colonies." Consideration of
this plan was postponed for nearly six months, but on January 16, 1776, the Congress heard
arguments whether "a Day shall be fixed for considering the Instrument of Confederation formerly
brought in." That motion failed. On June 7, 1776, as the second part of his motion "[t]hat these
United Colonies are, and of right ought to be, free and independent States," Richard Henry Lee
moved "[t]hat a plan of confederation be prepared and transmitted to the respective Colonies for
their consideration and approbation." Five days later, a committee consisting of one member from
each colony was formed "to prepare and digest the form of a confederation." This committee
presented its draft on July 12, enjoining the delegates and printers not to disclose its contents.9

Congress worked steadily on the Articles throughout July and August. On August 20, 1776, a
revised version of the Articles was ordered to be printed, under the same conditions of secrecy.
Because of the absence of many delegates and the time demands that the war made on those present,
the subject was then dropped. Congress decided on April 8, 1777 to resume deliberations on the
Articles. The work proceeded during May, June, July, August, and September with little progress.
In the early morning hours of September 19, Congress fled from Philadelphia to Lancaster, and then
to York, Pennsylvania, before the advancing British army. This event increased the urgency with
which the members viewed confederation. They responded with a burst of activity during October
and November, with final agreement in Congress on November 15, 1777.10 The Document provided
that “The Stile of this Confederacy shall be ‘The United States of America.’” The Articles of
Confederation were sent to the states for ratification beginning in 1788, but were only ratified by
each of the 13 states, and thus entered into force, on March 1, 1781. Many Internet cites contain the
text of the Articles of Confederation. One such site is “http://www.usconstitution.net/articles.html.”

As Professor Freedman has noted:

The conventional view of the period between the Declaration of Independence and the
Constitution, . . . is that the country came to the very brink of dying in infancy. Deep
ideological splits over the amount of power that should be vested in the national government

8 Id. at 1018.

9 See Eric M. Freedman, Why Constitutional Lawyers and Historians Should Take a Fresh
Look at the Emergence of the Constitution from the Confederation Period: The Case of the Drafting
of the Articles of Confederation, 60 Tenn. L. Rev. 783, 797-98 (1993), and sources cited therein.

10 Id. at 798-801.
accompanied the drafting of the Articles of Confederation. Those favoring a weak national government prevailed, but when put to the test of practice, their creation simply did not work. The national government lacked coercive power over individuals and a reliable revenue source, and depended on the voluntary (and often unobtainable) cooperation of the states. [There was no national executive branch; no federal court system; the powers over war, treaties, and coining money, among others, could only be used with consent of 9 states, not a simply majority; and amendment to the Articles could only be achieved by unanimous consent of all 13 states.] Because the national government could not function, the country was wracked by the alarming domestic insurgency known as Shay's Rebellion, and was unable to negotiate effectively abroad or stem protectionism at home. Eventually, the baleful effects of governmental impotence fed a centralizing reaction that enabled those favoring a stronger national government to triumph over their opponents by securing ratification of a radically different charter, the Constitution.\textsuperscript{11}

While this account may represent a slight exaggeration, and the Articles did vest significant federal power over Western lands and state boundaries, and regarding treaties with foreign nations,\textsuperscript{12} the weakness of the federal Congress became clear over time. Open hostilities with the British ended on October 19, 1981, with the British surrender in Yorktown, Virginia. The Treaty of Paris of 1783, which officially ended the Revolutionary War, was signed on September 3, 1783, and ratified by the Congress on January 14, 1784. It had been negotiated for the American side by John Adams, Benjamin Franklin, John Jay, and Henry Laurens. In the aftermath of the Revolutionary War, economic turmoil occurred, in part as the inevitable byproduct of economic dislocations caused by war on one’s own land, and in part by English efforts to restrict American trade after the War ended. This created demands for a stronger federal role over economic activity. As one author has noted:

\begin{quote}
The immediate aftermath of the war saw the U.S. economy expand. Demand for goods, especially English goods, led to rising prices. To supply this demand, American merchants took advantage of credit provided by English lenders to purchase these goods. Curtis Nettels noted that the U.S. purchased nearly 6 million worth of goods during 1784 and 1785, which resulted in price increases; between 1784 and 1786, nearly 8 million worth of goods were purchased, three-fourths to four-fifths of which were purchased on credit.

Two things occurred as a result: the flood of imported goods threatened the nascent domestic manufacturers that had grown up during the war, and specie flowed out of the country to merchants' English creditors. By 1784 this capital flight, combined with a glut of goods, restrictions the English placed on American merchants' access to overseas markets, and depressed prices, had plunged the new nation into its first economic depression [its first “boom and bust” cycle]. According to two economic historians, "something 'truly disastrous' happened to the American economy between 1775 and 1790." The performance of the economy during that period, they estimate, "fell by 46 percent." To offer a modern comparison, the gross national product during the Great Depression fell by forty-eight percent.
\end{quote}

\textsuperscript{11} \textit{Id.} at 785-87.

\textsuperscript{12} \textit{Id.} at 816-26.
In response, states began enacting protective tariffs seeking to raise revenue, curb imports, stop outflows of hard currency, and protect domestic manufacturers. The tariffs usually targeted (1) foreign "luxuries," (2) goods that could be supplied by state industries, (3) "useful" things not produced locally in sufficient quantities, like coaches, and (4) foreign liquor. The result was a confusing and conflicting skein of commercial regulations that lacked any coordination – one historian wrote that "occasional instances of harmony" were the result of "accident" not "design" – and sowed the seeds for interstate conflict.

During this period, according to one count, six states passed imposts, nine states discriminated against British goods, seven states imposed duties on British ship entrances and British commodities, and three states forbade export of American goods in British ships.13

As noted at § 18.1.1 n.13, faced with this reality, a meeting in Annapolis, Maryland was called and held in September, 1786 to focus on the need to amend the Articles to deal with economic problems and provide for “uniform rules regarding trade.” Only 5 States – New York, New Jersey, Pennsylvania, Delaware, and Virginia – sent a total of 12 delegates to that meeting. Among those 12 delegates were James Madison, Alexander Hamilton, and Edmund Randolph, who later became the first Attorney General. The problems raised at that meeting convinced the participants to petition the states for a broader Constitutional Convention the following year, in Philadelphia. A copy of the “Proceedings of Commissioners to Remedy Defects of the Federal Government,” signed September 14, 1786, appears at “http://www.yale.edu/lawweb/avalon/annapoli.htm.”

Following the Constitution Convention during the summer of 1787, discussed at § 18.1.1 nn.14-21, the proposed new Constitution was sent to the states for ratification. Article VII of the Constitution declares that "[t]he Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same." New Hampshire became the ninth state to ratify the Constitution on June 21, 1788. On one view, therefore, the Constitution took affect on June 21, 1788. As a historical matter, Virginia became the tenth state to ratify on June 25, 1788, and New York became the eleventh state on July 26, 1788. North Carolina and Rhode Island did not ratify the Constitution until after the spring of 1789, North Carolina on November 21, 1789, and Rhode Island on May 29, 1790.14

Following ratification by nine states, the Continental Congress under the old Articles of Confederation declared March 4, 1789 as the date the new Congress was to convene. Although Congress did convene that day, a quorum was not present in the House until April 1, and in the Senate until April 6. President Washington did not take office until April 30, 1789. The Judiciary Act of 1789 was passed on September 24, 1789, and the Supreme Court came into being on February 2, 1790.

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14 See Vasan Kesavan, When Did the Articles of Confederation Cease to be Law?, 78 Notre Dame L. Rev. 35, 36 n.9 (2002).
In the case of Owings v. Speed,\(^{15}\) the Supreme Court held, per Chief Justice Marshall, that the Constitution became effective only on March 4, 1789, the date Congress was to convene, not June 21, 1988, the date the ninth state ratified the Constitution. Marshall stated, “It is apparent that the Government did not commence on the Constitution being ratified by the ninth State; for these ratifications were to be reported to [the] Congress [under the Articles of Confederation], whose continuing existence was recognized by the Convention, and who were requested to continue to exercise their powers for the purpose of bringing the new government into operation.”

This conclusion has been questioned by some formalist commentators today. Under one version, provisions of the Constitution that were self-executing, such as the Contracts Clause, the State Treaty Clause, and other provisions contained in Article I, § 10 that limit the power of the states, became effective once a ninth state ratified the Constitution. A second tier of provisions, such as many of those contained in Article I, Article II, and Article III, did not become effective until those branches of the federal government had legislative, executive, and judicial personnel to exercise those powers. During the transition period, the Articles of Confederation still controlled those matters.\(^{16}\) Under another version, the Articles of Confederation ceased on June 21, 1988 with ratification of a ninth state, but there was no federal government until after March 4, 1789, when the new Congress convened.\(^{17}\)

Resolution of this issue has little practical significance today, except for a case involving the Oneida Indian Nation. In Oneida Indian Nation v. New York,\(^{18}\) the Oneida Indian Nation sued New York in order to recover five million acres of land in upstate New York that it claimed were purchased by New York through an unconstitutional treaty made on September 22, 1788, after the Constitution was ratified by a ninth state on June 21, 1988 and after New York had ratified the Constitution on July 26, 1788. The State Treaty Clause of Article I, § 10 provides that “[n]o State shall enter into any Treaty, Alliance, or Confederation." The federal district court dismissed the Oneida Nation's claim that the treaty was unconstitutional on the strength of Chief Justice Marshall's declaration in Owings v. Speed that the Constitution, in all its aspects, including the State Treaty Clause, only became effective on March 4, 1789. Thus, the state of New York could enter into the treaty with a domestic Indian Nation under the existing Articles of Confederation. If one were to adopt the formalist view of the Constitution noted above, that New York state treaty would be unconstitutional under the State Treaty Clause, and the Oneida Indian Nation would presumably own five million acres of upstate New York property.

\(^{15}\) 18 U.S. (5 Wheat.) 420, 422-23 (1820) (Marshall, C.J., opinion for the Court).

\(^{16}\) See Gary Lawson & Guy Seidman, When Did the Constitution Become Law?, 77 Notre Dame L. Rev. 1, 5-10 (2001).

\(^{17}\) See Kesevan, supra note 14, at 46-49.

§ 20.1.3  

Amending the United States Constitution

The procedures for amending the Constitution represent the efforts of the framers and ratifiers to balance the need for change with the desire for stability in government. As noted by Professor Thomas E. Baker, in an article entitled, *Towards a “More Perfect Union”: Some Thoughts on Amending the Constitution*, James Madison stated in *The Federalist Papers* that the amending procedures are designed to "guard[] equally against that extreme facility, which would render the Constitution too mutable; and that extreme difficulty, which might perpetuate its discovered faults."19

Article V provides for two ways to amend the Constitution, each involving two steps. Amendments may be proposed either by a 2/3 majority in both houses of Congress or by a special convention called at the request of 2/3 of the state legislatures. Under either option, amendments are then ratified by 3/4 of the states, either by the existing state legislatures or by special state conventions, depending on which means are designated. By historic practice, ratified amendments are added at the end of the Constitution, rather than incorporated directly into the text they amend.

The two-step procedure was a compromise based on checks and balances concerns. Under Article V, neither Congress nor the states have the exclusive power over amendment. Amending the Constitution was made difficult, but not as difficult as under the then-existing constitution, the Articles of Confederation, which had required the unanimous consent of all states for amendments to be valid. Given 50 states and 435 members of the House of Representatives, 34 Senators, 146 Representatives, or 13 state legislative chambers can keep an amendment from becoming part of the Constitution. Thus, there must be a broad national consensus to amend the Constitution.

It 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.”20 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, practice, and precedent kinds of arguments, 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 Professor Harold Bruff, of the University of Texas School of Law, has 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.21 From this perspective, 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 a formalist model of interpretation in mind, frustrates both the intent of the framers and ratifiers, and well as making little practical sense in terms of “consequentialist” arguments that might be used to support such a static model of interpretation, such as those made by Professor Randy Barnett, cited at § 8.4 n.59.

The Supreme Court has consistently ruled that since Article V places the primary responsibility for amending the Constitution with the legislative branches of the federal government and the states, courts should play virtually no role in the process of considering amendments. The Court has routinely deferred to the Congress to determine issues about its own procedures for proposing amendments and about the states' procedures for ratifying amendments. For example, Congress decided the 200-plus year delay between the proposal and the ratification of the 27th Amendment was permissible, as discussed at § 20.1.1.3 n.26. Although one author has suggested that there should be some limit on what proposals can qualify as valid “amendments” under Article V, as opposed to more radical proposals that would be transformative “unamendments” in the constitutional design,22 the Court has never indicated any such limitation on what amendments could be proposed or ratified. By historical practice, both houses of Congress must pass a proposed constitutional amendment during the same session of Congress for it to be valid, similar to the bicameralism rule for legislation.

Of the possibly more than 10,000 bills introduced in Congress to amend the Constitution at various times,23 only 33 have gotten the 2/3 vote in both houses of Congress and proceeded to the states, and only 27 have been ratified by 3/4 of the states. All but one of the 27 amendments have been ratified by the state legislatures. Only the 21st Amendment, which repealed the 18th Amendment regarding Prohibition, discussed at § 20.4, was ratified by state conventions upon the stipulation of Congress. There has never been a convention for proposing amendments, although, during the 1980s, 32 states had issued, at various times, a call for a constitutional convention to consider an amendment to require a balanced budget for the federal government.

As noted, of the 33 amendments that Congress has voted to propose to the states, 27 have been ratified, leaving six amendments that have failed to be ratified by the requisite 3/4 of the states. Professor Baker noted in his article:

> An amendment proposed along with the Bill of Rights would have set a population limit for congressional districts which, given today's population, would have required more than 5,000

21 Id. at 1339 & n.16.


23 See Baker, supra note 19, at 9.
members in the House of Representatives. In the early nineteenth century, an amendment was proposed that would have automatically expatriated anyone who accepted a title or honor from any foreign government without the consent of Congress, a measure that would have played havoc with Nobel prize winners and knighted former Presidents. There was a desperate and futile effort on the eve of the Civil War to appease the southern states by proposing to prohibit any future amendment that would eliminate slavery. As part of the progressive movement in the 1930s, a proposed amendment would have authorized Congress to regulate child labor in the face of an unwilling Supreme Court, but the Justices eventually got around to finding the power in the Commerce Clause. In the 1970s, a democrat-majority in Congress proposed to grant congressional representation to the District of Columbia, but the political reality that the measure would result in the election of at least three more democrats to Congress was enough for republicans to stall the measure in the statehouses.

The most important recent showdown over a proposed amendment was the ten years of debate whether to add an amendment for sex or gender equality – the Equal Rights Amendment. Congress proposed the ERA in 1972 with the usual seven-year deadline for ratifications, then extended the period for three more years. After some early momentum, however, in the end only thirty-five states ratified the measure – three short of the number needed – and some 14 states that had ratified the proposal went back to try to rescind their earlier ratifications.24

As discussed at § 26.3.1.2, the Court in the 1970s created an intermediate standard of review for cases involving gender discrimination. Had the ERA passed, the legal consequence would have been that gender discrimination cases would be tested under strict scrutiny, not intermediate review.

Of the 27 amendments that have been ratified, six amendments have been proposed and ratified directly against the backdrop of Supreme Court rulings. As Professor Baker noted:

The Eleventh Amendment (1795) promptly and decisively set aside the controversial 1793 holding in Chisholm v. Georgia that had interpreted Article III to authorize a federal court to entertain a suit brought against a sovereign state by a citizen of another state. The great Civil War Amendments – the Thirteenth Amendment (1865), the Fourteenth Amendment (1868), and Fifteenth Amendment (1870) – were proposed by the Reconstruction Congress and ratified by the states to restore the Union and to be rid of Supreme Court constitutional interpretations epitomized by the infamous Dred Scott v. Sandford decision. The Sixteenth Amendment (1913), for all intents and purposes, reversed Pollock v. Farmers' Loan and Trust Co. and granted Congress an expressly-enumerated power to tax individual income. Most recently, the Twenty-Sixth Amendment [1971] effectively reversed Oregon v. Mitchell to grant 18-year-olds the right to vote.25

A useful way to group the amendments is to note that most can be organized around four different historical concerns. As organized by Professor Baker:

24  Id. at 12-14.

25  Id. at 8-9.
Between 1789 and 1804, the "Anti-federalist" or "Jeffersonian" amendments were adopted. The first ten amendments, popularly known as the Bill of Rights (1791), secure the fundamental rights of the individual against the national government. The Eleventh Amendment (1795) prevents federal courts from entertaining lawsuits against the states. The Twelfth Amendment (1804) sought to harmonize political parties with the electoral college to avoid the problems the House of Representatives had with the election of 1800 between Thomas Jefferson and Aaron Burr.

The "Civil War Amendments," the Thirteenth, Fourteenth, and Fifteenth Amendments, were ratified during Reconstruction in the years 1865, 1868, and 1870, respectively. Ratified in the aftermath of a cataclysm that shook the constitutional structure to its foundations, those mighty provisions ended slavery, enforced due process and equal protection against the states, and guaranteed new freedmen the right to vote.

The populist and progressive movements at the beginning of the century produced four ratifications: the federal income tax in the Sixteenth Amendment (1913), the direct election of Senators in the Seventeenth Amendment (1913), the national Prohibition in the Eighteenth Amendment (1919), and women's suffrage in the Nineteenth Amendment (1920).

The most recent set of ratifications have dealt thematically with federal elections: 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; the Twenty-Fifth Amendment (1967) revised the constitutional rules for presidential succession and devised a new procedure for presidential disability; and the Twenty-Sixth Amendment (1971) extended the franchise to 18-year-olds.

This patterning is not perfect, and a few amendments cannot be drawn into these four groupings: the Twentieth Amendment (1933) limited the lame duck session of Congress, and the Twenty-First Amendment (1933) repealed Prohibition. The Twenty-Seventh Amendment (1992) – which requires that any pay increase for members of Congress can go into effect only after the next regular election – has the most idiosyncratic ratification story. It was proposed by the first Congress as part of the original Bill of Rights and was all but forgotten for more than 200 years before it was dusted off and ratified by the requisite number of states – something that is not likely to happen again because the modern practice is for Congress to include a time limit, usually seven years, in proposed amendments.26

With regard to some of the thousands of bills proposed in Congress to amend the Constitution, Professor Baker noted in 2000:

Consider some of the amendments currently being considered by Congress. One proposal would effect a wholesale overruling of the Supreme Court's Establishment Clause jurisprudence. Another that has passed the House, but not the Senate, with the requisite

26 Id. at 11-12.
two-thirds majority would have given the Congress the power to prohibit and punish flag burning. Other bills currently before Congress include a proposal to authorize a line-item veto for the President, a proposal to require that federal judges be reconfirmed every ten years, a proposal to abolish the electoral college to provide for the direct election of the President, several proposals for various versions of term limits for members of Congress, and a proposed amendment to guarantee rights to victims of crimes. As with all things political, different people assign different value and importance to these various proposals to change the nation's fundamental law. The wisdom – or the folly – of a proposal to amend the Constitution often is in the eye of the beholder.

Some amendments go out of fashion while they are under consideration, disappearing from popular concern. For example, the balanced budget amendment was in the headlines and looked close to passing Congress just a few years ago, partly as a consequence of pressure felt from the calls of thirty-two states for a constitutional convention to consider it. But when the burgeoning economy began to yield consistent federal surpluses, the political pressure for passage lessened and the measure disappeared from view, at least for now. And by now, the bills introduced annually over the last so many years proposing amendments to permit prayer in public schools, to outlaw school busing, and to ban abortions have become more like symbolic rituals than realistic efforts to change the Constitution. They are rallying points for organizations on their side for purposes of direct mail fundraising and membership recruitment, but they are not perceived by the other side as a genuine political threat any more.

Constitution-amending certainly is no sport for the short-winded. 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.27

For the Civil War Amendments, and amendments in the 20th century dealing with voting rights, Congress provided an added power for Congress to enforce the amendments by appropriate legislation. That congressional power is discussed in Chapter 28.

§ 20.1.2 Issues in the Election of Members of the Federal Government

§ 20.1.2.1 Presidential Election

Under the provisions regarding presidential election in Article II, § 1, the selection of the President takes place indirectly through the electoral college system. Technically, when casting a vote for President, the individual is voting for presidential electors who select the President. Under Article II, § 1, cl. 4, election day “shall be the same throughout the United States,” which by historical practice is the second Tuesday in November. Typically, the voter casts his or her vote for a single slate of electors, nominated by the parties in each state, with the slate that receives the most popular

27 Id. at 15-17.
votes in the state going to the electoral college. Maine and Nebraska use a district system where two electors are chosen on an at-large basis, and one elector is selected per congressional district based upon receipt of the most popular vote in that district. Although election by popular vote is the method used throughout the Nation today, it is not required. Under Article II, § 1, cl. 2, the Constitution merely requires that the electors to be chosen "in such [m]anner as the [State] Legislature thereof may direct."

Under Article II, § 1, cl. 2, the Constitution assigns to each state a number of electors equal to its combined representation to Congress. Currently there are 538 total electors, based on 435 members of the House, 100 Senators, and 3 electors for the District of Columbia pursuant to the 23rd Amendment. A majority, 270 votes, is needed to elect the President and Vice President respectively. Any citizen may be appointed an elector except Members of Congress and individuals holding offices of "Trust or Profit" under the Constitution. Under current practice, electors assemble in their respective states on the Monday after the second Wednesday in December. They are pledged to a single candidate. However, in most states they are not legally required to vote for those candidates. The electors cast separate ballots for President and Vice President as provided for under the provisions of the 12th Amendment. An elector is prohibited from casting both votes for presidential and vice presidential candidates if both are "inhabitants" of the same state as the elector.

An issue arose in 2000 whether the electors for the state of Texas could cast their votes for both Presidential candidate George W. Bush, and Vice-Presidential candidate Dick Cheney, based on the argument that both were in fact "inhabitants" of Texas, since Cheney’s last job before becoming the Vice-Presidential candidate, as CEO of Halliburton, was based in Texas. In Jones v. Bush,28 the district court ruled that the plaintiff voters had no personal or irreparable harm, noting that the Court has held that "[a] general interest in seeing that the government abides by the Constitution is not sufficiently individuated or palpable to constitute such an injury." However, in the interest of appellate review, the court went on to address the merits of the plaintiffs' motion for preliminary injunction by holding that the term "inhabitant" under the 12th Amendment is coextensive with the legal concept of "domiciliary." The Court then ruled that Cheney had both a physical presence in Wyoming with the necessary intent to remain there indefinitely, despite his job with Halliburton. The key factors in the court's conclusion were the facts that Cheney was "born, raised, educated, and married in Wyoming," and served for six terms in the U.S. House of Representatives as the Member from Wyoming. On appeal, the Fifth Circuit Court of Appeals, after an hour-long oral argument followed by a short recess, unanimously agreed that Cheney was a Wyoming resident, and affirmed the district court's decision without further elaboration.29

Sometimes disputes arise over the validity of electoral votes cast. Through election laws passed in 1887, Congress has placed the initial power to settle controversies with the state. Under 3 U.S.C. § 5: “If any State shall have provided, by laws enacted prior to the day fixed for the appointment of

the electors, for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such State, by judicial or other methods or procedures, and such determination shall have been made at least six days before the time fixed for the meeting of the electors, such determination made pursuant to such law so existing on said day, and made at least six days prior to said time of meeting of the electors, shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such State is concerned.”

This provision essentially states that as long as the state follows its procedures in a timely manner, the statute renders the state's judicial or regulatory determination of the outcome dispositive, and not subject to further challenge by Congress. Thus, if the state meets the deadline, its slate of electors reside in a "safe harbor," untouchable by those counting the electoral votes, the Congress. Where there are competing slates of electors, Congress resolves controversies as to which slate represents the state's electoral votes based upon the laws of the state in question. If both houses of Congress do not agree on how to interpret state law when deciding between or among competing slates of electors, then Congress looks to the governor of the state under 3 U.S.C. § 15, which provides, "[I]f the two Houses shall disagree in respect of the counting of such votes, then, and in that case, the votes of the electors whose appointment shall have been certified by the executive of the State, under the seal thereof, shall be counted."

Procedurally, the governor of the state is required to certify the electoral votes "as soon as practicable" after the final assessment of who have been selected to serve as electors, or after a controversy has been settled under the state's statutory procedures. The electoral votes are then certified at a joint session of Congress on January 6th of the year succeeding the election, though if January 6th falls on a Sunday, it takes place the following Monday. A concurrent resolution for a joint session of Congress, originating in the Senate, is passed in order for both Chambers to meet to count the electoral votes. The Vice President presides over the joint session as President of the Senate. The certificates for the electoral votes are opened in alphabetical order, passed to four tellers, two chosen by each chamber, who announce the results. The votes are then counted with the result announced by the President of the Senate.

Under this certification process, grounds for an objection are that the vote was not "regularly given" by an elector, or that the elector was not legally certified under the state's procedures. Title 3 U.S.C. § 15 states: "[N]o electoral vote . . . regularly given by electors whose appointment has been . . . received shall be rejected." Any objection to the validity of an electoral vote or votes "shall state clearly and concisely, and without argument, the ground thereof . . . ." At least one Senator and one Member of the House must sign a written objection. Upon receipt of an objection, the joint session goes into recess, and each chamber deliberates separately over the objection. Debate is limited to two hours. During debate, each Senator and Representative may speak for or against the objection for no more than five minutes, and may not address the chamber more than once. After the close of debate, each chamber votes separately whether or not to uphold the objection. After the two chambers have voted, they reconvene in joint session, and the President of the Senate announces the results. In order to sustain an objection, both chambers must vote to uphold. If the two chambers do not agree then the objection falls and the votes are counted. Also, under the statute, "[n]o votes or papers from any other State shall be acted upon until the objections previously made to the votes or papers from any State shall have been finally disposed of." These procedures were invoked in
1969, the only time since their enactment in 1887 when this has occurred. The objection concerned an elector from North Carolina who had cast his votes for Governor George Wallace for President and General Curtis E. LeMay for Vice President, the nominees of the American Independent Party, instead of President Nixon and Vice President Agnew, who had won the popular vote in the state. The vote was not critical to the election of President Nixon as President.30

Should no candidate receive a majority of the electoral votes cast, the House of Representatives chooses the President. The Senate chooses the Vice President. The newly elected Congress conducts the election. In the House of Representatives, the President is selected from the top three vote getters in the electoral college with each state delegation casting a single vote. An internal poll is taken by each delegation. If no single candidate receives a majority of the votes cast within the delegation, then, as a matter of legislative practice, the state's vote is counted as "divided" and barred from that round of voting. This was the practice in 1825, when John Quincy Adams was selected as President, despite Andrew Jackson receiving more electoral votes and popular votes, though not a majority of each, as discussed at § 14.3 nn.99-105. It has been adopted by Congress as non-binding precedent since that time, although it has never needed to be used. A majority of votes taken by the delegations is needed to win the presidency. The Senate selects from among the top two vote getters in the electoral college for Vice President. Each senator casts a single vote, with a simple majority needed to win. What is notable about this process is that it is placed entirely in the hands of the state legislature to appoint the electors by any manner of their choosing, for the governor of the state to certify the slate of electors, and for Congress to count the votes and resolve any and all disputes.

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 eliminated in 1933 the lame duck session of Congress and seats the new Congress at the beginning of the new year, but the outgoing Congress. In 1801, this meant it was not the incoming Congress, which was composed of a majority of Jeffersonian Republicans, but the outgoing Federalist Congress that was to make the decision. 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

30 On these procedures surrounding counting and objections, see id. at 218-20, 257-61.

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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.31

A separate kind of problem arose in 1876. In the 1876 Hayes/Tilden election, there was an electoral college deadlock. Democrat Samuel J. Tilden, Governor of New York, had a majority of the popular vote. Tilden was one vote away from winning the electoral vote. The Republican candidate, Rutherford B. Hayes, Governor of Ohio, needed every disputed electoral vote to prevail. There were four states that held the balance of power: Florida, Louisiana, South Carolina, and Oregon.32

In Florida, about 50,000 votes had been cast. Votes were reported by the various counties to a State Canvassing Board, and, on the "face of the returns," Tilden led Republican Rutherford B. Hayes by "only 80-some votes." The Canvassing Board, however, which had two Republicans and one Democrat, had the authority and "discretion to exclude returns that were 'irregular, false, or fraudulent.'" Exercising this discretion, sometimes unanimously and sometimes by a 2-1 vote along party lines, the Canvassing Board concluded that Hayes had won the state by 45 votes.

In Louisiana, Tilden appeared to have won the state by between 8000 and 9000 votes. The State Returning Board required that the Returning Board have five members with both parties represented, but there was only one Democrat on the Board, and he resigned prior to the 1876 election. The president of the Board had been Governor of Louisiana during Reconstruction, but had been removed as governor "for dishonesty." He remained on the Returning Board, however, and his three Republican colleagues were also not held in high regard by impartial observers. After taking testimony during 12 public sessions, the Board rejected more than 13,000 Democratic ballots, but only 2,500 Republican ballots. Hayes was declared the winner.

South Carolina saw illegal voting by both white Democrats and black Republicans. The Board of Canvassers certified Hayes as the winner. Courts in South Carolina, more sympathetic to the Democrats, held the members of the Board in contempt, fined them, and locked them up in the county jail. Nevertheless, Hayes prevailed.

It was accepted by both sides that the presidential electors pledged to Hayes had won in Oregon. One of the Republican electors, however, was not eligible to serve because he was a "fourth-class


postmaster and received an annual salary of $268,” an office of "Trust or Profit" under the Constitution. There was no disagreement about the postmaster's ineligibility, but Democrats and Republicans differed on how to interpret the state law governing how vacancies were to be filled. Republicans urged that the remaining electors should choose a replacement. This would have resulted in another Republican elector. Democrats argued that the candidate for elector with the next highest vote total should be elected. This interpretation would have led to a vote for Tilden.

While the House of Representatives possibly could have constitutionally elected the president because no candidate appeared to have won an electoral college majority, the prevailing uncertainty of the results in these four states, the almost certain existence of voting fraud, and the presence of violence on the streets by angry partisans, contributed to a very unstable political situation. Thus, members of Congress were apparently reluctant to exercise their constitutional prerogative to elect a president, and instead they created an ad hoc solution: a special Electoral Commission comprising of five congressional Democrats, five congressional Republicans, and five Supreme Court Justices.

The commission was created on January 29, 1877, when President Grant signed into law a bill creating a tribunal. Five of its members, or commissioners (three Democrats and two Republicans), would come from the House of Representatives and five (three Republicans and two Democrats) from the Senate. The remaining five would consist of Justices of the Supreme Court, including two Democrats (Clifford and Field) and two Republicans (Miller and Strong). These four Justices in turn were to select a fifth, the expectation being that they would agree on Justice David Davis who had once been a staunch Republican (and also Lincoln's campaign manager in the election of 1860), but whose recent vacillations left all unsure about his party loyalties. This arrangement thus provided for seven Democrats, seven Republicans, and one presumed independent.

Expectations were soon altered. William P. Pelton, Tilden's nephew, colluded with Democrats in the Illinois legislature to engineer Davis's election to the United States Senate. Perhaps their thinking was that Davis, out of gratitude to the Democrats, would favor Tilden. Or perhaps Tilden's supporters in Illinois wanted Davis off the Commission as he had been Lincoln's campaign manager in 1860. In any event, Davis announced his resignation from the Court to take effect on March 4, 1877, whereupon he would be sworn in as a senator. In the meanwhile, as a senator-elect, Davis could not sit as a judicial member on the Electoral Commission. The four judicial members of the commission then named Justice Bradley to take Davis' place. Justice Bradley was a Republican, but not an outspoken partisan. His political involvement over the years had been minimal, consisting of a single (and unsuccessful) campaign for a congressional seat in 1862.

In resolving the disputes from Louisiana and Florida, the commission's initial task was to decide whether it would look behind the officially certified election returns. Democrats argued that the official tallying of electoral votes in the presence of Congress made no sense if Congress could not be assured of the integrity of the votes. The question was critical and had not been answered by the statute setting up the commission. If the tribunal made its own independent assessment of validity, it would then have to consider evidence of voter intimidation and fraud, as well as the discounting

of Democratic ballots. Under that view, some of the electoral votes might be awarded to Tilden. On the other hand, if the commission decided it could not look behind the returns, then its role would be little more than assuring that the certifications had been presented in the proper form. Republicans argued that going behind the returns would place Congress in the unprecedented position of second-guessing state canvassing officials. They pointed to the specter of Congress making and unmaking election results from the states. On this and all other substantively important questions, members of the commission, including Justice Bradley, voted precisely according to party affiliation, accepting the Hayes electors from Louisiana and Florida by a vote of eight to seven.

Based upon similar reasoning, Democrats hoped to prevail in the Oregon dispute. If so, they would pick up the necessary and sufficient single electoral vote for Tilden. The state's governor (a Democrat) had certified that one Democratic and two Republican electors had been chosen. If the commission was not to look behind the official returns, Hayes seemed to face defeat. However, advocates for Hayes managed to turn things in his favor. Oregon state law made the Secretary of State (a Republican) the official canvassing authority. Refusal by the governor to sign that certificate of election did not undercut the validity of the conclusion of the canvassing authority. Members of the commission, again voting by party, decided eight to seven that the Secretary of State, not the Governor, spoke for the state. For later elections, that result was changed by 5 U.S.C. § 15, passed later in 1877, which makes the Governor the proper party to certify election returns.

By the same margin, the commissioners accepted the Hayes electors from South Carolina, in the last of the four cases they considered. These rulings favoring Republican electors in each state made it virtually certain that Hayes, not Tilden, would be the next president. The Republican Senate accepted the verdicts, and the Democratic House of Representatives rejected them. Under the terms of the statute that created the Electoral Commission, the Commission's judgments were to stand, unless a majority in both houses voted to discard them.

The outcome was costly to the Court. As stated by Professor Donald Stephenson:

Reflecting the consensus among Democrats that they had been duped into accepting the electoral commission . . . , [Justices] Field and Clifford conspicuously absented themselves from the inauguration of "His fraudulence," as critics had already begun to call the nineteenth president. A Republican paper decried their absence as "an act of discourtesy as discreditable and unworthy as it was uncalled for and undignified. . . ." Never one to keep opinions to himself, Field was believed to have started a rumor that Bradley changed his mind at the last minute on critical issues, after being visited by influential Republican leaders and railroad magnates. Bradley demanded that Field prove the accusation or retract it. Field insisted that he had been misquoted and misunderstood. Hard feelings between the two persisted. Moreover, the experience steeled Clifford to remain on the bench, incapacitated or not, until a Democrat again occupied the White House. While Garfield's election in 1880 made that hope impossible to realize, Clifford's mental deterioration soon posed a serious problem for Chief Justice Waite. With other members of the bench suffering various infirmities, a smaller number of Justices were left to shoulder an increasingly burdensome caseload.34

34 *Id.* at 472-73.
Despite this result, Field and Clifford performed a valuable public service in helping to resolve the electoral dispute. Nonetheless, participation by the Court in resolving the dispute meant that 5 Court members effectively decided the identity of the next president. Since 1877, this has happened only two other times: in 1974, when the Court’s decision in *United States v. Nixon* requiring President Nixon to turn over Watergate tapes to a special prosecutor, discussed at § 20.1.4.2.A, nn.60-61, precipitated Nixon’s resignation and made Vice President Gerald Ford president; and in 2000, when the Court’s decision in *Bush v. Gore* terminated the Florida Supreme Court’s recount order in Florida, which handed the White House to George W. Bush, discussed at § 26.5.3 nn.525-42.

In terms of who can run for President, 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 12th Amendment provides that “no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.”

Under Article II, § 1, cl. 6, “In Case of the Removal of the President from Office, or of his Death, Resignation, of Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President,” with Congress providing by law for Presidential succession in the case both the President and Vice President cannot serve. The 12th Amendment (1804) contains provisions, never used, regarding the Vice President serving as President in case the President was not chosen by inaugural day, at that time, March 4th. The 20th Amendment (1933) changed inauguration time to noon of January 20th, and provided that the new Congress would be seated noon of January 3rd. Following President Franklin Delano Roosevelt being elected President 4 times (1932, 1936, 1940 & 1944), the only President elected for more than 2 terms, the 22nd Amendment (1951) provided that no individual could be elected to the Presidency more than twice, and that any individual serving more than two years of another President’s terms would be counted for purposes of this rule as having been elected to that position. The 25th Amendment (1967) provides more detailed rules regarding how to proceed in the event the President is removed from office or on death, incapacity, or resignation. As noted at § 20.1.1.1 n.3, under current law the order of succession is the Vice President, the Speaker of the House, the President Pro Tempore of the Senate, and then members of the Cabinet. No succession other than the Vice President has ever occurred.

§ 20.1.2.2 Congressional Elections

Article I, § 2, cl. 3 provides, “Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.” The clause continues, “The actual Enumeration shall made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct.”

Under Article I, § 2, cl. 1, “The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors [voters] in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.”
Under Article I, § 2, cl. 2, “No Person shall be a representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.” Under Article I, § 2, cl. 5, “The House of Representatives shall chuse their Speaker and other Officers.”

Under Article I, § 3, cl. 1, “The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature therefore, for six Years. Article I, § 3, cl. 2, provided for dividing the seats of the Senators into three Groups, so that roughly 1/3 of the Senate is up for reelection every 2 years. Under Article I, § 3, cl. 3, “No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.” Article I, § 3, cl. 4 & 5 provide that the “Vice-President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided” and the “Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice-President.” Under Article V, “no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.” These procedures for Senate election based on equal state representation, while the House membership is based on population, was part of the “Grand Compromise” between large and small states at the Constitutional Convention, and departed from the Articles of Confederation, which had a unicameral legislature with each state having one vote.

Under Article I, § 5, cl. 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.” As discussed at § 17.3.4.4 n.556, the Court held in *Powell v. McCormack*35 that Congress cannot add qualifications to the constitutionally prescribed list of age, years of citizenship, and state residence to deny someone a seat in Congress, or expel a sitting member, by simple majority vote. Regarding exclusion, Article I, § 5, cl. 2 provides, “Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the concurrence of two thirds, expel a member.” Under Article I, § 5, cl. 3, “Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment 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.” Under the 27th Amendment, noted at § 20.1.1.3 n.26, pay increases for members of Congress go into effect only after the next regular election.

The right to vote has been the subject of numerous constitutional amendments. Under the 15th Amendment (1870), the right to vote for federal or state offices shall not be denied “on account of race, color, or previous condition of servitude.” Under the 17th Amendment (1913), state legislature election of Senators was abandoned to provide for election of Senators by popular vote, subject to the same voting requirements as for the House of Representatives. Under the 19th Amendment (1920), the right to vote for federal or state offices shall not be denied “on account of sex.” Under the 23rd Amendment (1961), the District of Columbia was granted electoral votes for President as

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if it were a state. Under the 24th Amendment (1964), the right to vote for federal officials shall not be denied “by reason of failure to pay a poll tax or other tax.” As discussed at § 26.5.3 n.515, in 1966 in Harper v. Virginia State Board of Elections, the Court extended the poll tax ban to state elections under a fundamental right, strict scrutiny analysis. Based in part of the fact that 18-year-olds were being drafted for the Vietnam War, under the 26th Amendment (1971), the right to vote for federal or state offices shall not be denied anyone of 18 years or older “on account of age.”

The only major constitutional issue represented by these provisions concerns the manner in which the Census Enumeration is to be taken under Article I, § 2, cl. 3. As discussed by Professor Thomas R. Lee, in an elaborate treatment of the issue, there is:

an extensive historical record – of both British and American origin – that supports the conclusion that the generation of the Framers understood that an "actual enumeration" would consist of an actual count and would not be based on statistical estimation. Specifically, . . . assessments of population on both sides of the Atlantic routinely contrasted methods of drawing "conjectural estimates" with the more costly approach of conducting an "actual enumeration." Moreover, . . . historical evidence [shows] that the Framers' generation was well aware of the principal "modern" objection to enumeration – that the inherent limitations of such an approach predictably lead to an undercount. Thus, . . . the Framers prescribed a census by "actual enumeration" not out of naiveté or unfamiliarity with methods of estimation, but to minimize the risk of political manipulation in what they knew would always be a politically charged decision – the apportionment of seats in the U.S. House of Representatives.36

Based in part over a concern with whether “sampling” would be constitutional, a 5-4 Court held in Department of Commerce v. United States House of Representatives37 that the current census statute requires an “actual enumeration.” On the other hand, in Utah v. Evans,38 the Court upheld a census practice known as “hot deck imputation,” which infers that the address or unit about which the Census Bureau is uncertain has the same population characteristics as those of its geographically closest neighbor of the same type. The Court held that such an imputation does not involve generalizations from a limited data base, as would “sampling,” but rather reflects a dwelling-by-dwelling approach, using reasonable inferences to arrive at the most accurate count possible.


37 525 U.S. 316, 343-44 (1999); id. at 357 (Stevens, J., dissenting, joined by Souter & Ginsburg, JJ., as to Parts I & II, and Breyer, J., as to Parts II & III).

38 536 U.S. 452, 457-58 (2002); id. at 488-90 (Thomas, J., joined by Kennedy, J., concurring in part and dissenting in part) (“hot deck imputation” authorized by statute, but unconstitutional as being an “estimated” enumeration, not “actual” enumeration); id. at 510-14 (Scalia, J., dissenting) (parties lack standing, because given the posture of the case the issue is not redressable by the courts). On the “census issue” generally, see Robert R. McCoy, Note, A Battle on Two Fronts: A Critique of Recent Supreme Court Jurisprudence Establishing the Intent and Meaning of the Constitution’s Actual Enumeration Clause, 13 Cornell J.L. & Pub. Pol’y 637, 643-59 (2004).
§ 20.1.3 Impeachment Power of Congress

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.” 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.” 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.”

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. Eleven district court judges have been impeached of out more than 2,000 who have served, and six have been convicted.39 Regarding Presidents, only two of 43 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, noted at § 19.4.3.2 nn.117-18, fell one vote shy of two thirds (35-19); votes on the two articles of impeachment for President Clinton regarding his actions in grand jury testimony denying a sexual relationship with an intern, Monica Lewinsky, growing out of a deposition given in Clinton v. Jones, discussed at § 20.1.4.2.A nn.69-74, 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 ever 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 proceedings to try to impose the additional punishment, discretionary with the Senate, of disqualifying him from holding office again, but the Senate vote to convict (37-25) failed to achieve the required 2/3 majority.40

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 on whether the charges were proven as true. It seems likely that answers to both questions are "no."

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.41 For example, proceedings surrounding the Senate’s refusal to convict President Clinton suggest that for some Senators even if the President had violated criminal law, some violations do not rise to the level of an impeachable offense, and alternatively, even if he had not violated the law, some behavior may be impeachable in any event.42 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.43

With regard to the second question, the Supreme Court held in *Nixon v. United States*44 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. As discussed at § 17.3.4.5 nn.571-73, 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. Similarly, 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.

§ 20.1.4 Immunities from Suit

§ 20.1.4.1 Congressional Immunities: The Arrest and Speech or Debate Clauses

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.45

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.46  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
Congress against the other party suggest that right should be personal to the member of Congress.47

This interpretation was adopted by cases during the early part of the natural law era, supported by
Justice Story in his 1833 Commentaries on the Constitution of the United States, and even adopted
by the Court during the formalist era in 1881, reflecting the moderate version of formalism that had


46 Id. at 616-18.

the controlling votes during the formalist era.48 The moderate version is more willing to consider purpose than the literalism of extreme formalism. Thus, when members of Congress act within their legitimate legislative sphere and participate in activities relating to the passage of legislation or other matters within Congress' jurisdiction, the Speech and Debate Clause is an absolute bar to judicial interference via civil or criminal process.49 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 their legislative activities.50

An issue has arisen, however, how broadly to define the activities of the legislative process to which the Speech or Debate Clause applies. Clear examples of legislative activity include authorizing an investigation or issuing a subpoena. On the other hand, does “legislative act” include the act of interviewing sources used to collect information in preparation for committee hearings? Is “informing the public” viewed as a “legislative act” for purposes of this analysis? A majority of the Court held in Gravel v. United States51 that the Speech or Debate Clause cannot be used to prevent questioning regarding sources used to collect information to prepare for a hearing, or to arrange for private publication of documents used at a hearing, in this case The Pentagon Papers relating to the Vietnam War, as those activities are not “legislative acts” under the Speech or Debate Clause. Reflecting the liberal predisposition to favor the legislative branch, three liberal instrumentalist Justices dissented from both of these conclusions. Even Justice Stewart dissented from the conclusion regarding inquiry into sources, noting that the “acquisition of knowledge through a promise of non-disclosure of its sources will often be a necessary concomitant of effective legislative conduct, if members of Congress are properly to perform their constitutional duty.”52

In Hutchinson v. Proxmire,53 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, as that kind of activity is also 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.”54 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


51 408 U.S. at 621-26.

52 Id. at 633 (Douglas, J., dissenting); id. at 659-64 (Brennan, J., joined by Douglas & Marshall, JJ., dissenting); id. at 629 (Stewart, J., dissenting in part).


54 Id. at 122 n.10.
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.

In applying the Speech or Debate Clause doctrine, the key question is the nature of the member’s activities, not the member’s motives. The Court does not inquire into a member’s motives, but focuses on whether the acts are part of the legislative process. It is an open question whether the Clause immunizes a congressional employer from suit for gender discrimination brought by a former employee, although after Clinton v. Jones, discussed at § 20.1.4.2.A, where the President was not given immunity in a sexual harassment lawsuit, immunity for members of Congress seems unlikely. Representative Dan Rostenkowski of Illinois contended during the proceedings against him that he was immunized from action for his activities in connection with the House Post Office because they related to his legislative duties, and because the power of the House to make rules, he said, is exclusive with respect to behavior covered by those rules. Since activities related to the House Post Office are not related to passage or enforcement of legislation, however, this argument seems weak.

§ 20.1.4.2 Executive Immunities

A. The President

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.

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

55 Id. at 136 (Stewart, J., dissenting in part); id. at 136 (Brennan, J., dissenting).


58 See generally Fields v. Office of Eddie Bernice Johnson, 459 F.3d 1 (D.C. Cir. 2006) (en banc); Bastien v. Office of Senator Ben Nighthorse Campbell, 390 F.3d 1301, 1304 (10th Cir.2004), cert. denied, 126 S. Ct. 396 (2005) (Speech or Debate Clause bars judicial review of allegedly discriminatory personnel decision only when the plaintiff's claim "question[s] the conduct of official Senate legislative business.").

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*, 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*, the President’s claim of privilege was based on only a general need for confidentiality, not a specific need to protect military, diplomatic, or sensitive national security interests. However, the judicial need was for specific evidence that could not be obtained from another source. In such a circumstance, the Court held the President's interest in confidentiality was outweighed by the judicial need to do justice in criminal prosecutions with respect to turning over specific material to a judge for *in camera* inspection. The Court held that the President's generalized interest in confidentiality must yield to a demonstrated, specific need for evidence in a criminal trial. Justice Rehnquist did not participate because of his service as a deputy attorney general in the Nixon Administration before joining the Court.

Whether the result would have been the same had the balance of needs been different seems questionable. Thus, had the President been able to argue that he had a specific need for confidentiality in the case, or had the case involved a generalized need for confidentiality balanced against a generalized need for information at trial, the result in *Nixon* might have changed. Given only a generalized need by the President, and a special need by the 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. 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 under separation of powers doctrine, claiming he had an interest in presidential privacy which deserved protection. The Court affirmed a dismissal of Nixon's complaint. For the Court, Justice Brennan conceded in *Nixon v. Administrator of General Services* 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

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61 *Id.* at 713.

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. Therefore, with respect to screening by archivists, the Act was not invalid on its face.

Presidential authority in the area of executive privilege was enhanced by Cheney v. United States District Court for the District of Columbia.63 In this case, the Court that 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 Nixon. The Court noted:

[W]hen compared against United States v. Nixon's criminal subpoenas, which did involve the President, the civil discovery here militates against respondents' position. The observation in 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 target[s] for suits for civil damages."

Finally, the narrow subpoena orders in 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 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, moreover, fell on the party requesting the information.64


64 Id. at 386-87 (citations omitted).
Numerous commentators have explored the separation of powers issues involved in these cases, whether or not executive privilege is officially invoked, as they arise in both Republican and Democratic Administrations. 65

With respect to damage claims for official presidential acts, even those within the "outer perimeter" of official responsibility, the Court adopted a test of absolutely immunity in *Nixon v. Fitzgerald,*66 rather than a balancing test. For a 5-Justice majority composed of conservative and centrist Justices, who tend to defer more to exercises of presidential authority, Justice Powell said that anything less might subject the President to lawsuits for practically everything done, thus undermining efficient operations of the executive branch, since the President, as the head of the executive branch, is a unique target for lawsuits. Regarding the concern with tyranny, Justice Powell said there remains enough protection against Presidential misconduct because of impeachment, other checks and balances, the power of the press, a desire to earn re-election, the need to maintain prestige, and a President's traditional concern for historical stature. Four functional, liberal Justices – Justices Brennan, White, Marshall, and Blackmun – favored only a qualified immunity in situations where there was no showing that the absence of absolute immunity would substantially impair the President's ability to carry out his constitutional functions.67 This dissent is consistent with the liberal predisposition to defer less to the executive.

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. 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. The natural law preference for deciding cases on narrow grounds, discussed at § 12.2.2.2 nn.65-66, caused Justice Powell to reserve this question in *Fitzgerald.*68

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66 457 U.S. 731, 748-63 (1982).

67 Id. at 764-70 (White, J., joined by Brennan, Marshall & Blackmun, JJ., dissenting).

68 Id. at 748 n.27 (Powell, J., opinion); id. at 763 n.7 (Burger, C.J., concurring).
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*, 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.

Writing for a unanimous Court, Justice Stevens said that because this action was against the President for non-official conduct, alleged sexual advances, there was no real possibility that the decision in this case might curtail the scope of the executive branch's official powers, nor the same likelihood of the President being a target for lawsuits as in *Fitzgerald*. Based on this language, 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” and thus outside the President’s “official” responsibility. The Court in *Fitzgerald* thus indicated that a case, like *Fitzgerald*, which involved a claim of a retaliatory firing, could not be brought against the President even if there were a possible argument that the President’s decision was not based on official authority to act. A later Supreme Court wishing to limit the *Jones* decision predominantly to cases of activities that occurred before the President took office, the core holding of *Jones* given its facts, could use this language in *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 *Jones* opinion that *Fitzgerald’s* reasoning “provides no support for an immunity for unofficial conduct.”

With respect to potential burdens the litigation might impose on the President, Justice Stevens concluded that “[m]ost 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 the facts of *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 for which he was personally

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69 520 U.S. 681, 694-95, 701-10 (1997).
70 *Fitzgerald*, 457 U.S. at 756-57.
71 *Jones*, 520 U.S. at 694.
72 *Id.* at 708.
responsible, since the case did not involve his official actions as President, and thus there was no real argument that the government should pay the cost of the litigation. Justice Stevens did note that burdens on the President are appropriate matters for the district court to evaluate in its management of the case, and underscored the respect owed the presidency that should inform the entire proceeding. Further, Justice Stevens noted that if Congress wished to pass a statute granting immunity from lawsuits to Presidents while in office, there was no apparent constitutional barrier to such a statute. Although the issue has never arisen, the predominant view is that the President cannot be indicted while in office, with a minority of commentators taking the opposing view.

B. Immunity for Lower Federal Officials

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. Vilas* 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. These decisions reflected the conservative pro-executive mindset of the formalist-era Justices, as well as their preference for clear bright-line rules.

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. Liberal instrumentalists Chief Justice Warren and Justices Douglas and Brennan dissented, foreshadowing the instrumentalist approach toward 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.

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73 *Id.* at 708-10.


75 161 U.S. 483, 498 (1896).


77 360 U.S. 564, 571-75 (1959) (plurality opinion of Harlan, J., joined by Frankfurter, Clark & Whittaker, JJ.); *id.* at 576 (Black, J., concurring).

78 *Id.* at 578 (Warren, C.J., joined by Douglas, J., dissenting); *id.* at 586 (Brennan, J., dissenting); *id.* at 586 (Stewart, J., dissenting).
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.79 As applied in 1978 in *Butz v. Economou*,80 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.81 Four Justices dissented in *Butz* and suggested adherence to *Spalding*: conservative Chief Justice Burger, and Justices Rehnquist and Stewart, reflecting conservative deference to the executive, noted at § 6.2.2.4, and moderate instrumentalist Justice Stevens, who also voted with the majority in *Fitzgerald* to give the President absolute immunity there, discussed at § 20.1.4.2.A nn.66-68.82 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.83

In applying the *Butz* test, the Court has had to decide whether “objective reasonableness” should be determined, as its plain meaning suggests, 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 acknowledged in *Harlow v. Fitzgerald*84 that prior Court opinions had stated that the test has both an “objective” and “subjective” component. However, because resolving evidence concerning the party’s mental state would often preclude the ability to decide the immunity issue at a summary judgment stage, and this would subject the executive branch to greater costs in defending such litigation, the Court held in *Harlow* that the test is a pure objective one concerning what “a reasonable person would have known” and that “allegations of malice” are not relevant to the qualified immunity analysis.

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80 *Butz*, 438 U.S. at 508-17.

81 *Id.* at 506-08.

82 *Id.* at 517 (Rehnquist, J., joined by Burger, C.J., and Stewart & Stevens, JJ., dissenting).


In 2002, in *Hope v. Pelzer*, the Court phrased the *Harlow* test as whether the individual was objectively put on “fair notice” that the conduct was unlawful, rejecting any requirement that prior cases had established “fundamentally similar” or “materially similar” facts were unlawful. The Court noted, “[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances.” Reflecting the conservative predisposition to grant executive immunity, Chief Justice Rehnquist, and Justices Scalia and Thomas, dissented in *Hope* on the grounds that the executive officials could not reasonably have known their behavior of handcuffing an inmate to a hitching post for 7 hours as punishment for disruptive behavior, being shirtless all day while the sun burned his skin, given water only once or twice and no bathroom breaks, was a violation of his 8th Amendment rights to not endure cruel and unusual punishment.

Reflecting the liberal predisposition in favor of protecting individual civil rights, and less concern with executive immunities, a 3-Justice instrumentalist concurrence in *Harlow* noted that in their view even under *Harlow* “the official who actually knows that he was violating the law” will not escape liability “even if he could not ‘reasonably have been expected’ to know what he actually did know. Thus, the clever and unusually well-informed violator of constitutional rights will not evade just punishment for his crimes.” Whether this reading of *Harlow* is accurate or not has been left unresolved, as the unusual fact pattern of such a “clever and unusually well-informed violator” has not been presented to courts for review. It is clear, however, that if the law the official is alleged to have violated requires evidence of intent or purpose to trigger a violation of the law, evidence of mental intent is relevant to making the finding that a statutory or constitutional violation has occurred, that finding being a necessary predicate, of course, for the issue of a qualified immunity defense to such a violation to be relevant.

Regarding circumstances where absolute immunity might be appropriate under the “special functions” exception, prosecutors have been granted absolute immunity for actions taken in the course of the prosecutorial role, as have other executive officials with adjudicatory roles. However, this does not extend to immunity for criminal acts, like bribery, since those are not part of the prosecutorial role. Similarly, judges have been granted absolute immunity for actions taken in their official role, but can also be tried for bribery, which is not part of the judicial role.

In a case with important implications after 9-11, 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:

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85 536 U.S. 730, 741 (2002); id. at 752-58 (Thomas, J., joined by Rehnquist, C.J., and Scalia, J., dissenting).

86 Id. at 821 (Brennan, J., joined by Marshall & Blackmun, JJ., concurring).


88 See generally *Harlow*, 457 U.S. at 807; *Bust*, 438 U.S. at 510-11.
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. The judicial process is an arena of open conflict, and in virtually every case there is, if not always a winner, at least one loser. It is inevitable that many of those who lose will pin the blame on judges, prosecutors, or witnesses and will bring suit against them in an effort to relitigate the underlying conflict. National security tasks, by contrast, 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 on the Attorney General's performance of his national security tasks.

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 to prevent unjust results. 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.89

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.

In deciding these cases, the Supreme Court has created a two-step analysis. As stated in Brosseau v. Haugen,90 the court must first ask if “[t]aken in the light most favorable to the party asserting the injury, do the facts alleged show the officer’s conduct violated a constitutional right?” If a violation is shown, the court must then consider whether a reasonable person in the circumstances would have known that a clearly established constitutional right has been violated. The Court noted in Brosseau, “Qualified immunity shields an officer from suit when she makes a decision that, even if

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constitutionally deficient, reasonably misapprehends the law governing the circumstance she confronted. . . . Because the focus is on whether the officer had fair notice that her conduct was unlawful, reasonableness is judged against the backdrop of the law at the time of the conduct. If the law at that time did not clearly establish that the officer’s conduct would violate the Constitution, the officer should not be subjected to liability or, indeed, even the burden of litigation.”

This two-step approach has been criticized by lower court judges and commentators as requiring courts to make an “unnecessary” initial decision, sometimes difficult, on whether a constitutional right was violated, even if it is clear, under the second part of the test, the court would grant immunity anyway because any violation, even if it exists, was not clearly established at the time of the violation.91 The Supreme Court’s approach does have the advantage, however, of helping to clarify constitutional doctrine for purposes of executive action in the future. It is thus consistent with a natural law concern for reasoned and predictable elaboration of the law.

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.92 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. § 1983.93

As a special branch of executive immunity doctrine, in Feres v. United States94 the Court stripped service members of their ability to sue for injuries caused by gross negligence or even intentional torts. This immunity gives the military discretion over the levels of risk and precautions that are appropriate for service members. While this immunity was not the product of clear legislative intent in the Federal Tort Claims Act (FTCA), but rather a determination by the Court that such immunity was needed to maintain an effective military, Congress has acquiesced in this reading of the FTCA.

§ 20.1.4.3 Judicial Immunity and Congressional Interference with the 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 or actions taken in the complete


absence of all 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 when rendering decisions on state law.

Another aspect of judicial immunity is the immunity that judges have, pursuant to *Marbury v. Madison*, to be the authoritative interpreters of the Constitution, discussed at § 17.1.2.1. Thus, attempts by Congress to overrule judicial decisions on the meaning of the Constitution are void. For example, in *City of Boerne v. Flores*, discussed at § 28.3 n.47-51, the Court struck down the Religious Freedom Restoration Act. That Act purported to overrule *Employment Division v. Smith*, by requiring the Court to apply strict scrutiny in cases involving a state law that substantially burdens a person's free exercise of religion, rather than the rational basis scrutiny applied in *Smith* to a law of general applicability, which affected religious exercise only incidentally, and not in conjunction with other constitutional protections, such as freedom of speech. Justice Kennedy wrote that Congress cannot "define its own powers" by "altering" the Constitution as interpreted by the Court.

A third 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, as discussed at § 17.1.4 nn.63-64, no serious momentum exists for any constitutional amendment along these lines. As noted at § 17.1.4 n.65, the life-tenure provision is relatively unique among countries in the world, with most European constitutional courts limiting appointment from 6-12 years.

Another congressional interference with the judicial process occurs where the legislature engages in the judicial function of defining individual punishment in violation of the Constitution’s Bill of Attainder Clause. That Clause is discussed at § 23.2.2.1.

§ 20.1.4.4 Sovereign Immunity of the United States from Suit

In a suit against the United States, a plaintiff must state not only a basis for the court's jurisdiction,
discussed at § 17.2; establish that the case is justiciable under the doctrines of standing, ripeness, mootness, and political questions, discussed at § 17.3; and indicate a valid cause of action, discussed at § 17.4, but also must demonstrate a waiver of the federal government's sovereign immunity. Absent such a waiver, the court lacks subject matter jurisdiction. Professor Kovacs has written:

[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 sovereign immunity, noted at § 17.2.4.2 n. 210, because] 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 that waive the United States' sovereign immunity, however, 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.98

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."99 Also, the court must have subject matter jurisdiction, which is usually supplied by 28 U.S.C. § 1331, dealing with jurisdiction for federal questions.

Before 1976, § 1331 extended jurisdiction only to cases in which the amount in controversy exceeded $10,000. That created a problem for judicial review of administrative action where the right asserted could not be easily valued in dollars and cents. Thus, in 1976, Congress eliminated that monetary requirement in cases against the United States, federal agencies, and federal officials sued in their official capacities.100 As noted at § 17.2.2.1.B n.111, Congress eliminated a monetary requirement in all federal question cases in 1980.


100 Kovacs, supra note 98, at 83.
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 sovereign immunity. For example, during the formalist era, the Court held in Noble v. Union River Logging Railroad Co.\textsuperscript{101} 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." This doctrine was based on a traditional common law tort action against a federal officer.

Similar to the replacement of the common law “cause of action” requirement with a more separation-of-powers based “distinct injury” requirement in standing doctrine, discussed at § 17.3.1.2.C, the Holmesian era brought a change in terminology here also. The common law tort theory fell away and was replaced by the theory that a federal officer acting unlawfully is not acting on behalf of the sovereign and thus not protected by sovereign immunity. In Larson v. Domestic & Foreign Commerce Corp.,\textsuperscript{102} the Court explained that actions of a government officer that are ultra vires or unconstitutional "are considered individual and not sovereign actions," and hence, may be restrained.

Since the inclusion of a broad waiver of sovereign immunity in the APA in 1976, nonstatutory review has fallen into disuse, because it is rarely needed. But it still can apply. For example, in Chamber of Commerce of the United States v. Reich,\textsuperscript{103} the plaintiffs, advancing statutory and constitutional claims, challenged an executive order that authorized the Secretary of Labor to disqualify certain employers from federal contracts. Once the court concluded that the APA was not available because the complaint challenged presidential action, the District of Columbia Circuit Court of Appeals held that the plaintiffs did not need to cite a statutory cause of action because under Larson, "there is no sovereign immunity to waive – it never attached in the first place."

Given the importance of the “dual theory of sovereignty” in a modern natural law analysis, as noted at § 18.4.5 nn.236-38, regarding the Tenth Amendment, and at § 20.2.3, regarding federal immunities from state regulation, and the importance of sovereign immunity notions generally in terms of the current 11\textsuperscript{th} Amendment analysis, discussed at §§ 17.2.4.2-17.2.4.3, it can be predicted that the Supreme Court will limit the “nonstatutory review” doctrine today. Despite the wishes of those commentators who favor limited sovereign immunity, and a more expansive doctrine of nonstatutory review, the Court will likely ground any waivers of federal sovereign immunity in congressional action, as the Court did in Sosa v. Alvarez-Machain.\textsuperscript{104}

\textsuperscript{101} 147 U.S. 165, 171-72 (1893).

\textsuperscript{102} 337 U.S. 682, 689-93 (1949).

\textsuperscript{103} 74 F.3d 1322, 1324-29 (D.C. Cir. 1996), citing Larson, 337 U.S. at 689.

§ 20.2 Federalism Checks and Balances: Intergovernmental Immunities

§ 20.2.1 Federal Immunity from State Taxation

Reflecting the dual theory of sovereignty, it has been clear since *McCulloch v. Maryland*,\(^{105}\) 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 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.\(^{106}\) For many decades the Court expanded *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.\(^{107}\)

In 1939, however, the Holmesian Court abandoned in *Graves v. New York*\(^{108}\) 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.\(^{109}\) 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.\(^{110}\)

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\(^{105}\) 17 U.S. (4 Wheat.) 316 (1819) (state attempted to tax a branch of the Second National Bank).

\(^{106}\) 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).


\(^{109}\) 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).

The related issue of a state’s ability to tax individuals in ways that might burden interstate commerce is discussed as part of the dormant commerce clause analysis at § 20.3.2.4.A.

§ 20.2.2 State Immunity from Federal Taxation

During the formalist era, the Court held in Pollack v. Farmer’s Loan\textsuperscript{111} 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 violation of the 10\textsuperscript{th} 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.\textsuperscript{112}

In 1939, however, deferring once again to legislative judgments and adopting a functional approach, the Court held in Graves v. New York\textsuperscript{113} that the theory was no longer tenable that a tax on income is legally a tax on its source. 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.\textsuperscript{114}

In 1988, in South Carolina v. Baker,\textsuperscript{115} the Court overruled 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 10\textsuperscript{th} Amendment and the Guarantee Clause, as well as in the principles of federalism implicit in the Constitution.\textsuperscript{116} 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.\textsuperscript{117} 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.\textsuperscript{118}


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\item\textsuperscript{111} 157 U.S. 429 (1895).
\item\textsuperscript{112} Collector v. Day, 78 U.S. (11 Wall.) 113 (1870).
\item\textsuperscript{113} Graves v. New York ex rel. O'Keefe, 306 U.S. 466, 480-87 (1939).
\item\textsuperscript{114} Massachusetts v. United States, 435 U.S. 444 (1978).
\item\textsuperscript{115} 485 U.S. 505, 516-26 (1988).
\item\textsuperscript{116} id. at 530 (O’Connor, J., dissenting).
\item\textsuperscript{117} id. at 512-13 (Brennan, J., opinion for the Court).
\item\textsuperscript{118} 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).
\end{enumerate}
§ 20.2.3  Federal Immunity from State Regulation

Since *McCulloch v. Maryland*,\(^{119}\) 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*,\(^ {120}\) 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*,\(^ {121}\) 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, only 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.\(^ {122}\)

In 1995, the Court struck down in *U.S. Term Limits v. Thornton*\(^ {123}\) 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), discussed at § 5.2.2.1.A n.34; the Court’s holding in *Marbury v. Madison* that Congress could not add to the Court’s original jurisdiction, discussed at § 17.2.2.1 n.101; and the Court’s holding in *Powell v. McCormack* that Congress cannot add to the qualifications of members for Congress, discussed at § 17.3.4.4 n.556. 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.”\(^ {124}\)

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 10\(^ {th} \) Amendment meant that because the Constitution does not expressly prohibit the states from enacting term limits, it raises no bar to such action.\(^ {125}\) The dissent was composed of the most conservative Justices on the Court, Chief Justice Rehnquist and Justices Scalia and Thomas, reflecting the conservative


\(^ {120}\) 352 U.S. 187, 189-90 (1956).


\(^ {122}\) Id. at 199 (Stewart, J., joined by Rehnquist, J., dissenting).


\(^ {124}\) Id. at 842 (Kennedy J., concurring).

\(^ {125}\) Id. at 845 (Thomas, J., joined by Rehnquist, C.J., and O'Connor & Scalia, JJ., dissenting).
predisposition to defer to states, noted at § 6.2.2.3, as well as Justice O’Connor, who often also strongly supported states’ rights, as noted at § 12.4.2 nn.181-83.

§ 20.2.4 State Immunity from Federal Regulation

States have immunity from federal regulation in areas where the federal government does not have power to act. For example, modern limitations on federal power to act under the Commerce Clause are discussed at § 18.2.5. Minimal limitations under the other provisions of Article I, § 8 are discussed at §§ 18.3.1-18.3.10. Even where the federal government does have power to act, the 10th Amendment provides some state immunity from federal regulations which “commandeer” state legislative, executive, or administrative systems. This 10th Amendment limitation is discussed at § 18.4.5. Additional limitations on federal power are noted at § 18.5. Limitations on federal power because of the 21st Amendment, which repealed Prohibition, are discussed at § 20.4.

§ 20 Federalism Checks and Balances: Federal Power Trumps States

§ 20.3.1 The Supremacy Clause and the Preemption of State Law

§ 20.3.1.1 Historical Overview of Preemption Doctrine

If Congress enacts a law that is constitutional, all conflicting state law is 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. Preemption is thus a statutory issue of congressional intent, not strictly speaking a constitutional doctrine.

In fact, Congress often does not consider the effects that its statutes may have on state law. It simply enacts legislation to achieve specific objectives. The Court is thus left to deal with situations in which state law may interfere with congressional purposes. This approach leaves room for judicial perspectives and judicial attitudes on specific subjects to influence decisionmaking. In every case, however, since the doctrine is based on statutory interpretation, if Congress wishes a different result, only a statutory amendment is required to clarify what is Congress’ preemptive intent.

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, discussed at § 14.2.1, meant that few areas of conflict arose. When such conflicts arose, the Court did not create any preemption nuances. Instead, as in Gibbons v. Ogden in 1824, the Court simply noted that if there is a collision between federal and state law, the state law must yield.


127 22 U.S. (9 Wheat.) 1, 210-11 (1824).
During the first part of the formalist era, 1873-1937, when Congress continued to do little to regulate commerce, the Court addressed few cases of federal preemption. Later, as the need for federal economic regulation became more evident and Congress gradually became more active, the Court tended to adopt a formalist, bright-line rule that if Congress regulated in an area, Congress should be taken to have occupied the field. Thus, congressional action would preempt all state laws in the area, even though there may have been no federal rule on the specific particular matter 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. For example, in *Campbell v. Hussey*, the Court held that provisions of the Georgia Tobacco Identification Act were preempted by the Federal Tobacco Inspection Act. The 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, which had the result of enhancing the price of Georgia tobacco. The federal law merely required a label truthfully showing the tobacco's official federal type. Justice Douglas' opinion for the Court said that Congress had preempted the field so that all related state regulations were invalid. Dissenting Holmesians Frankfurter and Harlan joined in an opinion by formalist Justice Black which objected that there was no indication of congressional intent to preempt complementary state regulation.

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. 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. Justice White, dissenting, with Justices Douglas, Black and Clark, concluded instead that there was no state health interest, and that

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129 331 U.S. 218, 229-31 (1947).

130 368 U.S. 297, 300-02 (1961); id. at 302-13 (Black, J., joined by Frankfurter & Harlan, JJ., dissenting).

131 373 U.S. 132, 143-46 (1963); id. at 165-74 (White, J., joined by Douglas, Black & Clark, JJ., dissenting).
the California law was only to protect the good will of the avocado industry, a more protectionist motive. With that perception, the dissent viewed the state statute as preempted by federal law.

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. However, even if Congress has not foreclosed state legislation in an area, state law is void if it conflicts with federal law. A conflict exists when compliance with both sets of regulations is impossible or the state law stands as an obstacle to accomplishing the purposes of Congress.

In Ray, the state of Washington first required that enrolled and registered oil tankers of at least 50,000 dead weight tons take on a pilot licensed by Washington. The Court unanimously agreed that this conflicted with a federal law which gave to the Coast Guard an exclusive authority regarding pilots on enrolled vessels. State pilot law, however, could apply to registered vessels for which there were no federal rules. Washington state next required that enrolled and registered tankers have certain safety features. The majority held that Congress intended uniform national standards on vessel safety and the marine environment. However, states can impose laws having other purposes, such as smoke abatement. Third, the majority agreed that Washington could require tug escorts for vessels over 40,000 DWT to protect its local environment. This was not the type of regulation that called for a uniform national rule. According to the record, it did not impede the free flow of commerce. Finally, Washington sought to exclude all vessels in excess of 125,000 DWT from Puget Sound. Justice White said that federal law, by allowing states to impose higher standards for "structures," implies that states shall not impose higher standards for "vessels." The federal law on vessel safety standards calls for factors to be considered by a single decisionmaker. The failure of federal law to ban all big tankers is like a regulation that they shall not be banned.

Justices Stevens and Powell dissented from the Court’s third conclusion. They said that requiring tug escorts on these vessels and not on others is invalid because of the need for uniform standards and the cost implications on interstate commerce. Regarding the fourth issue, Justice Marshall, joined by Justices Brennan and Rehnquist, dissented. They said that the federal law merely authorized federal regulations. None exist as to vessel size. State law should be displaced only to the extent needed to protect federal goals and, whenever possible, state and federal law should be reconciled. The tanker limit here, not shown to be irrational or a substantial burden on interstate commerce, does not violate the Commerce Clause. Justice Rehnquist probably was deferring to state decisionmaking; Justices Brennan and Marshall probably were concerned about the environment.

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133 Id. at 158-80.

134 Id. at 189 (Stevens, J., joined by Powell, J., concurring in part and dissenting in part); id. at 180-87 (Marshall, J., joined by Brennan & Rehnquist, JJ., concurring in part and dissenting in part).
§ 20.3.1.2  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 tests, however, the Justices do not always agree on: (1) when Congress has expressed an intent to preempt; or (2) whether the Court should find that the state law sufficiently obstructs federal law to be impliedly preempted. 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,\(^{135}\) or (ii) where state law stands as an obstacle to accomplishing Congress' purposes.

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, discussed at § 6.2.3.1 nn.72-90. 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 1992 case of Cipollone v. Liggett Group, Inc.\(^ {136}\) involved an example of express preemption. There, the Court dealt with Section 5(b) of the Federal Cigarette Labeling and Advertising Act. It provided that "no requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of" lawfully labeled cigarettes. The Court held that this preempted state common law claims based on a failure to warn, to the extent the claims were based on showing that post-enactment ads should have included better warnings. Also preempted were fraudulent misrepresentation claims that manufacturers neutralized federally mandated warnings by other statements. However, the federal law was held not to preempt claims based on breach of express warranty, on fraudulent misrepresentation by way of false statements and concealment of material facts in ads, promotions, or other channels of communication, and on conspiracy to misrepresent or conceal material facts concerning health hazards of smoking. The Court explained that Congress had here considered the issue of preemption and, therefore, the Court need only identify the domain expressly preempted by the Act. The central inquiry based on Congress' language in the statute was to ask whether the legal duty that is the predicate of each of

\(^{135}\) See Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963) ("A holding of federal exclusion of state law is inescapable and requires no inquiry into congressional design where compliance with both federal and state regulations is a physical impossibility for one engaged in interstate commerce, cf. Union Bridge Co. v. United States, 204 U.S. 364, 399-401 (1907); Morgan v. Virginia, 328 U.S. 373 (1946); Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959). That would be the situation [in Florida Lime, discussed supra note 131] 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.").

the possible common law damage actions constitutes a "requirement or prohibition based on smoking and health imposed under State law with respect to advertising or promotion."

As to breach of express warranty, a common law remedy for a contractual commitment voluntarily undertaken should not be regarded as a "requirement imposed under State law," within the meaning of 5(b). Claims relating to false representations are not predicated on a duty based on smoking and health, but rather on a more general obligation – the duty not to deceive. Justice Blackmun's dissent, joined by Justices Kennedy and Souter, but not by Justices Stevens or O'Connor, agreed that preemption of state common law claims should not be found in the absence of clear and unambiguous evidence that Congress intended that result, but found no intent to preempt state common-law damages actions in the language of the federal law. Such actions, Blackmun said, did not impose a "requirement or prohibition." In contrast, reflecting the conservative predisposition to protect business from regulation, Justices Scalia and Thomas would have found all the state law claims were preempted.

In 2000, in United States v. Locke, the Court unanimously applied field and conflict preemption doctrine to state regulation of oil-carrying vessels. The Court in Locke considered whether the state of Washington’s regulations for oil tankers were preempted by federal law. The Court noted that Title II of the Ports and Waterways Safety Act of 1972 covered the “design, construction, alteration, repair, maintenance, operation, equipping, personnel qualification, and manning” of tanker vessels. In this area the federal government has long been involved and has a concern for uniformity. Thus, Congress left no room for state regulation of these matters. As a result, field preemption applied and there was federal preemption of Washington’s requirements on crew training, English language proficiency, navigation watch requirements, and reporting requirements – all of which were not confined to the operation of vessels within Washington’s waters. To allow Washington law to apply to these matters would be to compromise the uniformity sought to be achieved by federal rules. The case was remanded for the trial court, applying field preemption analysis, to determine whether any other Washington regulations survived.

In contrast, Title I of the Oil Pollution Act of 1990 said that any state could impose additional liability with respect to the discharge of oil. The Court said this avoided preemption only with respect to liability rules and not regulations of ship design or operations. The federal law allowed state regulations based on the peculiarities of local waters, but not wide-ranging regulation of the at-sea operation of tankers. Applying conflict preemption analysis, Justice Kennedy said that states would be preempted when creating an obstacle to the accomplishment of the full purposes of Congress, such as when the Coast Guard had promulgated its own requirement on a subject or had

137 Id. at 531-44 (Blackmun, J., joined by Kennedy & Souter, JJ., concurring in part and in the judgment in part, and dissenting in part).

138 Id. at 544 (Scalia, J., joined by Thomas, J., concurring in the judgment in part and dissenting in part).

139 529 U.S. 89 (2000).

140 Id. at 96-116.
decided that no such requirement should be imposed at all. However, this would not be true as to local rules of Washington which pose only a minimal risk of innocent noncompliance, do not affect vessel operations outside the jurisdiction, do not require adjustment of systemic aspects of the vessel, and do not impose a substantial burden on the vessel’s operation within the local jurisdiction itself – as, for example, requiring a tug escort for certain vessels and requiring a registered vessel to take on a local pilot.141

Another 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,142 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 Kennedy objected to finding implied conflict preemption other than where state laws impose bars or obligations which directly contradict Congress' primary objectives. Justice Kennedy believed the dissent was wrong, however, in attributing to Congress an intent to allow a hodge-podge scheme of authority whereby federal standards could be supplemented by state standards. This disagreement between the majority and dissent seems to have been largely the result of whether a Justice perceived Congress to have been concerned primarily with minimum standards for worker safety, in which case there was no preemption, or uniform standards, in which case preemption would be found.143

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. He did not find express preemption and would hold here that as long as compliance with federal safety standards does not render obedience to state law impossible, enforcement of the state law should not be held barred by the Supremacy Clause. 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.144

Four additional preemption decisions provide a glimpse into the Court’s current preemption analysis. These cases suggest that the liberal instrumentalist preference for additional state regulation of business not to be preempted, as in Florida Lime, no longer has resonance with a majority of the Court. For example, in Norfolk Southern Railway Co. v. Shanklin,145 the Court applied field preemption, finding that state law regarding what warning devices were required at a grade crossing

141 Id. at 116-17.
143 Id. at 110-14 (Kennedy, J., concurring in part and concurring in the judgment).
144 Id. at 114-122 (Souter, J., joined by Stevens, Blackmun & Thomas, JJ., dissenting).
145 529 U.S. 344, 352-59 (2000); id. at 360-61 (Ginsburg, J., joined by Stevens, J., dissenting).
was preempted by federal standards that applied whenever warning devices were installed by the use of federal funds. The Court refused to find an exception where the warning device provided only minimal protection, i.e., was the familiar black-and-white X-shaped sign with the words “Railroad Crossing.” The opinion was written by Justice O’Connor. Justice Ginsburg dissented with Justice Stevens. She said the outcome defied common sense and sound policy. She said the case gave the railroads a double windfall in that the federal government foots the bill for crossing signals and that same expenditure spares the railroads from state tort liability.

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.”

In *Buckman Co. v. Plaintiffs’ Legal Committee*, the Court unanimously held that state common law claims for fraudulent representations made to the federal Food and Drug Administration (FDA) were preempted by the Act which created that agency. Chief Justice Rehnquist noted that policing fraud against federal agencies is hardly a field that the states have traditionally occupied such as to warrant a presumption under *Rice* against finding federal preemption. Further the relationship involved was inherently federal in character because it originates from, is governed by, and terminates according to federal law. Plaintiffs were injured by a medical device approved by the FDA after the FDA was told that it was substantially equivalent to an approved device. Rehnquist said that to allow a state action where the FDA had taken no action might discourage would-be applicants from seeking such approval for fear that they might be exposed to state-law claims. Further, to protect against such claims an applicant might submit a deluge of information that would create administrative burdens. Justice Stevens, concurring with Justice Thomas, said that if the FDA had determined that a fraud had been committed and had then removed the product from the market, a state damage remedy would not encroach upon, but rather would supplement, the federal enforcement scheme.

The Court was more divided in *Egelhoff v. Egelhoff ex rel. Breiner*. There the question was whether the federal ERISA Act, which deals with the administration of retirement plans, had pre-
emptied a Washington statute that provided that the designation of a spouse as the beneficiary of an asset not included in probate is revoked automatically upon divorce. The federal administrators wanted to distribute life insurance and pension proceeds to the woman designated by a decedent. However, his children by a previous marriage contended that they were statutory heirs under state law. As has been true of many cases involving ERISA, a majority of the Court concluded that the state statute was expressly preempted by the language of ERISA, which stated that ERISA “shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan” covered by ERISA. Justice Thomas said that the Washington statute runs counter to ERISA’s command that a plan should specify the basis on which payments are made. The Washington statute did not do that and, if it were allowed to control, would interfere with nationally uniform plan administration. Thus, it “related to” the benefit plan and was preempted.

Justice Scalia, concurring with Justice Ginsburg, said that “relate to” should be interpreted as merely referring to the Court’s jurisprudence concerning field and conflict preemption, rather than anything else, since as a matter of abstract definition, everything “relates to” everything else. Justice Breyer, dissenting with Justice Stevens, said that he agreed with Justice Scalia’s approach to “relate to,” but that no plausible preemption principle leads to a conclusion that ERISA preempted the entire field of state law governing inheritance. He pointed out that the beneficiary’s plan provided that when a beneficiary designation is “invalid” the benefits will be paid to the children if there is no surviving spouse. The Washington statute merely filled the gap by providing that a designation is invalid when there is no longer such a person as X, wife. In the field of family property, a field of traditional state regulation, there is a strong presumption under Rice against preemption that should be applied. There is no substantial disruption with federal administration because the administrators already had to familiarize themselves with state law in order to deal with such situations as those existing when a beneficiary kills the employee.

An additional recent preemption case suggests that the Rice presumption is still strong in cases outside ERISA. In Bates v. Dow Agrosciences LLC, peanut farmers sued the supplier of a pesticide for claims such as breach of warranty, fraud, and negligent testing because it developed that on soils having pH levels of 7.2 or higher, as is typical in Western Texas, the pesticide severely damaged peanut crops while failing to control the growth of weeds. The defendant argued that plaintiff’s claims were preempted by 7 U.S.C. § 136v(b) of the Federal Insecticide, Fungicide, and Rodenticide Act, a comprehensive regulatory statute that includes many labeling requirements for pesticides. The section provides that states “shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter.” A nearly unanimous Court reversed a lower court decision which found preemption because the new knowledge would induce a pesticide manufacturer to change its label. The Court held that this was not a “requirement” within the meaning of the federal law, saying, “An occurrence that merely


151 Id. at 153-61 (Breyer, J., joined by Stevens, J., dissenting).

motivates an optional decision does not qualify as a requirement.” The opinion by Justice Stevens continued, “In areas of traditional state regulation, we assume that a federal statute has not supplant ed state law unless Congress has made such an intention ‘clear and manifest.’”

Justice Thomas, joined by Justice Scalia, concurring in the judgment in part and dissenting in part, cautioned that states may not impose liability for labeling requirements predicated on distinct state standards of care. He also said that the Rice presumption should not apply when Congress, as here, has included within a statute an express preemption provision. Thus, the Court’s task was simply to determine which state law claims were preempted by § 136v(b), without slanting the inquiry in favor of either the federal government or the states. Nevertheless, Justice Thomas concluded by observing that in his view, “Today’s decision comports with this Court’s increasing reluctance to expand federal statutes beyond their terms through doctrines of implied preemption.”

§ 20.3.2 Dormant Commerce Clause Review of State Economic Regulations

§ 20.3.2.1 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 1824 in Gibbons v. Ogden as ensuring national economic solutions to national economic problems, as discussed at § 18.2.1.1 nn.48-54, 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

During the original natural law era, the Court was faced more with defining federal and state constitutional power to regulate, as discussed in Gibbons v. Ogden at § 18.2.1.1, rather than the interplay between federal and state power when both have the power to regulate. Reflecting a strong version of federalism, consistent with Professor Crosskey’s theory of strong federal supremacy, discussed at §§ 18.1 n.1 & 18.1.1 nn.7-8, Justice Johnson, concurring in Gibbons, had argued that where Congress has the power to regulate commerce, states have no power to regulate at all. As noted at § 18.2.1.1 n.59, the majority in Gibbons in 1824 acknowledged that this position “has some force,” but instead adopted the view, consistent with the “dual theory of sovereignty,” that even where Congress has the power to regulate commerce, states retain as well their own power to regulate commerce for local purposes. Similarly, the Marshall Court held in 1829 in Willson v. 

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153 Id. at 455-59 (Thomas, J., joined by Scalia, J., concurring in the judgment in part and dissenting in part). On issues surrounding preemption in the context of state tort law, see generally Richard C. Ausness, Preemption of State Tort Law by Federal Safety Statutes: Supreme Court Preemption Jurisprudence since Cipollone, 92 Ky. L.J. 913 (2003-04).

154 22 U.S. (9 Wheat.) 1, 204 (1824).
that states are not barred by the Commerce Clause from interfering with free trade when legislating for local purposes, in this case placing a dam across a local river, unless the state law “under all the circumstances of the case, be considered as repugnant to the power to regulate commerce in its dormant state, or as being in conflict with any law passed on the subject.” The Court rejected the argument of the challenger that the state law was invalid because the dam obstructed navigation on the river and that an unfettered right of navigation “is necessary for the purpose of commerce to the whole people of the United States.”

The Taney Court clarified 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, although Justice Story dissented from this conclusion, reflecting Professor Crosskey’s theory of federal supremacy. The Taney Court noted in 1856 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, 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.

While the majority of the Taney Court could agree on these basic propositions about dormant commerce clause analysis, in terms of applying the dormant commerce clause test, a majority of the Taney Court could not agree on a single approach. As often happens in the initial stages of judicial development of a doctrine, different formulations of the same idea were advanced and supported by different judges, each seeking ultimately to convince the majority of the felicity of that judge’s phraseology. For example, in 1847 in The License Cases, six Justices penned separate opinions. In 1849 in The Passenger Cases, eight separate Justices wrote opinions.

Dormant commerce clause doctrine remained undeveloped during this period primarily because the major source of contention in these cases was the constitutional issue of federal versus state power

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156 Mayor, Alderman and Commonalty of City of New York v. Miln, 36 U.S. (11 Pet.) 102, 132-38 (1837); id. at 153-61 (Story, J., dissenting).
158 46 U.S. (5 How.) 504 (1847) (state laws requiring a license to sell intoxicating liquor were unanimously sustained on different theories that congressional power was not exclusive, that the laws were not a regulation of commerce, or that they had been validated by long usage).
159 48 U.S. (7 How.) 283 (1849) (in a 5-4 opinion, state taxes imposed on alien passengers arriving from foreign countries were held invalid regulation of foreign commerce, with the dissenters arguing that Congress’ power was not exclusive, and this was a valid exercise of traditional state police power to raise revenue).
to regulate, not the dormant commerce clause of issue of conflict between state and federal statutes when both have the power to regulate. For example, as discussed at § 18.2.1.2 n.65, in *Cooley v. Board of Wardens*, 160 decided in 1851, the main focus of the Court’s analysis was the conclusion that “some subjects are in their nature national” and thus appropriate only for federal regulation, but that some subjects are so local that they are subject only to state regulation, and over some subjects there is concurrent state and federal power. Building on the *Cooley* theory, the Court held in 1852 in *Veazie v. Moor* 161 that Maine’s grant of an exclusive license of navigation on the upper part of the Penobscot River, which is located entirely within Maine, was a proper exercise of state regulation. On the other hand, based on the *Cooley* theory that some subjects are exclusively for Congress, the Court held in 1869 in *Woodruff v. Parham* 162 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**

The Dormant Commerce Clause cases between 1873 and 1937 reveal another aspect of the judicial development of doctrine. Terminology used with respect to one doctrine often is borrowed by judges and used in a related context, particularly if no previous agreed-upon test is currently in use. As discussed at § 18.2.2, between 1873 and 1937 the Court adopted a “direct versus indirect” test to determine congressional power to regulate economic activity affecting commerce under the Commerce Clause. Similarly, between 1873 and 1937, the Court used a “direct versus indirect” test to determine which state laws excessively burden interstate commerce under dormant commerce clause doctrine.

Under this doctrine, states were able to enact safety regulations that only "indirectly" affected interstate commerce. 163 The Court held that states cannot directly burden interstate commerce even if Congress has not acted. 164 However, questions of degree were sometimes involved in drawing the line between "directly" or "indirectly" affecting interstate commerce.

A law was considered directly to affect interstate commerce if its purpose was to prohibit interstate competition. 165 Direct affects could also result from a law that had a substantial affect on interstate commerce.

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161 55 U.S. 568, 571-75 (1852).
163 Erb v. Morasch, 177 U.S. 584 (1900) (speed ordinance which applied to all trains).
164 Hannibal v. Husen, 95 U.S. 465 (1877) (state ban on cattle driving); Crutcher v. Kentucky, 141 U.S. 47 (1891) (states cannot protect local citizens from unreliable businesses by requiring licenses for agents of foreign express companies engaged in interstate commerce, a right which every citizen is entitled to under the Constitution and laws of the United States).
165 Buck v. Kuykendall, 267 U.S. 307 (1925) (license denied highway common carrier on ground that a route was already served; such a bar on commerce was held to have a direct impact
commerce. Thus, a state speed-check law that affected 124 railroad crossings and increased running time was held invalid as a direct burden.166 A state regulation of the purchase of wheat for interstate shipment was similarly held a direct burden on interstate commerce.167 However, a state could refuse to issue a certificate to operate a motor carrier on an interstate run because of safety concerns about a congested route where the carrier had not applied for an alternative route and had not shown the unavailability of a feasible, less congested route.168

The pattern of case results indicates that the Court was making judgments on whether particular restraints on the import of goods were more than what was needed for reasonable protection of a local interest, such as health. For example, in Hannibal v. Husen,169 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.” However, in Mintz v. Baldwin,170 a state was allowed to require imported cattle to be from a herd certified free of Bang's disease. The Court also held 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."171

As discussed at § 18.2.3, this “direct versus indirect” distinction became discredited with respect to Commerce Clause analysis after 1937. Similarly, modern formalist Justices are not likely to advocate a return to the “direct versus indirect” distinction under dormant commerce clause analysis today. However, the fact that dormant commerce clause review has no textual support in the Constitution, and the fact that it has evolved into a judicial balancing test today, would likely mean that formalist Justices would be skeptical of the doctrine, and want to apply it sparingly.

166 Seaboard v. Blackwell, 244 U.S. 310 (1917).


168 Bradley v. Public Utilities Comm’n, 289 U.S. 346, 349-52 (1933) (Buck, cited supra note 165, was distinguished on the ground that there the license was denied to prevent undesirable competition in interstate commerce, whereas here the effects on interstate commerce of a denial based on safety reasons were merely incidental). This type of problem regarding state regulation for economic reasons no longer arises in the transportation industry because the federal government now regulates all interstate transportation and communication. 49 U.S.C. § 301-327.

169 95 U.S. 465, 469-74 (1877).


For this reason, it is not surprising that Justices Scalia and Thomas have indicated a desire to abandon traditional scrutiny of state regulations under the dormant commerce clause. Initially, Justice Scalia took the view that he would find a state law invalid under dormant commerce clause review only if it accorded discriminatory treatment to interstate commerce in a respect not required to achieve a lawful state purpose. Moreover, his view, shared by Justice Thomas, is to strike down state statutes under dormant commerce clause review that involve “rank discrimination against citizens” or are indistinguishable as a matter of “settled law” from prior Court precedents. As Justice Scalia phrased this point in American Trucking Association, Inc. v. Michigan Public Service Commission, 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.”

C. The Holmesian Era

As the Court did with many doctrines at the beginning of the Holmesian era in 1937, the Court rejected a formalist analysis for dormant commerce clause doctrine. Instead, the Court adopted a functional test that depended upon the impact of the state regulation on the free flow of commerce. The groundwork for this change in approach was laid by Justice Stone in 1927, dissenting in Di Santo v. Penn. Justice Stone said that the “direct/indirect” test was too mechanical, too uncertain in its application, and too remote from actualities. He added, "It seems that those interferences with commerce that are not deemed forbidden are to be sustained, not because the effect on commerce is nominally indirect, but because a consideration of all the facts and circumstances, such as the nature of the regulation, its function, the character of the business involved and the actual effects on the flow of commerce, lead to the conclusion that the regulation concerns interests peculiarly local and does not infringe the national interest in maintaining the freedom of commerce across state lines." Stone thus helped pave the way for a new test, and was able to write a majority opinion overruling Di Santo in 1941 in California v. Thompson. As the Court began looking realistically at economic effects after 1937, it recognized several different ways that state laws may adversely affect interstate commerce. The underlying theory behind dormant commerce clause review was phrased as follows:

175 Id. at 439 (Thomas, J., concurring in the judgment).
176 273 U.S. 34, 44 (1927) (Stone, J., joined by Holmes & Brandeis, JJ., dissenting).
177 313 U.S. 109, 113-16 (1941).
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. . . . [T]he Commerce Clause even without implementing legislation by Congress is a limitation upon the power of the States.178

The extent of this limitation will depend, of course, on how much deference is given to state legislative enactments. As discussed previously, Holmesian Justices give great weight to deferring to legislative and executive practice. In this case, however, the question is not whether to give deference to some governmental actor, but how much deference to give state action which has an effect on the federal interest in free trade.

On the one hand, a Holmesian Justice could give great deference to the state legislature’s interest. This would be consistent with the deference to government attitude reflected in rational basis review for congressional regulation of commerce and for determining whether laws violate the Due Process or Equal Protection Clauses, as stated in United States v. Carolene Products Co.,179 discussed at § 26.1.2.2. In South Carolina State Highway Department v. Barnwell Brothers,180 decided in 1938, the Court upheld a state law regulating truck width. The Court noted that Congress could determine whether the burdens imposed by a state on interstate commerce were too great. But without such legislation “the judicial function, under the commerce clause, as well as the Fourteenth Amendment, stops with the inquiry whether the state Legislature in adopting regulations such as the present has acted within its province, and whether the means of regulation chosen are reasonably adopted to the end sought.” As discussed at § 26.1.1.1 nn.22-24, under the 14th Amendment rational review analysis, the Court substantially defers to legislative judgment regarding the reasonableness of both legislative means and ends.

On the other hand, as noted in footnote 4 of Carolene Products,181 “deficiencies in the political process” may call for higher judicial review. It has been noted that state legislatures, because elected only by in-state citizens, may have a political predisposition for advancing local state parochial interests to the detriment of the national interest.182 As a result, the Court has increased the level of review for state commercial laws whose purpose is to protect local commerce from interstate competition by not deferring to legislative judgment regarding means and ends, as in H.P.


179 304 U.S. 144 (1938).

180 303 U.S. 177, 190 (1938).

181 304 U.S. 144, 152 n.4 (1938).

Hood & Sons, Inc. v. Du Mond, 183 and by stating, as in Dean Milk Co. v. Madison, 184 which involved a city ordinance discriminating against out-of-city and out-of-state milk refineries, that states, or cities as political subdivisions of the state, as in Dean Milk, must justify laws that discriminate against interstate commerce by showing that they serve a legitimate local purpose, unrelated to economic protectionism, that could not be served as well by reasonable nondiscriminatory means. This reflects the Holmesian view that deference to the government is not as appropriate where deficiencies exist in the political process, as discussed at § 10.2.1.2 n.18.

As in any common-law development of doctrine, earlier cases had to be limited, redefined, or overruled, to accommodate this shifting perspective. For example, in Southern Pacific Co v. Arizona, 185 the Court struck down a state limit on the maximum length of trains. The Court distinguished and limited Barnwell as a case involving state highways, a matter said to be "peculiarly of local concern." Candidly speaking, however, the Court's theory in Southern Pacific was at odds with what the Court had said in Barnwell. A more rigorous dormant commerce clause test emerged:

The matters for ultimate determination here are the nature and extent of the burden which the state regulation of interstate trains, adopted as a safety measure, imposes on interstate commerce, and whether the relative weights of the state and national interests involved are such as to make inapplicable the rule, generally observed, that the free flow of interstate commerce and its freedom from local restraints in matters requiring uniformity of regulation are interests safeguarded by the commerce clause from state interference. 186

The issue of how much deference to give state legislatures under the Southern Pacific case remains. As noted at § 10.3.3, in general conservative Holmesian Justices tend to give greater emphasis to deferring to state governments; more liberal Holmesian Justices tend to defer to the federal government. 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 applied the dormant commerce clause doctrine to support 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. 187

185 325 U.S. 761, 783 (1945).
186 Id. at 770-71.
187 See, e.g., Kassel v. Consolidated Freightways Corp., 450 U.S. 662 (1981); Hughes v. Oklahoma, 441 U.S. 322 (1979). In West Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 217 (1994), Chief Justice Rehnquist said in dissent, “The wisdom of a messianic insistence on a grim 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 . . . .” Id. at 217.
In an early case on interstate mobility, *Crandall v. Nevada*,\(^\text{188}\) decided in 1868, the Court spoke of a right to travel held by citizens of the United States, and a right in the United States not to have the states inhibit travel by United States citizens. During the Holmesian era, in 1941, a majority of the Court decided in *Edwards v. California*\(^\text{189}\) that a California law barring the import of a nonresident indigent was unconstitutional under the dormant commerce clause, citing *Baldwin v. G.A.F. Seelig, Inc.* Because the case involved people, not goods, four Justices said such a right was a privilege and immunity protected by the 14th Amendment, rather than a dormant commerce clause case.\(^\text{190}\) For each set of Justices, however, the basic doctrine was that the people of the several states must sink or swim together. The approach of the four Justices in *Edwards v. California* was adopted by a majority of the Court in 2000 in *Saenz v. Roe*.\(^\text{191}\) Thus, for discrimination against persons, 14th Amendment Privileges or Immunities Clause analysis applies today. As discussed at § 25.3, for substantial burdens that analysis adopts strict scrutiny review, rather than the second-order or third-order rational basis scrutiny under the dormant commerce clause, discussed next, at § 20.3.2.1. D.

**D. The Instrumentalist Era**

The instrumentalist-era Court between 1954 and 1986 continued the rigor of the *Southern Pacific* approach toward dormant commerce clause review. For example, in *Bibb v. Navajo*,\(^\text{192}\) the balancing test of *Southern Pacific* was used to invalidate 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.*,\(^\text{193}\) the Court struck down Iowa's ban on 65-foot doubles.

Like most judicially-created doctrines, the Court has elaborated the dormant commerce clause doctrine to respond to nuances presented by later factual cases coming before the Court. First, 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

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\(^{188}\) 6 Wall. 35 (1868).


\(^{190}\) *Id.* at 177-80 (1941) (Douglas, J., joined by Black & Murphy, JJ., concurring); *id.* at 181-82 (Jackson, J., concurring).

\(^{191}\) 526 U.S. 489, 500-01 (2000).


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 balancing test is the same in all sets of cases, with only the burden shifting. In practice, however, the instrumentalist Court stated that there is “a virtual *per se* rule of invalidity” for state legislation facially discriminating against interstate commerce or involving a discriminatory purpose or effect.

As the “virtual *per se*” language suggests, it can prove very difficult for the state to meet its burden in cases of discriminatory legislation. For example, in *Wyoming v. Oklahoma*, Oklahoma legislation required that Oklahoma coal-fired electric generating plants producing power for sale in Oklahoma must burn a mixture of coal containing at least 10% Oklahoma-mined coal. Oklahoma's concern to lessen the state's reliance on a single source of coal delivered over a single rail line was held not to be adequate to justify the law in terms of the local benefits and the unavailability of nondiscriminatory alternatives, because the state was using the illegitimate means of attempting to isolate itself from the national economy. Further, Congress had not unambiguously manifested an intent to permit such a violation of the Commerce Clause as Oklahoma here attempted to justify. However, in *Maine v. Taylor*, the Court held that Maine could bar the import of baitfish in order to protect a fragile fishery environment from parasites, there being no available alternative testing mechanism to keep non-indigenous species from harming Maine’s rivers.

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200 477 U.S. 131, 144-52 (1986).
As these cases suggest, though the instrumentalist Court tinkered with the dormant commerce clause tests, the Court did not reject the basic notion that the dormant commerce clause contains an implied negative prohibition against state laws that interfere with interstate commerce. This negative overrode for liberal instrumentalist Justices their predisposition to favor laws regulating businesses. Indeed, in 1977, the Court in *Boston Stock Exchange v. State Tax Commission*, reiterated the Holmesian-era statement:

> [W]e begin with the principle that '[t]he 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. . . . [T]he Commerce Clause even without implementing legislation by Congress is a limitation upon the power of the States.' *Freeman v. Hewit*, 329 U.S. 249, 252 (1946).\(^{201}\)

Applying this policy, the Court has held that state laws that directly regulate interstate commerce, as by regulating transactions in other states, are invalid,\(^{202}\) as are laws whose purpose or primary effect is to favor local economic interests.\(^{203}\)

The instrumentalist Court noted that even the *Pike v. Bruce Church* test for even-handed state regulations, which nevertheless incidentally burden interstate commerce, is more stringent than the minimum rational review test used under the Equal Protection Clause. Under minimum rational review, as discussed at § 26.1.2.1 nn.22-24, courts should substantially defer to legislative judgment concerning the weight given to the statute’s conceivable purposes and the rationality of the statutory means to advance that end. Because of the suspicion of state legislative motives in cases involving dormant commerce clause review, no such deference is given under the dormant commerce clause.

\(^{201}\) 429 U.S. 318, 328 (1977).

\(^{202}\) Brown-Forman Distillers Co. v. New York State Liquor Authority, 476 U.S. 573 (1986) (invalid to bar distillers from selling in New York at prices higher than the lowest price to be charged elsewhere, per a posted price list for future sales); Healy v. The Beer Institute, Inc., 491 U.S. 324 (1989) (local prices tied to the lowest prices charged in other states had the illegitimate practical effect of controlling conduct beyond the state's borders; also, the statute was discriminatory on its face because it applied only to brewers and shippers of beer in interstate commerce and, thus, created a disincentive for companies doing business in the state to engage in interstate commerce).

\(^{203}\) Philadelphia v. New Jersey, 437 U.S. 617 (1978) (barring import of waste to preserve local landfill space, the Court noting that there was no other reason than their origin for treating them differently; the state was merely trying to isolate itself from a problem shared by all); New England Power Co. v. New Hampshire, 455 U.S. 331 (1982) (barring export of electricity until local users were served); Wyoming v. Oklahoma, 502 U.S. 437(1992) (resident coal-fired electric generating plans serving Oklahoma customers were required to burn at least 10% Oklahoma-mined coal).
Instead, 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.

In dormant commerce clause cases, as under minimum rational review, the Court will consider any conceivable purpose that could be used to support the statute, and will not restrict itself to “actual purposes,” despite an attempt by Justices Brennan and Marshall to support the “actual purpose” standard. The use of “legitimate” legislative goals to support state laws under dormant commerce clause review, as well as the “any conceivable purpose” approach, makes dormant commerce clause review a species of rational review. Because of the lack of substantial deference to the legislature, however, the *Pike v. Bruce Church* test reflects “second-order” rational review, as discussed at § 7.2.1 text following n.42, rather than minimum rational review. Because the burden shifts to the government in the other three kinds of dormant commerce clause cases, these cases reflect “third-order” rational review, as discussed at § 7.2.1 text following n.42.

In engaging in dormant commerce clause review, the district court will hear the evidence concerning the state’s alleged legitimate interest, as well as evidence concerning the burden on interstate commerce. The district court will then 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 appeal only if it is “clearly erroneous.”

§ 20.3.2.2    The Modern Standards for Dormant Commerce Clause Review

A. Basic Doctrine

The Court has continued the Holmesian and instrumentalist-era dormant commerce clause doctrine during the modern natural law era, which is consistent with the broad outlines of Chief Justice Marshall’s opinion in the 1829 *Willson v. Black Bird Creek Marsh Co.* case. The Court continues to use the various tests derived from *Pike v. Bruce Church* and *Maine v. Taylor*, echoing *Maine v.*

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205  See, e.g., Kassel v. Consolidated Freightways Corp., 450 U.S. 662, 670-71 (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.


207  See *id.* at 670-71.

In stating that a state law that discriminates against interstate commerce, as by putting burdens on interstate commerce not shared by local interests favored by the legislation, must be justified by the state through showing that the law serves a legitimate local interest, unrelated to economic protectionism, that cannot be served as well by reasonable nondiscriminatory means. Of course, 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. This Taylor test is also identified with Dean Milk v. Madison, Hunt v. Washington, and Hughes v. Oklahoma.

Cases from the instrumentalist era left unclear how tough the heightened scrutiny was in cases involving facial discrimination, or a discriminatory purpose or effect. The analytic bias of a natural law judicial decisionmaking approach has pressed for greater clarity regarding the level of review. The instrumentalist-era cases spoke of “a virtual per se rule” and “the strictest scrutiny,” which suggest an approach akin to a strict scrutiny approach. However, the cases did not require the states to advance “compelling governmental interests” to support their laws. They only adopted the rational review standard of “legitimate interests.” Further, the cases never made clear whether the “less discriminatory alternatives” component of dormant commerce clause review is the strict scrutiny “least restrictive alternatives” test, or rather simply a rational review balancing of benefits and burdens in light of available nondiscriminatory alternatives.

In the Equal Protection context, facial discrimination based upon race, discussed at §§ 26.2.1.1, or a discriminatory intent to engage in racial discrimination, discussed at § 26.2.1.2, triggers a strict scrutiny approach. Mere discriminatory effects, however, without a finding of discriminatory intent, do not trigger strict scrutiny, discussed at § 26.2.1.2. It would be somewhat anomalous for mere discriminatory effects to trigger strict scrutiny in the dormant commerce clause context, but not in the context of racial discrimination. Further, given the difficult line to draw between a state law, even-handed on its face, which has discriminatory effects on interstate commerce (to which the more stringent Maine v. Taylor dormant commerce clause review applies), and a state law, even-handed on its face with only incidental effects on interstate commerce (to which the Pike v. Bruce Church test applies), it would be somewhat anomalous for that difficult line-drawing task to result in a shift from the “second-order” rational review of Pike to a strict scrutiny approach.

For these reasons, probably the better analysis of the instrumentalist-era cases is that cases involving facial discrimination against interstate commerce, or discriminatory purpose or effects, trigger a “third-order” rational review approach, as defined at § 7.2.1 text following n.42. That level adopts the same kind of rational review balancing test as “second-order” rational review, but shifts the burden from the challenger to the state, as is true of the Taylor test. The “virtual per se rule of invalidity” would then reflect that when the state is engaged in such discrimination against interstate commerce.
commerce, the state’s interests would likely be sufficiently weak, and the burden on interstate commerce sufficiently great, that almost inevitably the burden on interstate commerce would be “clearly excessive,” a conclusion that could be reached without any extensive court analysis. In reaching this conclusion, the Court would apply not the strict scrutiny “least restrictive alternative” analysis, but would merely consider less discriminatory alternatives in the context of deciding whether the state’s statute represented a clearly excessive burden on interstate commerce.

This would be consistent with the way some lower federal courts are applying the dormant commerce clause test. For example, in McNeilus Truck & Manufacturing, Inc. v. Ohio, the Sixth Circuit Court of Appeals cited Supreme Court opinions suggesting that in both Pike and Taylor kinds of cases the “critical consideration is the overall effect of the statute on both local and interstate activity.” The McNeilus court also noted that in a Taylor kind of case, which involves discrimination against interstate commerce, the burden that falls on the state requires the state to justify their statute “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,” and related that part of the analysis to the similar focus on less discriminatory alternatives in Pike.

Despite this conclusion, some lower courts, based on the “strictest scrutiny” and “virtual per se rule of invalidity” language have begun to apply a version of strict scrutiny, as did the Fourth Circuit Court of Appeals in Waste Management Holdings, Inc. v. Gilmore. Interestingly, though applying strict scrutiny, the Gilmore court would have permitted the state to satisfy the first prong of strict scrutiny based not on showing a compelling governmental interest, the normal strict scrutiny standard, but rather only by showing a “legitimate” governmental interest “other than economic protectionism.” This rational review kind of approach is supported by Supreme Court precedents, as the Gilmore court acknowledged. Regarding the “less restrictive alternative” analysis, the Fourth Circuit did apply a rigorous, strict scrutiny “least discriminatory alternative” analysis.

At some point, the Supreme Court will need to decide whether to ratify this Fourth Circuit approach, or adopt the suggested analysis proposed above and reflected in the Sixth Circuit opinion. If the Court decides to go with the strict scrutiny approach, it would probably be best to clarify the standards for proving discriminatory purpose versus effect, and perhaps make the doctrine more similar to that under the Equal Protection Clause, where only discriminatory purpose triggers strict scrutiny, not mere discriminatory effects, if a similar strict scrutiny standard is going to be used.


213 Id. at 443, citing Hunt, 432 U.S. at 353; Taylor, 477 U.S. at 141; Pike, 397 U.S. at 142.

214 252 F.3d 316, 333-34 (4th Cir. 2001).

215 Id. at 341-45.

216 On this issue of discriminatory purpose versus effect in dormant commerce clause cases, see Julian Cyril Zebot, Awakening a Sleeping Dog: An Examination of the Confusion in Ascertaining
B. The Market Participant Exception

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. 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.”217 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.

In addition, the Court has created an additional exception to dormant commerce clause review under the “market participant” exception. Beginning in 1976, in Hughes v. Alexandria Scrap Corp.,218 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 Hughes opinion was decided 6-3, with an opinion authored by natural law Justice Powell. He was joined by Justices whose decisionmaking style all shared the analytic leanings of either a natural law or formalist approach: Justice Stewart, a conservative Holmesian with natural law leanings; Justice Rehnquist, a conservative Holmesian with formalist leanings; Justice Blackmun, a moderate instrumentalist with natural law leanings; and Chief Justice Burger, a moderate formalist. Thus, although the doctrine was created during the instrumentalist era, it was adopted over the dissents of the most functional Justices on the Court at the time, instrumentalist Justices Marshall and Brennan, and liberal Holmesian, Justice White. Moderate instrumentalist Justice Stevens concurred in the majority’s result, but he indicated that he did not think the market participant doctrine would have much practical effect on dormant commerce clause review generally.219

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219 Id. at 814-15 (Stevens, J., concurring); id. at 817-23 (Brennan, J., joined by White & Marshall, JJ., dissenting).
The market participant theory was elaborated further in 1980 in *Reeves, Inc. v. Stake*,\(^\text{220}\) where the Court held that South Dakota could prefer its 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 burdened 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.*,\(^\text{221}\) 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. Wunnicke*.\(^\text{222}\) 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. Justice White distinguished *Hughes* on the ground that Alaska participated in the timber market, but imposed conditions "downstream" in a different market – the timber-processing market. Also, while the state had a market participant interest as a private trader in the immediate sales transaction, the antitrust laws place limits on vertical restraints, and downstream restrictions have a greater regulatory effect than do limits on the immediate transaction.

In *Wunnicke*, Justices Powell and Chief Justice Burger agreed with the “regulator/market participant” distinction, but would have remanded the case to the district court to apply that test in the first instance. Justices Rehnquist and O’Connor, dissenting, said Alaska was only doing indirectly what it could do directly, *i.e.*, sell only processed logs.\(^\text{223}\)

\(^{220}\) 447 U.S. 429, 434-40 (1980); *id.* at 452-54 (Powell, J., joined by Brennan, White & Stevens, JJ., dissenting).

\(^{221}\) 460 U.S. 204, 209-10 (1983); *id.* at 223-24 (Blackmun, J., joined by White, J., concurring in part and dissenting in part).

\(^{222}\) 467 U.S. 82, 93-101 (1984); *id.* at 101 (Marshall, J., took no part in the decision).

\(^{223}\) *Id.* at 101 (Powell, J., joined by Burger, C.J., concurring in part and concurring in the judgment); *id.* at 101 (Rehnquist, J., joined by O’Connor, J., dissenting).

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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, which the Court so far 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.

C. New Areas for Dormant Commerce Clause Review

One new area where dormant commerce clause doctrine may have some affect is with respect to the Internet. Over the last few years, state governments have taken a variety of steps within their borders to regulate Internet content flows, including regulating users, hardware and software, Internet service providers, and financial institutions within their territory. In a leading case in this area, American Libraries Association v. Pataki, a federal district court in New York was confronted with a New York statute that prohibited the intentional use of the Internet "to initiate or engage" in certain pornographic communications deemed to be "harmful to minors." As two authors have noted, in enjoining enforcement of the law, the court reasoned:

Because it is difficult for content providers to control access to their websites and communications, a content provider outside New York might inadvertently send proscribed content into New York. Fear of liability in New York thus might chill the activities of a content provider operating legally in California, thereby affecting legitimate commerce wholly outside New York. Moreover, because states regulate pornographic communications differently, "a single actor might be subject to haphazard, uncoordinated, and even outright inconsistent regulation by states that the actor never intended to reach and possibly was unaware were being accessed." These extraordinary burdens on Internet communication were said to outweigh any regulatory benefit in New York. In sum, "the Internet is one of those areas of commerce that must be marked off as a national preserve to protect users from inconsistent legislation that, 


taken to its most extreme, could paralyze development of the Internet altogether.\footnote{228}

The reasoning of *American Libraries Ass'n* extends far beyond the regulation at issue in that case, and threatens to invalidate most state regulation of Internet communications. The decided cases to date have mostly involved pornography regulations and anti-spam statutes, but the logic of the case, and other cases that follow its reasoning,\footnote{229} extend to state anti-gambling laws, computer crime laws, various consumer protection laws, libel laws, licensing laws, and many more. Many academic commentators support the emerging conventional wisdom among courts that the dormant commerce clause requires invalidation of many state Internet communication regulations.\footnote{230} Others have suggested the dormant commerce clause principles, properly applied, “leaves states with much more flexibility to regulate Internet transactions than is commonly thought.”\footnote{231}

In *State v. Heckel*,\footnote{232} the Washington Supreme Court rejected a dormant commerce clause challenge to a commercial electronic mail act, which prohibited misrepresentation in the subject line or transmission path of unsolicited commercial e-mail (UCE) messages. The Court noted that in contrast to the statute in *American Libraries Ass'n*, which could reach “all content posted on the Internet and therefore subject individuals to liability based on unintended access, the Act [in *Heckel*] reaches only those deceptive UCE messages directed to a Washington resident or initiated from a computer located in Washington; in other words, the Act does not impose liability for messages that are merely routed through Washington or that are read by a Washington resident who was not the actual addressee.” Under *Pike*, based on this less severe burden on interstate commerce, summary judgment in favor of the challenger was improper.

Another area where dormant commerce clause doctrine might have some applicability concerns state laws that affect aspects of foreign relations and foreign commerce. Even in the absence of finding such a state law is implied preempted by an Act of Congress, as was the case in *Crosby v. National*
Foreign Trade Council, discussed at § 20.3.1.2 n.146, or similarly preempted by Presidential or administrative agency action pursuant to delegated power from Congress, discussed at § 19.2, or any direct Presidential action under the President’s foreign affairs power, discussed at § 19.3.2, there is an argument that general dormant commerce clause principles should render such state laws invalid as impermissible burdens on foreign commerce.233 There is also an argument that certain of such state laws, in the unusual case that they would not be rendered invalid under preemption or dormant commerce clause principles, could be viewed as invalid as in conflict with the power of the President and Congress to deal with foreign affairs through the Treaty Power, discussed at § 18.3.9, or preempted pursuant to federal common law, discussed at § 20.3.4.1.B.234

§ 20.3.2.3 Analysis of Dormant Commerce Clause Cases Generally

A majority of the Supreme Court Justices appear to believe that after decades of close judicial review, congressional silence manifests an intent that the Court's free trade policy as implemented by dormant commerce clause review should be maintained. Or they may believe that without the Court's review of state commercial laws, Congress might overreact to state laws that burden interstate commerce and thus produce negative results for state "sovereignty." Or, they may be working from implications. Justice Kennedy said in Carbone v. Clarkstown,235 "The Commerce Clause presumes a national market free from local legislation that discriminates in favor of local interests." The Court has recently turned down a request that it reconsider its dormant commerce clause jurisprudence.236

The current two-level system is an improvement over the pre-1937 doctrine represented by Cooley v. Board of Wardens. Under the current approach, state laws that regulate transactions in other states or which discriminate against interstate commerce are subjected to a heightened level of scrutiny under Maine v. Taylor. Such “rank discrimination” against interstate commerce clearly violates the purpose behind the Commerce Clause, and is not the subject of much debate. Applying the Pike v. Bruce Church balancing test to evenhanded legislation has caused some Justices greater concern.

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236 South Central Bell Telephone Co. v. Alabama, 526 U.S. 160, 171 (1999) (request not made until a brief was filed on the merits); id. (O’Connor, J., concurring) (no reason given to reconsider or abandon the Court’s well-established body of Commerce Clause jurisprudence).
For example, concurring in *Bendix Autolite Corp. v. Midwesco Enterprisers, Inc.*, Justice Scalia said the Court should engage in dormant commerce clause review only if a state statute is discriminatory, and thus the *Taylor* test applies, or creates an impermissible risk of inconsistent regulation by more than one state, and thus implied preemption principles would apply. Justice Scalia charged that determining whether interstate commerce is excessively burdened by state law, as called for by the *Pike* balancing test, is an inquiry ill-suited to the judicial function because it is like asking whether a particular line is longer than a particular rock is heavy. Justice Thomas has joined Justice Scalia in his criticism of *Pike*.

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 burdened by a state law, choose to bring that complaint to a court for initial review. Congress, of course, can 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. If there was no such dormant commerce clause review, states might vigorously regulate commerce and Congress either might not react at all, or might be goaded into a strong counter-reaction that could deprive the states of all independence in the matter.

Chief Justice Rehnquist has not joined with Justices Scalia and Thomas in their rejection of the *Pike v. Bruce Church* test. However, his conservative preference for states’ rights meant that he was reluctant to invalidate state laws under the Commerce Clause. His reasoning techniques included pushing for greater use of minimum rational basis scrutiny in cases of traditional local concern, such as highway safety cases, and overlooking an appearance of discrimination if the state could have reached the same result by using nondiscriminatory means.

For example, in *Bendix Autolite Corp. v. Midwesco Enterprisers, Inc.*, Justice Kennedy wrote that an Ohio statute that tolled a 4-year statute of limitations on breach of contract and fraud cases for persons or corporations who are not “present” in the state failed post-1937 dormant commerce clause review balancing as an excessive burden on interstate commerce. Justice Scalia concurred in the result because the Ohio tolling statute, applying only to out-of-state corporations, was discriminatory on its face and Ohio had not shown the absence of reasonable nondiscriminatory alternatives, since the Ohio tolling statute applied even to corporations fully able to be sued in Ohio. Chief Justice Rehnquist dissented on the ground that Ohio could have required Bendix to appoint

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240 *Bendix*, 486 U.S. 888, 891-95 (1988); *id.* at 895-98 (Scalia, J., concurring in the judgment).
an agent to receive process before allowing it to install a furnace in Ohio. Thus, Rehnquist concluded that there was no discrimination against interstate commerce in the case.\textsuperscript{241}

The question remains whether Justice Scalia is correct in his criticism of the \textit{Pike} balancing test. Would his view better contribute to constructive long-run systemic consequences? One's answer may depend on evaluating cases that have invalidated state laws by using \textit{Pike} balancing and whether one believes it is important for states to be free to experiment when Congress has not acted. If Justice Scalia's view had been used, the following representative sample of post-1937 cases, in which state laws were struck down by \textit{Pike}-like balancing, would likely have been decided the other way:

\begin{enumerate}
\item \textit{Southern Pacific} (1945) (Arizona train length rules).\textsuperscript{242}
\item \textit{Bibb} (1959) (Illinois mud-guard law).\textsuperscript{243}
\item \textit{Pike} (1970) (Arizona ban on export of cantaloupes unless marked "Packed in Arizona," as applied to a shipper who would have had to spend $200,000 to build a packing plant).\textsuperscript{244}
\item \textit{Kassel} (1981) (Iowa ban on 65-foot doubles).\textsuperscript{245}
\item \textit{Edgar v. Mite} (1982) (Illinois Business Takeover Act required prior registration of takeover offers where residents owned 10\% of a company's securities, and the Act limited offeror communication with shareholders).\textsuperscript{246}
\end{enumerate}

On balance, the Nation's interests appear to have been advanced by striking down the state laws in these cases. Thus, there is at best an uneasy case for \textit{Pike} review. Without \textit{Pike} review, Congress would be forced to become more regularly involved in reviewing state legislation that interfered with free trade. In addition to the concerns with the institutional mechanisms and inertia of Congress discussed above, whether that would be a good idea also depends upon whether Congress’ performance in considering trade legislation and free trade issues supports the view that Congress would do a better job than the Court in considering these issues, or rather is too greatly influenced by political considerations. Under dormant commerce clause doctrine, of course, if Congress disagrees with any Court decision under the dormant commerce clause, Congress can enact corrective legislation. 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, if Congress so wished. Congress has shown no interest to do either.

\textsuperscript{241} \textit{Id.} at 898-900 (Rehnquist, C.J., dissenting).
\textsuperscript{242} \textit{Southern Pacific Co.} v. \textit{Arizona}, 325 U.S. 761 (1945).
\textsuperscript{244} \textit{Pike} v. \textit{Bruce Church, Inc.}, 397 U.S. 137 (1971).
\textsuperscript{245} \textit{Kassel} v. \textit{Consolidated Freightways Corp.}, 450 U.S. 662 (1981).
\textsuperscript{246} \textit{Edgar v. Mite}, 457 U.S. 624 (1982).
§ 20.3.2.4 Different Subject Areas of Dormant Commerce Clause Review

Because dormant commerce clause doctrine is so fact specific, predicting applications of the doctrine requires study of the specific applications that the Court has decided over time. To predict any particular result, it is useful to ask what kind of government regulation is involved (e.g., a tax case, a subsidy case, a price-fixing case, a health or safety measure); what area is being regulated (e.g., a milk case, a waste disposal case, a transportation case); and how the regulation operates (e.g., does it involve in-coming commerce or out-going commerce). To provide some insight into this kind of fact-specific analysis, a review of four sample areas of dormant commerce clause review follows.

A. Commerce Clause Review of State Taxation

It has long been clear that the Import/Export Clause of Article I, § 10, cl. 2 prevents states from enacting taxes that discriminate against goods from abroad.247 During the formalist period, the Court invalidated a number of state taxes for bearing "directly" upon interstate or foreign commerce. During the Holmesian era, however, the Court allowed state taxes on net income attributable to activity within a state, provided that not all of the activity within the state was interstate commerce.248

During the instrumentalist era, the Court created in Complete Auto Transit, Inc. v. Brady249 a four-part test that sustains a state tax against Commerce Clause challenge if the tax: (1) applies to an activity with a substantial nexus with the taxing state; (2) is fairly apportioned; (3) does not discriminate against interstate commerce; and (4) is fairly related to services provided by the state. With respect to the policy underlying this rule, the Court explained that the Commerce Clause balance tips against the tax only when it unfairly burdens commerce by exacting more than a just share from the interstate activity, i.e., under Pike is a "clearly excessive" burden.250

In the three other kinds of dormant commerce clause cases, the tax will likely be unconstitutional. Thus, the Court has held that a tax may violate the Commerce Clause "if it is facially discriminatory, has a discriminatory intent, or has the effect of unduly burdening interstate commerce."251 The Court has upheld the imposition of a Louisiana use tax on catalogs printed outside the state for a Louisiana department store that were delivered to customers in Louisiana without sales tax having been imposed by the state where they were printed.252 The Court has also upheld a 5% Illinois tax on

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interstate phone calls where the state had a similar tax on intrastate calls. The Court there noted that the economic burden of the tax fell on Illinois telecommunications users, and commented, "It is not a purpose of the Commerce Clause to protect state residents from their own taxes."253 Similarly, the Court held in Oklahoma Tax Commission v. Jefferson Lines, Inc.,254 that Oklahoma could impose a sales tax on the full price of a bus ticket for travel from Oklahoma to another state. Only one state, said Justice Kennedy, could be the site of the agreement, payment, and delivery of some of the services.

Other dormant commerce clause decisions have struck down state taxes. For example, a state cannot require a non-resident to collect a use tax on purchases of goods outside the state where the seller's only connection with customers in the state is by mail or common carrier.255 Also, a state may not tax a value earned by the taxpayer outside its borders unless there is some minimum connection between the state and the transaction.256

In 1988, this area of law was reviewed by Justice Scalia in New Energy Co. of Indiana v. Limbach.257 In Limbach, Ohio allowed a tax credit against its motor vehicle fuel sales tax for each gallon of ethanol sold by fuel dealers, if the ethanol was produced in Ohio or in a state that granted similar tax advantages to ethanol produced in Ohio. The Court held this limited credit to be an invalid discrimination against interstate commerce. Depriving products made elsewhere of a generally available tax credit was discriminatory, despite the reciprocity provision and that only one out-of-state manufacturer was disadvantaged. States may not place out-of-state products at a disadvantage to force other states into reciprocity. Nor had Ohio validated this discrimination by showing that it advanced a legitimate purpose that could not be adequately served by a reasonable nondiscriminatory alternative. Health and commercial reasons advanced by Ohio were merely implausible speculation because health concerns were only incidentally benefitted by the favorable tax treatment for Ohio-produced ethanol. Further, the economic activity encouraged by the credit was not ethanol subsidies in general, but only favorable treatment for Ohio-produced ethanol. Justice Scalia added that direct subsidization of domestic industry ordinarily would not violate the prohibition against a state giving its residents an advantage in the marketplace in connection with regulation of interstate commerce.


256 Allied-Signal, Inc. v. Director, 504 U.S. 768 (1992) (a state cannot include in a corporation's apportionable tax base the capital gain from an arms-length stock investment in another corporation which was not in the same business and did not result in a management role by the investor).

A similar result was reached in *Associated Industries of Missouri v. Lohman*,\(^{258}\) where the Court held in 1994 that a state tax system is invalid in localities where residents who buy an item from a local seller pay a sales tax which is lower than the use tax imposed on neighbors who buy the same item through the mail from a vendor in another state. Justice Thomas wrote for the Court that this was a form of discrimination against interstate commerce that had not been adequately justified. A further such holding, with similar reasoning, was the unanimous 1999 decision in *South Central Bell Telephone Co v. Alabama*.\(^{259}\) There the Court held that a state could not allow only local corporations to reduce their franchise tax by reducing the par value of their stock where that reduction was not shown to offset other taxes imposed solely on domestic corporations.

**B. Requiring Business Operations to be Done in the Home State**

During the formalist era, the Court invalidated without balancing several laws requiring local processing.\(^{260}\) In 1970, the Court formulated the oft-used *Pike* balancing test. It applies where a law is evenhanded on its face and affects interstate commerce only indirectly and incidentally.\(^{261}\) Where the law discriminates in purpose or has more than an incidental effect on interstate commerce, the Court applies the *Taylor* test.

Application of either of these tests can be tricky given the complexity of the factual circumstances faced by the Court. Thus, in some cases, even Justices sharing a similar judicial decisionmaking style can have different views on how the case should be resolved. For example, in *C & A Carbone v. Town of Clarkstown*,\(^{262}\) the Court invalidated a so-called "flow control" ordinance. It required all solid waste to be processed at the city's transfer station before leaving the city. All solid waste handled within the town had to be handled at the town's transfer station. The purpose was to gain processing fees to amortize the cost of the facility. A majority of the Court held that because the law deprived out-of-state businesses of access to a local market it discriminated against interstate commerce. Yet the city had not demonstrated there were no other means to advance its legitimate local interest. For 5 Justices, Justice Kennedy applied the *Taylor* test and said the city had a number of nondiscriminatory alternatives for addressing its health and environmental problems, *e.g.*, uniform safety regulations enacted without any purpose to discriminate. He noted that revenue generation is not a local interest that can justify discrimination against interstate commerce.\(^{S}\)

\(^{258}\) 511 U.S. 641 (1994).

\(^{259}\) 526 U.S. 160 (1999). On the limits on a state’s ability to tax consistent with the dormant commerce clause, see generally Ronald Rotunda, Modern Constitutional Law: Cases and Notes 157-67 (7th ed. 2003) (“An Introductory Note on Commerce Clause Limitations on State Taxation”).

\(^{260}\) See, *e.g.*, Minnesota v. Barber, 136 U.S. 313 (1890) (ban on sale of meat not from locally inspected animals); Foster-Fountain, 278 U.S. 1 (1928) (ban on export of unprocessed shrimp).


Justice O'Connor, concurring in the judgment only, said the ordinance did not involve the kind of discrimination against interstate commerce calling for the *Taylor* test to be used because the ordinance required in-town processors to use the city's transfer station, as well as out-of-town and out-of-state processors. All were treated equally under the ordinance. Even under the *Pike* test for incidental burdens on interstate commerce, however, she noted that the ordinance favored local interests over out-of-state enterprises since the city's garbage sorting monopoly was to be achieved at the expense of all competitors, be they local or non-local. Further, the law imposed an excessive burden on interstate commerce since the city's purpose of insuring the financial viability of the local facility could be achieved by means that would have a less dramatic impact on the flow of goods. Considering what would happen if similar laws were enacted in other states, she said that "pervasive flow control would result in the type of balkanization the Clause is primarily intended to prevent."{263}

In dissent, Justice Souter said the law bestowed no benefit on a class of local private actors, but instead directly aided the government in satisfying a traditional governmental responsibility. Souter then said that the law satisfied the *Pike* test. He said the record did not show any disruption in the flow of trash from Clarkstown to landfills in other states. Its sole effect, he said, was to cause local residents to pay more for trash disposal services.{264}

C. **Preserving Resources for In-State Consumption**

Using the formalist categorical approach, in 1923 the Court invalidated a ban on the export of natural gas in *Pennsylvania v. West Virginia*.{265} The Court reached a similar result under the Holmesian functional approach 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*,{266} 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.

In 1978, in *Philadelphia v. New Jersey*,{267} the instrumentalist Court similarly 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-county waste was held unambiguously to discriminate 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.

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{263} *Id.* at 405-07 (O'Connor, J., concurring in the judgment).

{264} *Id.* at 421-30 (Souter, J., joined by Rehnquist, C.J. and Blackmun, J., dissenting).

{265} 262 U.S. 553 (1923).

{266} 336 U.S. 525, 539 (1949).

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.

In 1979, the Taylor discrimination standard was applied in Hughes v. Oklahoma.\textsuperscript{268} In Hughes, the Court invalidated a state ban on export of minnows seized within the state. Justice Brennan explained that the state had chosen the most discriminatory means without showing that nondiscriminatory methods were unfeasible. In 1982, in New England Power Co. v. New Hampshire,\textsuperscript{269} 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 Sporhase v. Nebraska.\textsuperscript{270} The Court said that the state was not discriminating since it also controlled intrastate transfer of water. Using the Pike balancing test, the Court said that the burden on interstate commerce was not excessive 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. A reciprocity requirement, however, was invalid, and the Court remanded for Nebraska courts to decide on severability.\textsuperscript{271}

In 1992, the Court reaffirmed Philadelphia in Fort Gratiot Landfill v. Michigan Department.\textsuperscript{272} The Court held that the Commerce Clause was violated when a state imposed an additional fee upon interstate hazardous waste disposed of in the state, absent evidence that waste generated outside the state was more dangerous than waste generated in the state. The Court noted that attempting to isolate a state from the national economy is an "illegitimate means." The Court also referenced the long-standing rule that economic discrimination, which is a finding that leads to a virtual \textit{per se} rule of invalidity, applies not only to laws motivated by a purpose to protect local industries from out-of-state competition, but also to laws that respond to legitimate local concerns by discriminating means or effects against interstate trade. Here the state could have responded in a non-discriminatory fashion by imposing (1) additional fees on all hazardous waste disposed of within the state, (2) an even-handed cap on total tonnage landfilled, or (3) a per-mile tax on all vehicles transporting hazardous waste within the state.

Chief Justice Rehnquist, dissenting, said that the Court had the facts exactly backwards because the states who have isolated themselves are the 34 states that have no hazardous waste facility and the 15 states that have smaller facilities than Michigan. He suggested that Michigan might avoid the consequences of the decision by subsidizing local industries that generate hazardous wastes or,

\textsuperscript{268} 441 U.S. 322 (1979).

\textsuperscript{269} 455 U.S. 331 (1982).

\textsuperscript{270} 458 U.S. 941, 954-57 (1982).

\textsuperscript{271} Id. at 957-58.

under the market participant doctrine, open its own facility but cater only to local customers. \textsuperscript{273} Indeed, reflecting the strong interest that states have in this matter, Justice Rehnquist has noted that nearly 80\% of the nation’s landfills receiving municipal solid waste are now run by state entities, and thus exempt from dormant commerce clause review under the market participant exception. \textsuperscript{274} With congressional consent, of course, states could also enter into multi-state compacts, as provided in Article I, § 10, cl. 3 of the Constitution, to deal with trash disposal problems in their region of the country.

Beyond subsidies, another way to preserve resources for in-state consumption is to deny otherwise applicable tax exemptions to persons whose operations primarily benefit non-residents. The Court considered this in \textit{Camps Newfound/Owatonna, Inc. v. Town of Harrison}. \textsuperscript{275} There the state of Maine, which exempted from property tax all property owned by charitable institutions, argued that dormant commerce clause review was inapplicable to excluding from that exemption all organizations operated principally for the benefit of non-residents, including petitioner's non-profit summer camp. The state gave six reasons to justify their statute: (1) campers are not articles of commerce; (2) the camp's product is delivered and consumed entirely within Maine; (3) the services provided by petitioner do not have a substantial effect on interstate commerce; (4) dormant commerce clause review does not apply to real estate taxes; (5) functionally, the exemption was a subsidy and the state should be viewed as a market participant; and (6) different rules apply to charitable tax exemptions.

Justice Stevens, joined by Justices Kennedy, O'Connor, Souter, and Breyer, rejected each of these six contentions. Stevens replied that dormant commerce clause review should be applied to state action that affects interstate commerce because of \textit{stare decisis} and to preserve the nation’s economic solidarity. The camp’s operations, which generate transportation of persons across state lines, are in commerce. Exempting taxes from dormant commerce clause review would destroy the barrier against protectionism. The discriminatory feature of this tax has not been justified by a lack of alternatives and there is no reason why nonprofit character should exclude an enterprise from coverage of either the affirmative or negative aspects of the Commerce Clause. \textsuperscript{276}

\textbf{D. Limits on Business Entry}

Cases on business entry during the instrumentalist era, as well as the modern era, illustrate use of the \textit{Pike} balancing test and a tendency to create narrow rules for dealing with particular situations. For example, in \textit{Lewis v. BT Investment Managers}, \textsuperscript{277} the Court invalidated in 1980 a Florida law

\textsuperscript{273} \textit{Id.} at 369-72 (Rehnquist, J., joined by Blackmun, J., dissenting).


\textsuperscript{275} 520 U.S. 564 (1997).

\textsuperscript{276} \textit{Id.} at 572-83.

\textsuperscript{277} 447 U.S. 29 (1980).
that barred out-of-state bank holding companies from furnishing investment advice in Florida. Though the law displayed local favoritism or protectionism, Justice Blackmun said the Court need not decide whether this made the law per se invalid because the law could not even pass the Pike test. Applying that test, he said that discouraging economic concentration and protecting citizens against fraud were legitimate interests, but did not justify burdening out-of-state companies since there was no basis to infer that they are more likely to possess monopoly power or to engage in sharp practices. Nor was a barrier, rather than some other control, shown to be the only effective method for protecting against the evils. The state's interest in promoting local control perhaps was not legitimate, but in any event was not well served because the statute did not prevent out-of-state ownership of local bank holding companies who could enter the investment counseling business. Finally, the Court noted that Congress had not consented to this burden on interstate commerce.

By similar reasoning, in Edgar v. Mite,278 the Court struck down in 1982 an Illinois law which required takeover offers for shares in an Illinois corporation to be registered 20 days before the offer became effective and let the target company, but not the offeror, talk to shareholders during those 20 days. Five Justices agreed that the law flunked the Pike test because the Act burdened some out-of-state transactions, but its legitimate purpose of protecting local shareholders was not much advanced because: (1) the Act's disclosure requirement may not substantially enhance shareholder ability to make informed decisions, (2) the Act exempts corporate acquisition of its own shares, and (3) there is an increased risk that tender offers will fail solely because of defensive tactics employed by incumbent management during the 20-day period.

Similar reasoning can be found in the 1989 case of Bendix Autolite Corp. v. Midwesco Enterprises, Inc.279 Justice Kennedy wrote for the Court that an Ohio statute excessively burdened interstate commerce by giving out-of-state corporations the choice of consenting to the general jurisdiction of Ohio courts or having the statute of limitations tolled indefinitely. The state's interest in protecting residents was not much advanced since out-of-state corporations which did business in Ohio could be sued under its long arm statute. Justice Kennedy noted that the statute might have been invalidated under the “virtual per se rule of invalidity,” but said the Court chose to engage in a fuller balancing test anyway. Justice Scalia, concurring, said that a state statute violates the Commerce Clause if and only if, like the Ohio statute, it discriminates against interstate commerce in a respect not required to achieve a lawful state purpose. Otherwise, balancing should be done by Congress.280

On the other hand, again applying Pike, the Court in 1987 sustained an Indiana law protecting shareholders of Indiana corporations from hostile takeovers by allowing control shares to acquire voting rights only if approved by the shareholding resolution. In CTS Corp. v. Dynamics Corp. of America,281 Justice Powell wrote for the Court that the law was not discriminatory because it had

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280 Id. at 895-98 (Scalia, J., concurring in the judgment).
the same effect on tender offers whether the offeror was resident in Indiana or not. Nor did the Act create an undue risk of inconsistent regulation by different states. Finally, applying *Pike*, the law did not create an excessive burden on interstate commerce because the states have long had power to regulate rights in corporations they create and Indiana has a substantial interest in preventing the corporate form from becoming a shield for unfair dealing. Justice Scalia concurred because he would not apply even a balancing test if a state law was neither discriminatory nor created an impermissible risk of inconsistent regulation by different states. Justices White, Blackmun, and Stevens, dissenting, said the law undermined the policy of the Williams Act by burdening the interstate securities market.

During the 2004 Term, the Court upheld a flat $100 fee that Michigan charged trucks engaged in intrastate commercial hauling. The Court concluded in *American Trucking Association, Inc. v. Michigan Public Service Commission*,\(^\text{282}\) that the $100 fee did not violate the dormant commerce clause because it did not facially discriminate against interstate activities or enterprises, did not burden or discriminate against interstate commerce, was applied evenhandedly to all carriers making domestic journeys, and did not reflect an effort to tax activity taking place out of the state.

§ 20.3.3 The Article IV, § 2 Privileges and Immunities Clause

§ 20.3.3.1 Background History: The Natural Law Era

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*,\(^\text{283}\) 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*,\(^\text{284}\) 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.

The Court formally adopted the *Corfield* approach in 1873 in the *Slaughter-House Cases*,\(^\text{285}\) holding that Justice Washington’s approach was correct in limiting the Privileges and Immunities Clause

\(^{282}\) 125 S. Ct. 2419, 2423-26 (2005).

\(^{283}\) 6 F. Cas. 546, 4 Wash. C.C. 371 (1823).

\(^{284}\) 94 U.S. 391 (1871).

\(^{285}\) Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873).
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.286

The Court has never adopted an even more limited interpretation of the Privileges and Immunities Clause that would restrict the privileges and immunities to those dealing with economic rights like trading. Such a more limited theory might have been appropriate under the Articles of Confederation. The Articles prefaced its Privileges and Immunities Clause language by saying its purpose was “the better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union.”287

With respect to the second issue, Chief Justice Taney wrote in Dred Scott v. Sandford288 that the Clause gave the citizens of each state, who were also thereby citizens of the United States, 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 freed slaves from discrimination by states in which they then resided, such as a requirement that they post a bond if they wanted to reside in the state. On more pedestrian matters, it did not protect non-residents against the New York steamboat monopoly in Gibbons v. Ogden.289 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.”290

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

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289 22 U.S. 1 (1824).

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.

§ 20.3.3.2 Modern Privileges and Immunities Clause Doctrine

The modern test under the Article IV, § 2Privileges and Immunities Clause was first stated by a Holmesian Court in 1948 in Toomer v. Witsell. Under Toomer, as further explained in United Building and Construction Trades Council v. Camden, 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.

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 §§ 21.2.2.1 & 26.1.1.2. 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 non-residents 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.

Applying the Toomer test, the Court held in Baldwin v. Montana Fish and Game Commission that a state may charge nonresidents a higher fee to hunt elk as a sport without violating the Clause. The reason is 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.

296 Id. at 222.
297 Toomer, 334 U.S. at 398.
Justice Brennan, dissenting with Justices White and Marshall, said that discrimination against nonresidents on "any" matter, whether substantial or not, should trigger the Clause.\textsuperscript{299}

Determining whether a right is "fundamental" tracks the substantive due process doctrine of "fundamental" rights, discussed at § 27.3, as well as being related to the conclusion under modern Contracts Clause doctrine that only "substantial" impairments of contract rights trigger that doctrine, discussed at § 22.1.4 n.27, or in cases of regulations which diminish property values only "substantial deprivations" trigger a Takings Clause analysis, discussed at § 22.2.5.2 n.104-09. Justice Brennan’s view that "any" effect should trigger Privileges and Immunities Clause review is similar to the instrumentalist position under the Commerce Clause that "any" affect on interstate commerce should give Congress constitutional power to act, rather than the current majority view that only "substantial affects" on interstate commerce give Congress power under the Commerce Clause, as discussed at § 18.2.5. In later cases, Justice Brennan acquiesced in the "sufficiently basic" or "fundamental" language of \textit{Baldwin}. In \textit{Hicklin v. Orbeck},\textsuperscript{300} Justice Brennan wrote that Alaska cannot require oil and gas 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.\textsuperscript{S}

Writing for the Court in \textit{United Building and Construction Trades Council v. Camden},\textsuperscript{301} 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 \textit{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 \textit{Dean Milk}, 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, discussed at § 20.3.2.1.C n.184. 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. Thus, the city had to show a substantial reason for the difference in treatment, and a trial should be held on its claim that (1) persons who "live off" the city without living in it are a source of the economic and social ills against which the ordinance was aimed and (2) the law is closely related to that end.

Justice Blackmun, dissenting, said that an extension of the clause to discrimination based on municipal residence has little practical justification and no historical or textual support. New Jersey residents living outside Camden can protect themselves by state political processes and this will

\textsuperscript{299} \textit{Id.} at 398-402 (Brennan, J., joined by White & Marshall, JJ., dissenting).

\textsuperscript{300} 437 U.S. 518 (1978).

further the interest of residents in other states.\textsuperscript{302} However, just as the Equal Protection Clause, discussed at § 26.1 nn.1-4, and the dormant commerce clause, as in \textit{Dean Milk}, discussed at § 20.3.2.1.C n.184, apply to state and local action, so does the Privileges and Immunities Clause.

In applying the \textit{Toomer} test, the Court has not allowed a state to discriminate against nonresidents regarding employment in the oil industry, as in \textit{Hicklin v. Orbeck}\textsuperscript{303}; has refused to allow states to deny nonresidents access to medical services, as in \textit{Doe v. Bolton}\textsuperscript{304}; and has refused to allow a state to deny nonresidents the right to engage in commercial shrimp fishing, as in \textit{Toomer v. Witsell}\textsuperscript{305}

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, discussed at § 7.2.1 text following n.42, 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 \textit{Supreme Court of New Hampshire v. Piper},\textsuperscript{306} 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 \textit{pro bono} work, could also be advanced by a substantially less discriminating mean, requiring all licensed attorneys to do \textit{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 \textit{Supreme Court of Virginia v. Friedman},\textsuperscript{307} Justice Kennedy, for a 7-2 Court, invalidated the

\textsuperscript{302} \textit{Id.} at 223-35 (Blackmun, J., dissenting).
\textsuperscript{303} 437 U.S. 518 (1978).
\textsuperscript{304} 410 U.S. 179 (1973).
\textsuperscript{305} 334 U.S. 385 (1948).
\textsuperscript{306} 470 U.S. 274 (1985); \textit{id.} at 289-90 (Rehnquist, J., dissenting).
\textsuperscript{307} 487 U.S. 59 (1988); \textit{id.} at 70-71 (Rehnquist, C.J., joined by Scalia, J., dissenting).
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 as well pursue its goals 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.

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.

§ 20.3.4 Federal Common Law

The ability of states to regulate certain areas may be affected by "federal common law." As noted at § 17.2.1, 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.

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

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308 489 U.S. 546, 559 (1989); id. at 559-60 (Rehnquist, C.J., joined by White & O'Connor, JJ., dissenting)

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.310

Consistent with the initial period of natural law being based more on Stage 3 concrete operational thought, rather than formal operational thought and its abstract reasoning capabilities, discussed at § 15.4.1, the areas over which federal courts exercised judicial powers derived from concrete customary judicial notions of power without regard to any overarching theoretical structure. 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.311

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.” Professor William Fletcher has noted about this provision, it was “generally understood to be merely declaratory of existing law; that is, even if the section had never been enacted, the federal courts would have followed the local law of the states in cases where it applied.” For other cases, the court would follow “general law,” that which “existed by common practice and consent among a number of sovereigns.” As an example, Professor Fletcher discussed the law of marine insurance, noting that federal courts, even when sitting in diversity, felt free to develop a general law of marine insurance, irrespective of local law on the subject.312

A more important example of this general common law during the original natural law era concerns commercial transactions and the law of contracts. In his treatment of early federal common law, Professor Stewart Jay observed:


312 Id. at 1554-75.
Justice Wilson, in his charge to the grand jury in *Henfield's Case*, expounded this theory by distinguishing matters subject to “local laws” from those decided under “the law of nations” or “the law of merchants.” Far from being extraordinary, Wilson's view was shared by persons of diverse sympathies, such as St. George Tucker and James Sullivan. The latter wrote in 1801:

> It seems to be the opinion of the best writers, ancient and modern, that as contracts arose from commerce, they ought to be governed by the *jus gentium*, the law of nations, known and established over the commercial world. . . . There is no act of any particular legislature, for the recovery of money due on policies, bills of exchange, charter parties, freight, &c. but we find the same form of contract, the same manner of construction, and the same remedies, all over the world.

Sullivan was exaggerating the actual uniformity of commercial law, but the idea of bringing the law of merchants under the rubric of the law of nations was accepted. Similarly, the body of legal rules and principles that we now call the “law of conflict of laws” or “private international law” would have been included within the law of nations.

Accordingly, Lord Mansfield could write, concerning a point of marine insurance law, that “[t]he mercantile law, in this respect, is the same all over the world.” By this he meant that merchants behaved similarly everywhere, and their practices would be applied universally to define norms of behavior. Again, this may not have stated the actual truth of uniformity; rather, he referred to a process by which all courts were to investigate international customs and practices. Consistent with this view, Chief Justice Marshall would state in *Gibbons v. Ogden* that the right to engage in commerce “derives its source from those laws whose authority is acknowledged by civilized men throughout the world.”

During the original natural law era, this principle was adopted by the Supreme Court most famously in the 1842 case of *Swift v. Tyson*, discussed at § 20.3.1.4.1.D.

The *Swift* doctrine of a “federal general common law” of contracts was continued during the formalist era based on the literal holdings of cases following *Swift v. Tyson*. It also was supported by the pro-business, conservative policy of the federal courts during this era, discussed at § 14.2.2, as the *Swift* approach permitted the federal courts to ensure contract and commercial law decisions under diversity jurisdiction reflected appropriate pro-business policies elaborated by the federal judiciary.

This understanding of “federal 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

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the sovereign, the Supreme Court stated in 1938 in *Erie Railroad Co. v. Tompkins*\(^\text{315}\) that there is "no federal general common law." The Court noted in *Erie* that the common law of contracts and commercial law 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 contract and commercial law, state law should be applied in such state cases that are in federal court pursuant to diversity jurisdiction. As for which state law would apply when the parties reside in different states, and thus diversity jurisdiction applies, 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, and, like personal jurisdiction in *Pennoyer v. Neff*, discussed at § 17.2.3.2 n.165, based more exclusively on physical concrete presence, reflecting Stage 3 concrete operational thought considerations, 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.\(^\text{316}\)

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.\(^\text{317}\) 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

\(^{315}\) 304 U.S. 64, 78 (1938).

\(^{316}\) 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 as raising “due process” or “full faith and credit” constitutional issues as not giving sufficient respect to which state has the greater interest in the underlying litigation, see Scott Fruehwald, *Constitutional Constraints on State Choice of Law*, 24 U. Dayton L. Rev. 39 (1998).

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.\textsuperscript{318}

In applying this doctrine, the Court stated in 1997 in \textit{Atherton v. FDIC}:

"Whether latent federal power should be exercised to displace state law is primarily a decision for Congress," not the federal courts. Nor does the existence of related federal statutes automatically show that Congress intended courts to create federal common-law rules, for "Congress acts . . . against the background of the total \textit{corpus juris} of the states. . . ." Thus, normally, when courts decide to fashion rules of federal common law, "the guiding principle is that a significant conflict between some federal policy or interest and the use of state law . . . must first be specifically shown." Indeed, such a "conflict" is normally a "precondition."\textsuperscript{319}

This modern doctrine, rejecting the approach of \textit{Swift v. Tyson}, is consistent with a reasoned elaboration of the law. Federal common law power should be related to areas of federal authority, not state authority. While the modern natural law concept of “equal concern and respect,” discussed at § 16.2.1, would support a general obligation that “promises should be kept,” that principle does not determine every aspect of contract and commercial law, as noted by Professor Fried at § 4.2.3 n.61. Elaboration of details of contract law are thus properly subject to other sovereign entities to develop – state, federal, and international law and treaties – not general federal common law.

\textbf{§ 20.3.4.1 Areas of Uniquely Federal Interest}

A. Rights and Obligations of the United States

One area of federal common law concerns the rights and duties of the United States on the commercial paper 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 \textit{Clearfield Trust Co. v. United States},\textsuperscript{320} “[W]hile the federal law merchant developed for about a century under the regime of \textit{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 the Court stated in \textit{United States


\textsuperscript{319} 519 U.S. 213, 218 (1997) (citations omitted).

\textsuperscript{320} 318 U.S. 363, 366-67 (1943).
v. Seckinger,\textsuperscript{321} “The validity and construction of contracts through which the United States is exercising its constitutional functions, their consequences on the rights and obligations of the parties, the titles or liens which they create or permit, all present questions of federal law not controlled by the law of any state.' In fashioning a federal rule we are, of course, guided by the general principles that have evolved concerning the interpretation of contractual provisions such as that involved here.”

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.,\textsuperscript{322} 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 Court reached this conclusion despite acknowledging that the great body of law which controls acquisition, transmission, and transfer of property is found in the statutes and decisions of the state courts, and that, discriminatory state action aside, state law governed generally the federal government’s proprietary relations with the state. The Court noted, however, that “even assuming in general terms the appropriateness of 'borrowing' state law, specific aberrant or hostile state rules do not provide appropriate standards for federal law.”

B. Interstate and International Disputes

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.\textsuperscript{323} 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.,\textsuperscript{324} “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,\textsuperscript{325} “If federal authority, in this instance this Court, orders the field of judicial competence in this area for the federal courts, and the state courts are left free to formulate their own rules, the purposes behind the doctrine could be as effectively undermined as if there had been no federal pronouncement on the subject. . . . [W]e are constrained to make it clear that an issue

\begin{itemize}
  \item \textsuperscript{321} 397 U.S. 203, 209-10 (1970) (citations omitted).
  \item \textsuperscript{324} 304 U.S. 92, 110 (1938).
  \item \textsuperscript{325} 376 U.S. 398, 424-25 (1964).
\end{itemize}
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 a comprehensive discussion of federal court litigation concerning foreign affairs matters during the first 50 years of the Constitution’s history, Professor Ariel N. Lavinbuk 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.326

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.327 Further, as the Court noted in Sosa v. Alvarez-Machain,328 where Congress has passed a jurisdictional statute, such as the Alien Tort Claims Act, which creates on its own new no causes of action, the reasonable inference is that the statute was intended to have practical 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 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, and questions such as the role of the federal judiciary in determining the proper extent of jurisdiction of state courts over aliens.

C. Admiralty and Maritime Cases

A third 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. During the original natural law era, the Supreme Court noted in *American Ins. Co. v. 356 Bales of Cotton*, “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 *Southern Pacific Co. v. Jensen*, 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." 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 § 20.3.4 n.318, 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 in the area, 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. 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. So have some Circuit Courts of Appeals. For example, the Court of Appeals for the

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333 244 U.S. 205, 215-16 (1917).


Fifth Circuit has tried to refine the \textit{Jensen} test into more workable criteria. As summarized by Professor Robert Force, under the Fifth Circuit approach:

(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.336

D. The Original Natural Law Era Doctrine of \textit{Swift v. Tyson}

In 1842, the Supreme Court held in \textit{Swift v. Tyson} that the Rules of Decision Act of 1789 did not preclude federal courts from creating common law in areas outside the federal area of competence. The Court said that the Act was limited to statutory law, and, therefore, did not include common law created by state courts. After \textit{Swift}, federal courts created what came to be known as "general law" or "general federal common law" to govern diversity cases involving contract and commercial law. General law differed from federal common law because, although both were created by federal courts, general law referred to common law outside the scope of direct federal regulatory control, such as state contract and commercial law.337

This doctrine was rejected in 1938 as part of the Holmesian rejection of natural law understood as a “brooding omniscience in the sky,” particularly as based on general customary practices, as discussed at § 3.4 n.92. Thus, in state contract, commercial law, tort, and other cases heard today in federal courts pursuant to federal diversity jurisdiction, the federal court applies state substantive law. It has been noted, "\textit{Erie} left to the states much of the necessary modern private law development in torts and contracts through case law and statutes and avoided the necessity of ad hoc decisions in this area by federal courts not particularly well qualified to develop private substantive law."338 However, as discussed at § 20.3.4.2.D, in these cases, the court applies federal procedural law, pursuant to congressional delegated power to the federal courts to apply their own rules of procedure.


§ 20.3.4.2 Congressionally Granted Power to Develop Law

A. Antitrust Laws

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,339 "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."

In Texas Industries, Inc. v. Radcliff Materials,340 the Court cautioned, “It does not necessarily follow, however, that Congress intended to give courts as wide discretion in formulating remedies to enforce the provisions of the Sherman Act or the kind of relief sought through contribution. The intent to allow courts to develop governing principles of law, so unmistakably clear with regard to substantive violations, does not appear in debates on the treble-damages action created . . . . [T]he power of federal courts under the Act suggests a sharp distinction between the lawmaking powers conferred in defining violations and the ability to fashion the relief available to parties claiming injury.” Thus, the Court noted that in contrast to the sweeping language of §§ 1 and 2 of the Sherman Act, the remedial provisions defined in the antitrust laws “are detailed and specific: (1) violations of §§ 1 and 2 are crimes; (2) Congress has expressly authorized a private right of action for treble damages, costs, and reasonable attorney's fees; (3) other remedial sections also provide for suits by the United States to enjoin violations or for injury to its "business or property," and parens patriae suits by state attorneys general; (4) Congress has provided that a final judgment or decree of an antitrust violation in one proceeding will serve as prima facie evidence in any subsequent action or proceeding; and (5) the remedial provisions in the antimerger field, not at issue here, are also quite detailed.”

B. Laws Relating to Collective Bargaining

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,341 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. The Court concluded that “the substantive law to apply in suits under § 301(a) is federal law, which the courts must fashion from the policy of our national labor laws.”


C. Congressional Statutes that Incorporate Non-Federal Law

Another kind of congressionally authorized federal common law occurs when Congress incorporates by reference non-federal law as part of the statutory criteria. With respect to the circumstances where such incorporation may apply, as for applicable statute of limitations under various federal statutes, including § 1983 actions, Professor Tribe has observed:

Although Congress sometimes intends that a statutory term be given content by the application of state law, “the meaning of [a] term . . . as used in . . . a federal statute is by definition a federal question,” and the Court usually starts “with the general assumption that in the absence of a plain indication to the contrary, . . . Congress when it enacts a statute is not making the application of the federal act dependent on state law.” The Court has noted that “federal statutes are generally intended to have uniform nationwide application,” and, “[a]ccordingly, the cases in which we have found that Congress intended a state-law definition of a statutory term have often been those where uniformity clearly was not intended.” In addition, “a second reason for the presumption against the application of state law is the danger that ‘the federal program would be impaired if state law were to control.’”

On the basis of this presumption against state-law incorporation in federal statutes, the 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].

D. Issues of Procedures and Remedies

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

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been “abused throughout history, especially against those perceived as socially threatening (e.g.,
labor leaders, Communists, and civil rights activists).”  

In addition, the Court has recognized that when Congress creates rights under a statutory scheme,
judicially derived federal law governs remedial issues left unaddressed in the statutory text. In
resolving such cases, the Court indicated in *Semtek International, Inc. v. Lockheed Martin Corp.*
that a court should:

> endeavor to fill the interstices of federal remedial schemes with uniform federal rules only when
> the scheme in question evidences a distinct need for nationwide legal standards, or when
> express provisions in analogous statutory schemes embody congressional policy choices readily
> applicable to the matter at hand. Otherwise, we have indicated that federal courts should
> "incorporat[e] [state law] as the federal rule of decision," unless "application of [the particular]
> state law [in question] would frustrate specific objectives of the federal programs." The
> presumption that state law should be incorporated into federal common law is particularly
> strong in areas in which private parties have entered legal relationships with the expectation that
> their rights and obligations would be governed by state-law standards [such as commercial law,
> property law, and family law because of primary state responsibility].

This federal reference to state law will not obtain, of course, in situations in which the state law is
incompatible with federal interests. Thus, although a federal court may look to state law for
guidance, there is no constitutional obligation to adopt state law as the federal common law rule.
Federal courts may borrow state law rules when the state law provides an appropriate federal rule,
but no state can claim that, as a matter of state sovereignty, federal common law must incorporate
state law.

With regard to procedural rules applicable in federal courts, the Supreme Court has long recognized
that Congress may delegate to the Court authority to promulgate procedural rules. As early as 1825,
in *Wayman v. Southard*, the Court held that Congress had full authority to regulate procedure in
the federal courts, but that Congress had delegated to the Court procedural rulemaking authority
under the Judiciary Act of 1789. Since 1825, courts have held that Congress has the authority to
delegate procedural rulemaking authority to the Supreme Court, and that Congress has delegated that
authority to the Supreme Court, most recently pursuant to the Rules Enabling Act of 1934, codified

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346 *Id.* at 738-39.


349 *See generally* Paul Lund, *The Decline of Federal Common Law*, 76 Boston U.L. Rev. 895,

350 23 U.S. (10 Wheat.) 1, 43-45 (1825).
Professor Bernadette Bollas Genetin has noted:

The prevailing view of scholars and legislators who supported adopting the Rules Enabling Act of 1934 was that, although the Rules Enabling Act would effect a shared rulemaking authority, the Supreme Court would be the superior procedural and, therefore, primary rulemaker. The assumption that the Court possessed an institutional superiority in procedural rulemaking proceeded from the following factors: (1) Congress was busy with issues of public policy and was ill-suited to determine the details of court procedure; (2) judges, directly involved with procedural issues on a day-to-day basis, had more expertise than Congress in procedural issues; (3) the Court's involvement and expertise would enable it to discover more readily inadequacies in the procedural Rules; (4) the Court could more easily remedy perceived inadequacies in Federal Rules because its promulgation process would not be as slow or cumbersome as statutory revision; and (5) the Court, as opposed to Congress, would be less partisan and less influenced by special interest groups; thus, it would be better situated to promulgate neutral rules.\[^{351}\]

While Congress has substantially deferred to the Supreme Court following the Court's promulgation of the Federal Rules of Civil Procedure in 1938, Congress retains the power to recall that delegation subject to two constitutional limitations. The Court has recently underscored that there are at least two constitutional limits on Congress' authority to enact rules to govern the federal courts: (1) a congressional standard cannot establish a standard or supersede a rule that articulates a constitutional requirement, and thus violates the Court's power to "declare what the law is" under *Marbury v. Madison*, discussed at § 17.1.2.1; and (2) a congressional provision cannot infringe on core judicial functions in a manner that diminishes the courts' ability to decide cases effectively.\[^{352}\]

\section*{§ 20.4 Federalism Checks and Balances: State Regulations That Trump Federal Law Under the 21st First Amendment}

\subsection*{§ 20.4.1 Relationships Between the 21st Amendment and the Dormant Commerce Clause}

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.


\[^{352}\] See generally id. at 685, citing, Dickerson v. United States, 530 U.S. 428, 437 (2000) (Congress may not legislatively supersede Court decisions interpreting and applying the Constitution); Miller v. French, 530 U.S. 327, 349-50 (2000) (noting possibility of congressional impairment of core judicial functions in a manner that threatens the independence of the judiciary).
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, discussed at § 30.3.2.1 nn.246-48, or other clauses of the Constitution, including the Import/Export Clause, the Establishment Clause, the Equal Protection Clause, and the Due Process Clause.

Early Holmesian-era cases did suggest that there was no dormant commerce clause review of state statutes involving liquor. For example, the Holmesian era cases sustained great state power in making clear that a state could prevent the import of liquor for consumption, that it could tax imported liquor, and that it could prevent import on the basis of reciprocity – all being barriers that would likely violate the dormant commerce clause but for the 21st Amendment.

Of course, § 2 of the 21st Amendment also gives the federal government broad power to regulate liquor in property controlled by the federal government. For example, in Collins v. Yosemite Park & Curry Co., decided in 1937, the Court held that the United States could ship liquor into Yosemite Park over California's objection, but only because the liquor was not intended for "use" in California. It was for "use" in an area under the exclusive power of the United States. Looking back on Collins, the Court said in Carter v. Virginia that shipments through a state were not "transportation or importation" into the state within the meaning of the 21st Amendment, even though a state may regulate such shipments to prevent diversion or use within the state.

Decisions in the instrumentalist era have qualified the broad Holmesian-era dicta that the states were released from the negative implications of the dormant commerce clause. Under these decisions, the Court reviews state liquor laws much as when it is engaged in dormant commerce clause review of state commercial regulations under the Pike balancing test, i.e., it weighs and accommodates constitutional policies that potentially conflict: the free trade policy implicit in the dormant commerce clause that gives great power to Congress versus the power assured to states by the 21st Amendment of promoting temperance by barring the import and controlling the distribution of

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354 See Granholm v. Heald, 544 U.S. 460, 486-87 (2005), and cases cited therein.
liquor. The result is that the Court has struck down state liquor laws if they do not relate to temperance policy, but instead have the purpose and effect of promoting local industry, or are an attempt to control prices in other states, or to regulate the sales of liquor in other states.

The cases provide a useful study in how the Court engages in a balancing analysis. The cases attempting to harmonize the conflicting policies began in 1964 with Hostetter v. Idlewild Bon Voyage Liquor Corp. In Hostetter, New York had attempted to regulate retail liquor dealers by requiring an entrance from street level and a location on a public thoroughfare. The plaintiff dealer sold bottled liquor at an airport for delivery on arrival in other countries. The United States Bureau of Customs had approved this method of doing business. The Court noted that New York had not sought to regulate passage of the liquor in the interest of preventing its diversion into interstate commerce. Instead, said the Court, the state sought to prevent transactions carried on under the aegis of a law passed by Congress in the exercise of its power to regulate commerce with foreign nations. This the state could not do. The Court pointed out that the Commerce Clause was not totally repealed by the 21st Amendment, or Congress would be left with no power to regulate interstate or foreign commerce in liquor. Thus, the two clauses should be read together, and accommodated in the context of the issues and interests at stake in concrete cases.

The Court’s decision in 1980 in California Retail Liquor Dealers Association v. Midcal Aluminum, Inc. is also instructive. In Midcal, the Court held that California’s resale price maintenance and price posting statutes for the wholesale wine trade were preempted by the Sherman Act. Past decisions, said Justice Powell, recognized both that states have a "wide latitude" in state liquor regulation and that important federal interests in regulating liquor matters survived the 21st Amendment. Hostetter and other decisions demonstrate, he said, that there is no bright line between federal and state power over liquor. States have virtually complete control over whether to permit importation or sale of liquor and how to structure the distribution system. But these controls are subject to federal commerce power "in appropriate situations." Competing federal and state concerns are to be reconciled in concrete cases. Justice Powell concluded that since the record did not show that California's wine pricing system helped sustain small retailers or inhibited consumption of alcohol by residents, California's asserted state interests in price fixing were less substantial than the national policy in favor of competition.

Four cases in the 1980s, one in 1990, and one in 2005 have carried forward this balancing approach and have helped develop a jurisprudence that assigns relative weights to various state policies. Two of the 1980 cases, and the 2005 case, involved the dormant commerce clause. The other two cases

from the 1980s, and the 1990 case, involved the question of whether a state liquor law had been preempted by a federal law.

The first of the 1980s dormant commerce clause cases was *Bacchus Imports, Ltd. v. Dias.*\(^{363}\) In an opinion by Justice White, the Court held that the Commerce Clause was violated when Hawaii exempted “okolehao” and locally produced fruit wine from its tax on imported liquor with the purpose and effect of promoting a local industry. The Court said that the central purpose of the 21st Amendment was not to empower states to favor local liquor industries by erecting barriers to competition. The Commerce Clause, in contrast, was intended to further strong federal interests in preventing economic balkanization. State economic protectionism is therefore not entitled to the same deference as laws enacted to combat the perceived evils of an unrestricted traffic in liquor. The state here did not seek to justify the tax on the ground that it promoted temperance or any other central purpose of the 21st Amendment. Justice Stevens dissented, with Justices Rehnquist and O’Connor. Stevens said that under the 21st Amendment a state could prohibit the import of all intoxicating liquors. It could do so without prohibiting the local sale of liquors produced within the state. If the state has the power to create a total local monopoly, it could also engage in a less extreme form of discrimination by providing a special benefit, perhaps in the form of a subsidy or tax exemption, for locally produced alcoholic beverages. Justice Stevens noted that the language of the 21st Amendment was clear, so it was not necessary to consider its history, as White had done.\(^{364}\)

The second dormant commerce clause case was *Brown-Forman Distillers Corp. v. New York State Liquor Authority,*\(^{365}\) decided in 1986. The question was whether the 21st Amendment validated a New York statute that required liquor distillers to sell liquor in the state at a price no higher than the lowest price they would charge for similar sales in other states. The state argued that the 21st Amendment gave it wide latitude to regulate the distribution of liquor. The Court held, however, that one effect of the statute was to regulate sales in other states of liquor that would be consumed there, and the 21st Amendment confers no authority to control sales in other states. Justice Stevens again dissented, joined this time by Justices White and Rehnquist joined. In their view, “The serious discriminatory effects of § 9 alleged by appellants on their business outside New York are largely matters of conjecture. It is by no means clear, for instance, that § 9 must inevitably produce higher prices in other States, as claimed by appellants, rather than the lower prices sought for New York.”\(^{366}\)

The 21st Amendment was also involved in the 2005 case of *Granholm v. Heald.*\(^{367}\) In *Granholm,* a 5-4 Court struck down state laws which, as described by Justice Kennedy, were designed “to allow


\(^{364}\) *Id.* at 278-87 (Stevens, J., joined by Rehnquist & O’Connor, JJ., dissenting).

\(^{365}\) 476 U.S. 573, 578-86 (1986).

\(^{366}\) *Id.* at 587 (Stevens, J., joined by White & Rehnquist, JJ., dissenting).

in-state wineries to sell wine directly to consumers in that state but prohibited out-of-state wineries from doing so or, at the least, to make direct sales impractical from an economic standpoint.” Justice Kennedy reasoned that the states had triggered the high level of review required under the dormant commerce clause for state laws that discriminate against interstate commerce; that the states were not immunized from this rule by the 21st Amendment; and that the states had not met the heightened standard of review because they did not show by concrete record evidence that any non-discriminatory alternatives would prove unworkable in relation to their goals of policing underage drinking, avoiding tax evasion, facilitating orderly market conditions, protecting public health and safety, and ensuring regulatory accountability.

Regarding the question of whether the states had been allowed by Congress to discriminate against interstate commerce in liquor by the Webb-Kenyon Act of 1913, Justice Kennedy said that its ban on shipments or transportation of liquor in violation of state law did not include state laws that discriminated against out-of-state goods. For that interpretation he relied on cases decided before 1913; the fact that Webb-Kenyon did not purport to repeal the Wilson Act of 1890 that had been held not to allow states to discriminate against interstate commerce; and Bacchus, which in 1984 struck down an Hawaiian tax on liquor that exempted locally produced products from the tax.368 Justice Thomas, dissenting, joined by states’ rights advocates Chief Justice Rehnquist and Justices O’Connor, and Justice Stevens, reflecting his view regarding the clear intent of the 21st Amendment, noted that the Webb-Kenyon Act prohibited interstate shipment of liquor into a state in violation of any law of such state, and that meant “any law, including a ‘discriminatory’ one.” Thomas added that the Bacchus case should be overruled, as it was the only decision of the Court holding that the 21st Amendment does not authorize the in-state regulation of imported liquor free of the dormant commerce clause. Thomas observed that the 21st Amendment and the Webb-Kenyon Act had taken policy choices regarding liquor from the judges and returned them to the states, and that the majority had done the nation no service by ignoring the text of the Constitution and the Acts of Congress.369

§ 20.4.2 Preemption of State Liquor Laws by Federal Law

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 been faced with deciding whether a particular state law was preempted by federal law. Preemption has been found where:

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368 Id. at 481-84. On interstate sales of alcohol through the Internet, see generally Brannon P. Denning, Smokey and the Bandit in Cyberspace: The Dormant Commerce Clause, the Twenty-First Amendment, and State Regulation of Internet Alcohol Sales, 19 Const. Comm. 297 (2002).

369 Id. at 1909-19, 1925-27 (Thomas, J., joined by Rehnquist, C.J., and Stevens & O’Connor, J., dissenting).
(1) state regulation of liquor sales to overseas airline passengers was not designed to prevent diversion into local commerce and there was a conflict with federal law relating to foreign commerce;  
(2) state resale price maintenance and price posting statutes conflicted with the federal antitrust policy embodied in the Sherman Act; and  
(3) there was a conflict between a state bar against cable television ads for alcoholic beverages contained in out-of-state signals retransmitted to subscribers and federal policy to promote the widespread development of cable communications.

Despite cases such as these, 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.

The 1984 preemption case of Capital Cities Cable, Inc. v. Crisp is instructive of modern preemption analysis regarding the 21st Amendment. The Court held in Crisp that FCC rules preempted an Oklahoma law requiring cable television operators in that state to delete all ads for alcoholic beverages contained in out-of-state signals retransmitted to subscribers. The Court said that federal policy was to promote the widespread development of cable communications. The state law interfered with that policy. Justice Brennan said that the 21st Amendment did not justify what would otherwise be an unconstitutional interference with federal policy. The Amendment primarily creates an exception to the normal operation of dormant commerce clause analysis.

Under this doctrine, the federal government retains authority to regulate interstate commerce in liquor. When a state has not attempted directly to regulate the sale or use of liquor within its borders – the core power given by the 21st Amendment – a conflicting exercise of federal power may prevail. Justice Brennan read Midcal Aluminum, discussed § 20.4.1 n.362, as holding that because the state's interest in promoting temperance through the program was not substantial, the state interest was outweighed by the important federal objective of the Sherman Act. The central question is whether the interests implicated by the state regulation are so closely related to the powers reserved by the 21st Amendment that the regulation may prevail, notwithstanding its conflict with express federal policies. Resolving the question requires a pragmatic effort to harmonize state and federal interests.

Applying that approach to the facts, Brennan said that the means chosen by Oklahoma to discourage consumption of intoxicating liquor are very limited since the state permits other kinds of print and broadcast advertising for liquor. The selective approach taken here limits the substantiality of the interests asserted by the state. Thus it engages only indirectly the central power reserved by the 21st Amendment. When this limited interest is measured against the significant interference with the federal objective, the state's interest can be seen not to be of the same stature. As in Midcal Aluminum, the Court held that the balance between state and federal power tips in favor of the federal law when a state law conflicts with the accomplishment and execution of the purposes of federal law, and the state has not implicated its central power under the 21st Amendment of regulating the times, places, and manner under which liquor may be imported and sold.375

Another instructive liquor preemption case is 324 Liquor Corp. v. Duffy.376 In Duffy, the Court held that the Sherman Act preempted state law where there were no adequate state interests to support a New York liquor price discrimination statute that required retailers to charge at least 112% of the posted wholesale price but permitted wholesalers to sell at less than the posted price.

In 1990, a plurality of four Justices said in North Dakota v. United States377 that a state could require reporting of imported liquor even when sold directly to federal enclaves within the state, and require such liquor to be labeled "for domestic consumption only." The four Justices said the law fell within the core of state power over temperance or establishing an orderly market. Thus it did not violate the Commerce Clause, nor did it violate intergovernmental immunity or discriminate against the United States. Congress had not clearly preempted the state law by conferring an immunity from state regulatory law to the involved military bases. Justice Scalia, concurring, said that the 21st Amendment abolished any federal immunity from state liquor import regulation. Four other Justices disagreed on immunity and said that the labeling regulation was invalid for substantially obstructing federal operations and discriminating against it and its chosen business partners.

A recent discussion of preemption in the context of the 21st Amendment occurred in 44 Liquormart, Inc. v. Rhode Island,378 decided in 1996. There the Court held that Rhode Island's statutory prohibition on retail price advertising of alcoholic beverages violated the First Amendment, as discussed at § 30.3.2.1 nn.246-48, and was not shielded from constitutional scrutiny by the 21st Amendment. For the Court, Justice Stevens said that "while it [the 21st Amendment] grants the States authority over commerce that might otherwise be reserved to the Federal Government, it places no limit whatsoever on other constitutional provisions." Justice Stevens noted that since the 21st Amendment does not diminish the force of the Supremacy Clause, the Establishment Clause,

375 Id. at 698-16.
377 495 U.S. 423, 431-44 (1990) (plurality opinion of Stevens, J., joined by Rehnquist, C.J., and White & O'Connor, JJ.); id. at 444-48 (Scalia, J., concurring in the judgment); id. at 448-71 (Brennan, J., joined by Marshall, Blackmun & Kennedy, JJ., concurring in part in the judgment and dissenting in part).
and the Equal Protection Clause, the Court saw no reason why the First Amendment should not also be included in the list. Thus, the 21st Amendment could not save Rhode Island's ban on liquor price advertising.


**SUB-PART TWO: INDIVIDUAL RIGHTS DOCTRINES GENERALLY**

Sub-Part One of Part IV of this book, Chapters 17-20, detailed the constitutional doctrines involving structural issues: judicial review, federalism, separation of powers, and checks and balances. The remainder of this book considers constitutional protections involving individual rights.

Sub-Part Two of Part IV, in Chapters 21-24, considers the general doctrines applied in judicial review of individual rights, including the protection given economic and non-economic rights by sources other than the First Amendment, Fifth Amendment Due Process Clause, and Civil War Amendments, that is, the 13th, 14th, and 15th Amendments. These named provisions have triggered much litigation in our Nation’s history, and thus require treatment in separate chapters.

Sub-Part Three of Part IV, Chapters 25-28, considers the Civil War Amendments, including the 14th Amendment’s Due Process and Equal Protection Clauses, which are directly applicable only against the states, but which are applicable against the federal government through the Fifth Amendment Due Process Clause, considered along with the 14th Amendment Due Process Clause in Chapter 27.

Sub-Part IV of Part IV, in Chapters 29-32, considers the First Amendment, which is directly applicable against the federal government, but which is applicable against the states as part of the 14th Amendment Due Process Clause analysis, discussed at § 27.2.

All of these constitutional protections apply to government action, with the exception of the 13th Amendment, which protects against both governmental and private acts of slavery or involuntary servitude, discussed at § 25.1. Determining what actions constitute government action is addressed by the state action doctrine, discussed at § 21.1. Chapter 21 continues by considering the structure of judicial reasoning that is used once state action is found, that is, the importance of government interests involved, the fit between government means and ends, and the severity of the burden on individual rights. Also considered is whether the Court uses a categorical approach or a balancing test, and whether either calls for considering elements or factors. The issues are discussed at § 21.2.

Following this, Chapter 22 deals with individual rights protections involving economic interests other than those protected by the First Amendment, such as the protection for commercial speech, the Fifth Amendment Due Process Clause, and the Civil War Amendments. This involves the Contracts Clause of Article I, § 10, cl. 1, discussed at § 22.1, and the Fifth Amendment Takings Clause, discussed at § 22.2. Individual rights protection involving non-economic rights other than those protected by the named provisions are discussed in Chapter 23. This discussion addresses the initial eight Amendments to the Constitution, other than the First Amendment and Fifth Amendment Due Process and Takings Clauses. Those Amendments involving civil rights are discussed at § 23.1. This section also addresses the Full Faith and Credit Clause of Article IV, § 1. Those Bill of Rights provisions involving criminal rights are discussed at § 23.2. This section also addresses the criminal rights provisions in Article I, § 9 of the Bill of Attainder Clause, Ex Post Facto Clause, and Habeas Corpus Clause, along with the Extradition Clause of Article IV, § 2, cl. 2. Chapter 24 discusses the Ninth Amendment’s provision that the “enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” The issue regarding which of these constitutional rights can be waived (“alienable”) and which cannot be waived (“inalienable” rights) is discussed at § 24.1 text following n.14. The Tenth Amendment is discussed at § 18.4.
CHAPTER 21: INDIVIDUAL RIGHTS PROTECTION UNDER THE CONSTITUTION

§ 21.1  The State Action Requirement

§ 21.1.1  Introduction

With the exception of the 13th Amendment’s ban on slavery or involuntary servitude, discussed at § 25.1, other 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. As the Court stated in the 2001 case of Brentwood Academy v. Tennessee Secondary School Athletic Association:

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. The Court noted in Brentwood Academy,3 “[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 cases of federal, state, or local action, the terminology and tests can be organized around three basic factors:

3 Id. (citations omitted).
(1) The extent to which the individual is burdened by “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;

(2) The extent to which the individual and the government are “entwined,” 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; and

(3) The extent to which the individual is performing an activity considered by the Court to be a “public function.”

Differences among the four decisionmaking styles influence how, in practice, the Justices go about defining each of these three factors. As discussed at § 21.1.2.5 nn.38-43, these three considerations are best understood as factors to be weighed together, although a formalist approach would prefer to view them as elements to meet, meaning at least one of them must be met on its own, without aggregating the cumulative affects of all three factors, to support a finding of state action.

§ 21.1.2  Historical Development of the State Action Doctrine

§ 21.1.2.1  The Original Natural Law Era

The Court decided no explicit state action cases during the original natural law era. All cases dealing with constitutional rights involved federal, state, or local governmental action. There were very few state cases during this period, since the first eight Amendments were not applicable to the states until after the 14th Amendment was ratified in 1868, as discussed at § 27.2. The few state cases involving individual rights, as opposed to federalism concerns, involved cases such as those under the Contracts Clause, discussed at § 22.1. Few federal cases existed because of sparse federal legislation touching on individual rights. The cases decided involved issues such as those under the Takings Clause, discussed at § 22.2, or whether the Ex Post Facto Clause applies only to criminal legislation, discussed at § 23.2, all examples of clear federal, state, or local government action.

§ 21.1.2.2  The Formalist Era

As might be expected, a formalist approach to state action looks for examples which clearly, that is, literally, involve “overt official involvement”; or shared control because the private organization

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is clearly “created, coerced, or encouraged by the government,” or is in a “symbiotic relationship with the government”; or the organization is performing a clear “public function.” Under this approach, “mere entwinement” of some kind is not sufficient to trigger a finding of state action.5

For example, during the formalist era in 1927, the Supreme Court held in *Nixon v. Herndon*6 that a Texas statute excluding blacks from Democratic primaries was unconstitutional as race discrimination by the state. Similarly, in 1932, in *Nixon v. Condon*,7 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*,8 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.

§ 21.1.2.3 The Holmesian Era

Based upon its more functional approach to law, discussed at § 3.2 nn.23-25, 43-50, the Holmesian-era Court took a more functional view of the state action doctrine. It extended the state action doctrine beyond the literal application of state law by state officials to actions of private persons where there were sufficient connections with the state.

For example, in *Smith v. Allwright*,9 the Court overruled *Grovey v. Townsend* because the state's allowing a private political party to deny in their primary election the eligibility of blacks to vote was the functional equivalent of excluding blacks from the primary based upon the state statutory permission that occurred in *Nixon v. Condon*. Similarly, in *Terry v. Adams*,10 the Court held that excluding blacks from a private group's pre-primary straw vote was state action because the winners of that primary ran unopposed in formal Democratic primaries. Functionally, therefore, it was indistinguishable from *Herndon* and *Condon*.

Since *Allwright* and *Terry* did not literally involve “overt official involvement,” as did *Herndon* and *Condon*, from these cases emerged the “public function” aspect of state action doctrine. Where

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5 See, e.g., *Brentwood Academy*, 531 U.S. at 305 (Thomas, J., joined by Rehnquist, C.J., and Scalia & Kennedy, JJ., dissenting).


7 286 U.S. 73, 88-89 (1932).


10 345 U.S. 461, 462-70 (1953) (Black, J., announcing the judgment of the Court, joined by Douglas & Burton, JJ.); *id.* at 482-84 (Clark, J., joined by Vinson, C.J., and Reed & Jackson, JJ., concurring in the judgment); *id.* at 472-79 (Frankfurter, J., opinion, but disagreeing with the Court as to the appropriate remedy).
private individuals perform a public function, such as choosing candidates to run for public office, the Court indicated that it will find that state action exists independent of overt official involvement.

A second example of the operation of the public functions doctrine during the Holmesian era occurred in *Marsh v. Alabama.* *Marsh* involved a “company town,” which provided, among other things, its own downtown business district; its own police and fire protection; its own sewage system and sewage disposal plant; its own residential area; and its own mail delivery system. Because this literally private company town operated functionally as a regular public municipality, the Court held that under the “public function” doctrine the town was the equivalent of a state actor, and thus had to comply with the First Amendment.

The functional emphasis of the Holmesian approach can also be seen in the famous case of *Shelley v. Kraemer.* *Shelley* involved the attempt by a private party to have a court enforce a racially restrictive covenant in a private land deed. Because a court was being asked to cooperate in enforcing racial discrimination, the Supreme Court held that such action would constitute state action, which then was viewed as unconstitutional racial discrimination under the Equal Protection Clause. In terms of contemporary state action terminology, *Shelley* reflects the view that sufficient “overt official involvement,” whether by statute, executive or administrative actor, or judicial actor, can constitute state action. The Court in *Shelley* made that point by noting many references to state action by the operation of state laws and the action of state executive or judicial officials, and it said that in many previous opinions the Court had given “specific recognition to the fact that judicial action is to be regarded as action of the State for the purposes of the Fourteenth Amendment.”

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, as are formalist and natural law jurists, as noted at Table 2.4 and §§ 3.1 & 3.4, would 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.13 One author has suggested that judicial enforcement of the racially

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12 334 U.S. 1, 14-18 (1948). Although *Shelley* involved the equitable remedy of injunctive relief, the Court extended the *Shelley* rationale to a claim for damages in *Barrows v. Jackson,* 346 U.S. 249 (1953).

restrictive covenant in *Shelley* should be viewed as a “badge or incident of slavery,” and thus barred by the 13th Amendment, which applies to private action, without the need for a finding of state action. Once so viewed, distinguishing *Shelley* would not be necessary for lower state and federal courts that 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 judicial enforcement of confidentiality provisions in settlement agreements that limit individual free speech rights.14

During this period, the Court did not explore explicitly the split between a conservative and liberal Holmesian state action doctrine. The conservative position would reflect traditional Holmesian deference to government, and thus be less likely to find state action. The liberal predisposition, even among a Holmesian judge, would be to have enforceable remedies if clear constitutional violations exist. The split was reflected, however, in cases like *Marsh v. Alabama*,15 with liberal Holmesian Justice Frankfurter joining in the majority liberal formalist Justice Black, and liberal instrumentalist Justices Douglas, Rutledge and Murphy, finding state action, while conservative Holmesians Chief Justice Vinson, and Justices Reed and Burton, were in the dissent.

§ 21.1.2.4 The Instrumentalist Era

In a case still used as a starting point for reasoning in state action cases, in *Burton v. Wilmington Parking Authority*16 the Court generalized from earlier opinions to conclude that it must weigh circumstances to determine whether a state is involved with private action "to some significant extent" – the forerunner of the modern “entwinement” language in *Brentwood Academy*. *Burton* found significant involvement where a state had leased property to a restaurant operated as an integral part of a public building. The Court concluded that the state had placed its “power, property and prestige” behind the operation of the racially discriminatory restaurant. “Entwinement” was

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15 326 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).

also found in *Evans v. Newton*, where newly-installed private trustees of a park could not engage in racial discrimination because “maintenance” of the park—which is “municipal in nature,” although by itself not a “public function,” since private parks, like Disney World, are private entities—was done by municipal employees, and for many years “control” of the park had been overseen by public trustees of the city.

Particularly during the core instrumentalist period of the Court, 1963-69, the Court extended its analysis of “public function” and “overt official involvement” quite broadly to reach findings of state action. For example, with regard to the “public function” doctrine, 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*. The Court reached this conclusion despite the fact that the shopping center was the equivalent of only the business district in *Marsh*. There was no showing in the case that the shopping center had its own residential area, police and fire protection, mail delivery system, or other aspects of a city that existed in *Marsh*.

As noted at § 11.2.2.2, 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 with respect to each of the three factors: overt official involvement, entwinement, and public function. For example, with respect to whether a private shopping center, by itself, can constitute a “public function,” the Burger Court overruled *Logan Valley in Hudgens v. NLRB,* and held that running a large privately-owned shopping center was not a “public function.” Thus, speakers had no First Amendment free speech rights of access to the center. Only Justices Marshall and Brennan dissented. Some state Supreme Courts, under state constitutions, have continued to find state action in these, and similar, circumstances.

With respect to “entwinement,” 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. Justices Douglas, Brennan, and Marshall dissented in *Moose Lodge.*

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21 407 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, J.J., dissenting).
With respect to “overt official involvement,” no state action was found in *Flagg Bros., Inc. v. Brooks*.

*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. 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.*, 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.

As indicated by the decisions in *Flagg Bros.* and *Lugar*, with Justice Blackmun being the swing vote in each case, the debate on the Court during this period was mostly between a conservative formalist and Holmesian approach to overt official involvement, entwinement, and public function versus a liberal instrumentalist approach. The term “conservative Holmesian” approach is used because the more liberal Holmesian approach, represented by judges such as Justice White, is more focused on broader use of federal governmental power, including the full power of the courts to order remedies for constitutional violations. As discussed at § 10.3.3 n.64, in state action cases, Justice White often joined with Justices Brennan, Marshall, and Stevens to support a liberal instrumentalist result.

Under the conservative formalist and Holmesian approach, as represented by Justice Rehnquist’s opinion in *Flagg Bros.*, a public function should only be found for activities “traditionally exclusively reserved to the states.” That approach rejects the liberal instrumentalist view in *Flagg Bros.* that public functions can be found in any activity “traditionally and historically associated” with public entities, with no requirement of exclusivity. Under a conservative formalist and Holmesian approach, entwinement should be found only for circumstances where the state has

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22 436 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).


24 436 U.S. at 159 (Rehnquist, J., opinion for the Court).

literally compelled the act to occur, or the private party and the state are involved in a conspiracy. 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 liberal instrumentalist position would be more accommodating in finding many of these activities enough to constitute “entwinement,” particularly if race discrimination were involved, as in Moose Lodge No. 107 v. Irvis. Regarding “overt official involvement,” the differences between the two approaches are in the amount of involvement necessary to trigger a finding of state action, with the conservative formalist and Holmesian position finding no state action in both Flagg Bros. and Lugar, and the liberal instrumentalist position finding state action in both cases.

For many cases between 1969 and 1986, the conservative Holmesian approach was ascendent, as Justices Blackmun and Powell, who tended to follow a moderate natural law approach during this period, as discussed at § 11.4 nn.93-99 for Justice Blackmun, and § 12.4.2 nn.189-97 for Justice Powell, joined with this approach more times than not. For example, regarding “entwinement,” state action was not found in Jackson v. Metropolitan Edison Co., a case involving electric utility service terminated without due process under a tariff filed with the state which had not given the consumer a hearing or other scrutiny. Despite the state’s heavy regulation of the utility industry, the Court held that the decision to terminate service was an independent decision of the private utility company, and not subject to any joint management or control by the state. Nor was state action found in Blum v. Yaretsky, a case of nursing home physicians transferring patients to another level of care, thus reducing Medicaid benefits. Despite the financial connections between the hospital and the state under the Medicaid program, the Court found the transfer decision to be an independent decision of the hospital, not subject to joint management or control by the state.

In both of these cases, the fact that the action forming the basis for the litigation was an independent decision of the private actor was important to the outcome of the case. A similar result was reached in Polk County v. Dodson. In Dodson, the Court held that a public defender, despite being paid by the state, and officially a state employee, was not a state actor when representing a criminal defendant, since in that role the public defender was an adversary of the state’s district attorney. In contrast, a public defender is a state actor for purposes of employment decisions, since in that role the public defender, like the district attorney, is a state employee.

26 Id. at 164 (Rehnquist, J., opinion for the Court).


The Court did find state action during this period where the state assisted private race discrimination by lending textbooks to a racially discriminatory private school. Such lending of textbooks was held to be impermissible encouragement of the private school’s discriminatory practices. For a unanimous Court, Chief Justice Burger wrote in *Norwood v. Harrison*, “A state may not grant the type of tangible financial aid here involved if that aid has a significant tendency to facilitate, reinforce, and support private racial discrimination.”

A final aspect of state action doctrine during the instrumentalist era was the phrasing of the state action doctrine as a two-part test in *Lugar v. Edmondson Oil Co, Inc.* In that case, Justice White stated:

> 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.

The second part of this test – may the person “fairly be said to be a state actor” – is determined by the familiar three-factor analysis of state action, focusing on “overt official involvement” of state officials, aspects of “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 cases in the modern natural law era since 1986 have focused on the three-factor state action test.

§ 21.1.2.5 The Modern Natural Law Era

Today’s post-instrumentalist Court has resisted both the extremes of the general reasoning of the limited state action doctrine of the conservative formalist and Holmesian approach, and the expansive state action doctrine of the liberal instrumentalist approach. Following the received precedents of earlier cases, the Court has continued to judge state action according to the three basic factors of overt official involvement, entwinement, and public function.

Sometimes this balance results in a finding of no state action. A typical case is *NCAA v. Tarkanian*. In *Tarkanian*, the critical question was whether the University of Nevada-Las Vegas’ actions in the case, 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.

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32 413 U.S. 455, 466 (1973).


Roughly half of these institutions are private 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, the 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.35

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 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.36

With respect to the “public function” analysis, the Court held in San Francisco v. United States Olympic Committee,37 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 from this state action conclusion.

Other times the facts of a case have supported a finding of state action. For example, in Edmonson v. Leesville Concrete Co., Inc.,38 the Court noted that there is state action if a deprivation of federal rights results from a rule or claim of right to act whose source is state authority and the actor can fairly be deemed a state actor, considering any “governmental assistance and benefits” (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,

35 Id. at 199.

36 Id. at 200-01 (White, J., joined by Brennan, J., Marshall, J. & O’Connor, J., dissenting).

37 483 U.S. 522, 544-48 (1987); id. at 548 (O’Connor, J., joined by Blackmun, J., concurring in part and dissenting in part); id. (Brennan, J., joined by Marshall, J., dissenting).

and where government assistance occurred in the form of a judicial summons to individuals for jury duty. In *Edmonson*, it is likely that it was only the cumulative effect of all three factors aggregated together that led to the finding of state action. For example, prior precedents, like *Flagg Bros.*, 39 had held that private dispute resolution, by itself, is not enough to trigger a finding of state action. Nor does judicial involvement trigger a finding of state action in every case, as discussed at § 21.1.2.3 nn. 13-14. The majority opinion noted this fact in *Edmonson*. 40 Similarly, it was probably only the combined effects of the “entwinement” of maintenance of a park, which has aspects of a “public function,” since even private parks are “municipal in nature,” with prior “overt official involvement” of public trustees, that led to a finding of state action in *Evans*, discussed at § 21.1.2.4 n.17.

Conservative formalist and Holmesian Justices dissented in the case, and disputed the majority’s analysis on all three grounds. First, *Flagg Bros.* had held that mere dispute resolution, by itself, was not a public function. Second, on the question of governmental assistance/entwinement, the dissent noted that it was the private attorneys who actually decided which potential jurors to strike in using the peremptory challenges. Thus, the state did not compel or conspire with the attorneys in their making the decision, and the decisions were made independently by the private actors. Third, according to the dissent, peremptory challenges should be viewed like the private self-help remedy in *Flagg Bros.*, rather than as the product of overt official involvement by the judge, who merely dismisses the juror based on the attorney’s independent decision. 41

Justice O’Connor authored this dissent, although typically she decided cases according to the natural law model of judicial decisionmaking. However, as discussed at § 12.4.2, occasionally she displayed an infinity for the Holmesian mode of analysis. She was not a consistent Holmesian with respect to state action, however, as revealed by her joining dissents in *Tarkanian* and *Olympic Committee*, discussed above at § 21.2.5 nn.36-37, and Justice Souter’s majority opinion in *Brentwood Academy*, discussed below at § 21.2.5 nn.42-43.

An additional modern case finding state action is *Brentwood Academy v. Tennessee Secondary School Athletic Association*. 42 In this case, the Court 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. Fully 84% of the members of the organization were public schools, and each of these public schools, of course, owed their creation to the same sovereign entity, the state of Tennessee. These facts distinguished the case from *Tarkanian*.

The conservative formalist and Holmesian dissent in the case disputed that this entwinement, by itself, could give rise to a finding of state action. Justice Thomas, joined by Chief Justice Rehnquist,

39 *Flagg Bros.*, 436 U.S. at 162.


41 *Id.* at 637-38 (O’Connor, J., joined by Rehnquist, C.J., & Scalia, J., dissenting).

and Justices Scalia and Kennedy, adopted a phrasing of state action doctrine more in terms of elements to meet, stating, “[W]e have found a private organization’s acts to constitute state action only when the organization performed a [traditional] public function; was created, coerced, or encouraged by the government; or acted in a symbiotic relationship with the government.” Justice Thomas added, “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 that it does . . . . 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.”43 As discussed at § 12.4.1, Justice Kennedy occasionally has displayed an infinity for the formalist mode of analysis. Justice Kennedy is not a consistent formalist with respect to the state action doctrine, however, as indicated by his authoring the majority opinion in Edmonson, discussed above at § 21.1.2.5 nn.38-40.

On balance, although occasionally Justices O’Connor or Kennedy have decided a particular case differently, in general the modern natural law approach rejects both the predisposition against state action found in the conservative formalist and Holmesian approaches, and the predisposition in favor of finding state action of the liberal instrumentalist approach. Consistent with the mainstream precedents of the Holmesian and instrumentalist eras, the modern natural law approach follows a straight-forward balancing of the three state action factors of overt official involvement, entwinement, and public function to determine whether in any individual case the private behavior is sufficiently connected to the government—“fairly attributable” in the language of Brentwood Academy44—that state action should be found.

§ 21.1.2.6 "State Action" Based on Laws that Repeal Existing Laws or Restrict Future Legal Change

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, discussed at § 26.2.1.2, or does not involve such a purpose, and thus triggers only rational review. The cases are mentioned here because the lack of analytic rigor in some functional instrumentalist opinions meant that most of these cases were discussed by the Court as involving the question of state action, even though analytically that was not the issue on which the decision turned. Since the cases really involve the Equal Protection Clause issue of whether discriminatory purpose or intent.

43 Id. at 305, 315 (Thomas, J., joined by Rehnquist, C.J., and Scalia & Kennedy, JJ., dissenting).

44 Brentwood Academy, 531 U.S. at 295 (finding of state action depends ultimately on determining that the private action is “fairly attributable to the State.”).
can be established, as in *Reitman v. Mulkey*,\(^{45}\) which involved repealing existing state anti-discrimination laws in housing, or *Washington v. Seattle School Dist. No. 1*,\(^{46}\) which involved 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 for adjudicating constitutional issues, these cases are discussed in Chapter 26 on the Equal Protection Clause, at § 26.2.1.2 nn.164-68.

§ 21.2 Structure of Individual Rights Doctrine Once State Action is Established

§ 21.2.1 General Considerations

§ 21.2.1.1 Categorical Approaches versus Balancing Tests in Individual Rights Doctrine

As noted at § 4.2.1 nn.17-18, one conception of rights is that they are absolute for the area covered by the right. Under this conception, rights “trump” all other considerations; they are not balanced against other considerations. This approach has been called a categorical approach. The alternative concept of rights is that they are balanced against governmental interests to determine which prevails – the individual right or the government’s action. As noted at § 4.2.1 nn.23-24, a balancing test involves a cost-benefit analysis of means and ends – “a head-to-head comparison with competing interests.”\(^{47}\) The logic of this cost-benefit analysis means that in every balancing test there are three basic components of the test. First, there is a question of what principles or policies are involved, that is, what are the ends to be achieved by the government action. Against the backdrop of these ends, the means of the action under review are examined both for the benefits achieved by the means (the benefit) and the burdens imposed by the means (the cost) as part of a cost-benefit analysis.

As discussed at § 4.2.2 nn.47-48, this means-end balancing test can either be structured in terms of a weighing of factors, with some of those factors focused on ends, and others on means. Alternatively, means-ends considerations can be phrased as separate elements of a balancing test. Similarly, categorical approaches also involve consideration of ends, benefits, and burdens. Specific examples of each of these kinds means-end reasoning are discussed below at § 21.2.2.

As noted at § 4.2.1 n.32, analytic approaches to law, like formalism and natural law, have a predisposition for categorical rules based on elements to meet. Balancing doctrines or categorical rules derived from a weighing of factors are reflective of the pragmatic, functional theories of Holmes, Cardozo, and Llewellyn, and triumphed on the Supreme Court after 1937 during the Holmesian and instrumentalist eras.\(^{48}\) In modern times, however, the natural law judge’s great respect for precedent, and willingness to consider background moral principles embedded in the law,

\(^{45}\) 387 U.S. 369 (1967).

\(^{46}\) 458 U.S. 457 (1982).


\(^{48}\) *Id.* at 952-72.
discussed at § 3.4 nn.93-106, have pushed natural law judges in the direction of a willingness to accept balancing tests and weighing of factors approaches. As noted at § 4.2.1 nn.33-34, the precedents and background moral principles embedded in doctrine since 1937, during the Holmesian and instrumentalist eras, are filled with more balancing tests and weighing of factors approaches than were the precedents and doctrine considered by natural law judges between 1789-1873.

In applying these balancing tests and weighing of factor approaches, the analytic predisposition of the modern natural law approach calls for a more systemic, logical elaboration of the various balancing tests and factors approaches used under current law. This aspect of modern natural law doctrine is discussed at § 21.2.3 (regarding burdens to trigger a particular standard of review) and § 21.2.4 (regarding determining the content of the various standards of review).

§ 21.2.1.2 Economic Versus Non-Economic Rights Cases

An additional aspect of individual rights adjudication remains to be noted. As the cases throughout Chapters 22-32 attest, in general conservative judges tend to be particularly sensitive to claims of deprivations of economic rights. Liberal judges tend to be more sensitive to claims of deprivations of non-economic personal or civil rights. This may be a by-product of the standard conservative predisposition for the status quo, and thus sensitivity to existing contract and property rights, while the progressivism of liberal judges makes them more sensitive to the claims of the unempowered, which usually involves personal or civil rights matters, as Justice Brennan noted at § 11.2.1.2 n.19.

For a number of individual rights doctrines, these predispositions appear to play an even more significant role than usual. On the conservative side, such predispositions are particularly important to keep in mind for doctrines such as the Contracts Clause, discussed at § 22.1; the Takings Clause, discussed at § 22.2; the Lochner-era liberty of contract doctrine, discussed at § 27.3.2.1; constitutional protection for commercial speech under the First Amendment, discussed at § 30.3.2; issues of the constitutionality of monetary limits on contributions and expenditures in political campaigns, discussed at § 30.4.2.1; and permissible rights of advocacy, and thus permissible kinds of advertisements, on behalf of candidates in elections to judicial office, discussed at § 30.4.2.4. On the liberal side, such predispositions are particularly important to keep in mind for doctrines such as the Fourth Amendment ban on “unreasonable searches and seizures,” discussed at § 23.2.1.1; the Eighth Amendment ban on “cruel and unusual punishment,” discussed at § 23.2.1.4; and what speech constitutes advocacy of illegal conduct under the First Amendment, discussed at § 30.1.1.1.

§ 21.2.2 Means/End Reasoning in Categorical and Balancing Tests Involving Elements to Meet or Factors to Weigh

As noted at § 21.2.1.1 n.47, balancing tests involve a three-part consideration of: (1) governmental ends; (2) how the means of government action achieve benefits; and (3) how the means of government action distribute burdens. Upon closer analytic examination, categorical tests equally involve consideration of ends, benefits, and burdens. This fact is discussed next for the four kinds of possible individual rights doctrines: balancing tests phrased in terms of elements to meet, at § 21.2.2.1; balancing tests phrased as factors to weigh, at § 21.2.2.2; categorical tests phrased as factors to weigh, at § 21.2.2.3; and categorical tests phrased as elements to meet, at § 21.2.2.4.
§ 21.2.2.1 Means/End Reasoning in Balancing Tests Involving Elements to Meet

The classic means/end balancing test involving three elements to meet is rational review under the Equal Protection Clause. As noted at § 26.1.1.1 n.12, the Court stated in Nordlinger v. Hahn,49 “[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.”

To determine whether a statute “rationally furthers a legitimate state interest,” the Court considers three things, as discussed at § 26.1.1.1 nn.13-31. The first inquiry is what governmental ends, or interests, support the statute’s constitutionality. Under rational basis review, the governmental ends supported by the statute must be “legitimate.” Legitimate ends are those within the usual “police power” of the state, that is, they involve the health, safety, or general welfare of the people. In practice, 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. Once it is determined that the statute is advancing a “legitimate state interest,” the next inquiry is whether the statute “rationally furthers” that interest or instead is irrationally underinclusive. The third inquiry then asks whether the statute’s means impose an irrational burden, that is, is irrationally overinclusive. As with the legitimate ends inquiry, in practice the Court presumes the statute’s means are “rationally related” to furthering its ends, leaving the burden on the challenger to prove the existence of irrational underinclusiveness or overinclusiveness.50

In addition to this minimum rational review balancing test, the Court uses a more searching standard of review than rational basis under the Equal Protection Clause if governmental action has a significant impact on a constitutional right that the Court has designated as “fundamental” or includes a classification whose legislative basis may be “suspect,” such as race, or “quasi-suspect,” such as gender. In such cases, as discussed at § 26.1.1.2 nn.32-56, the Court has developed in general two different versions of heightened scrutiny: intermediate review and strict scrutiny.51

These two versions of heightened scrutiny track the three means/end inquiries that the Court uses at rational review, but at each level increase the difficulty for the government to satisfy each inquiry. Thus, with respect to governmental interests, while at rational review the government need only advance “legitimate” government interests for the governmental 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 “compelling.” Once the governmental interest part of the inquiry is finished, the attention then turns, as at rational basis review, to the way in which the statute’s means further these ends. At

49 505 U.S. 1, 10 (1992).

50 On all these aspects of rational review, see, e.g. Heller v. Doe, 509 U.S. 312, 320 (1993).

51 Occasionally, the term “mid-level review” has been used to refer to the intermediate level of scrutiny. See, e.g., Michael M. v. Superior Court, 450 U.S. 464, 497 n.4 (1981) (Stevens, J., dissenting) (contrasting “mid-level review” from “strict scrutiny”). The more common term, however, and the term used in this book, is “intermediate review.”
intermediate scrutiny, the statute must be “substantially related” to advancing its ends, and not be “substantially” more burdensome than necessary.\textsuperscript{52} Under strict scrutiny, the statute must be “necessary” to further the statute’s ends, which means, in part, that the statute must be the “least restrictive” or “least burdensome” way of advancing the governmental ends.\textsuperscript{53} As discussed at § 26.2.1.1 nn.54-56, at strict scrutiny the statute must also be “directly related” to advancing the government’s ends, not merely “substantially related,” as at intermediate scrutiny.

By using these different levels of scrutiny, the Court balances the respective interests of the individual versus the government differently depending upon whether rational review, intermediate scrutiny, or strict scrutiny is used. The higher level of scrutiny that is used, the greater protection that is given to the individual right involved, both in terms of the importance of the government ends necessary to support government regulation (legitimate, important or substantial, or compelling), and in terms of how narrowly tailored the means of the statute must be in advancing the government’s ends (rational relationship, substantial relationship, or necessary).

While these three standards of review are clearly identified in modern Supreme Court doctrine, two other standards of review have been used in modern times. These standards reflect variations on the three inquiries of governmental interests, relationship to benefits, and burdens. As noted at § 7.2.1 nn.36-37, the first additional level continues the intermediate level of scrutiny of important government ends and burdens not substantially greater than necessary, but increases the level of scrutiny under the second prong from the intermediate level of substantial relationship to the strict scrutiny level of direct advancement. This “intermediate scrutiny with bite” test is used to determine the constitutionality of commercial speech regulations under the First Amendment, as in \textit{Central Hudson Gas & Electric Corp. v. Public Service Commission},\textsuperscript{54} discussed § 30.3.2.1 nn.228-32.

The second additional level of review adopts the strict scrutiny requirement for compelling interests and direct advancement, but continues the intermediate level of scrutiny for burdens not substantially greater than necessary, rather than the strict scrutiny requirement of least burdensome alternative. As noted at § 7.2.1 nn.38-43, this “loose strict scrutiny” standard of review occurred in the Equal Protection case dealing with racial redistricting in \textit{Bush v. Vera},\textsuperscript{55} discussed § 26.2.1.5 nn.278-85. All of these standards of review are summarized in Table 7.2.

\textsuperscript{52} \textit{See generally} Erwin Chemerinsky, \textit{ Constitutional Law: Principles and Policies} 645 (2d ed. 2002) (“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.”).

\textsuperscript{53} \textit{See id.} (“Under strict scrutiny a law is upheld if it is proved necessary to achieve a compelling government interest. The government . . . must show that it cannot achieve its objective through any less discriminatory alternative.”).

\textsuperscript{54} 447 U.S. 557, 566 (1980).

\textsuperscript{55} 517 U.S. 952 (1996).
21.2.2.2 Means/End Reasoning in Balancing Tests Involving Factors to Weigh

A second kind of balancing test structures these three considerations of ends, benefits, and burdens as factors to weigh. This is a balancing test where the consideration of ends, benefits, and burdens are thrown together and weighed one against the other. As noted at §§ 4.2.2 nn.28-30, the procedural due process cases based upon the Mathews v. Eldridge analysis of what procedures are “appropriate” to satisfy due process, and the dormant commerce clause cases involving Pike v. Bruce Church’s “clearly excessive” burden analysis, are classic examples of factor balancing tests.

In applying this kind of balancing test, there is an issue of whether the challenger has the burden of establishing that the governmental action is unconstitutional, or whether the government has the burden of establishing that the action is constitutional. Sometimes, such as in each of the two cases cited above, the burden is on the challenger to establish the unconstitutionality of the governmental action. As noted at § 7.2.1 n.22, cases under the Contracts Clause that involve the government substantially impairing the contract obligations of their own contracts have a similar structure, as indicated by United States Trust Co. v. New Jersey, discussed § 22.1.4 nn.29-30.

However, sometimes the burden shifts to the government, as noted at § 7.2.1 nn. 23-26. As cited there, under the Dorman Commerce Clause, where state regulation facially discriminates against interstate commerce, such as in Maine v. Taylor, discussed § 20.3.2.1.D. n.194, the Court weighs (1) the state’s legitimate interest in the regulation; (2) whether the benefits could be achieved as well by available non-discriminatory means; and (3) the burden on interstate commerce, but the burden shifts to the government to establish constitutionality. Under the First Amendment, when considering the right of government workers to speak on matters of public concern, the government has the burden to establish in cases like Pickering v. Board of Education of Will County, Illinois, discussed § 30.2.2.1 nn.178-81, that (1) the government’s “legitimate” ends; (2) given the means by which the governmental action achieved these benefits, including whether the ends “could be promoted through less drastic action”; (3) “outweigh” the “burden” on the individual’s First Amendment rights. The Fifth Amendment Takings Clause balancing test in Dolan v. City of Tigard, discussed § 22.2.5.1 n.97-103, requires the government to establish a “rough proportionality” between the government’s burden on the individual and the individual’s burden on society. As the Court noted in Dolan, this test is similar to the kind of balancing done in search and seizure cases under the Fourth Amendment, where, as discussed at § 23.2.1.1 n.59, the government has the burden to show that any search and seizure is “reasonable” under the circumstances.

56 431 U.S. 1, 22, 31 (1977).
60 See id. at 391. See generally Aleinikoff, supra note 47, at 965 (describing the range of cases in modern doctrine that use balancing under Fourth Amendment search and seizure doctrine).
Means/End Reasoning in Categorical Tests Involving Factors to Weigh

Categorical tests also involve the same kind of three-part means/ends reasoning. This is easiest to see in the context of categorical tests in involving factors to weigh. For example, as noted at § 21.1.1 n.4, the state action doctrine, phrased as a categorical requirement of state action before constitutional rights are triggered, involves weighing three factors of “overt official involvement,” “entwinement,” and “public function.” One way to view these factors is to note that the “overt official involvement” factor involves government officials advancing government ends; the “entwinement” factor focuses on the means by which governmental benefits (regulatory, financial, and symbolic) are provided to private individuals; and the “public function” factor focuses on whether the burdens of the private action are similar to burdens usually imposed by public actors. Thus, the three state action factors track an end, benefits, and burdens analysis.

Other factor weighing categorical approaches similarly track an ends, benefits, and burdens analysis. For example, as discussed at § 17.3.4.4 n.555, under the political questions doctrine, the six factors in Baker v. Carr can be organized around three groupings, as Justice Powell did in his concurrence in Goldwater v. Carter: (1) is the issue committed by the text of the Constitution to a coordinate branch of government; (2) the core separation of powers concerns whether there are judicially manageable standards or whether the issues calls for an initial non-judicial policy decision; and (3) general separation of powers concerns dealing with whether prudential considerations counsel against judicial intervention, such as a need for finality, a special concern with expressing lack of respect for a coordinate branches of government, or potential embarrassment from multifarious pronouncements if the court second-guessed how the coordinate branch has acted. The first of these factors is focused on the end of following constitutional meaning, as revealed in clear text; the second of these factors is focused on the benefits of following reasoned elaboration of the law where judicially manageable standards exist; the final set of factors is concerned with whether there are any special burdens of judicial review that counsel that an issue be viewed as a political question.

Any test involving factors to weigh can similarly be understood as focused on constitutional ends, benefits, and burdens. For example, as discussed at § 27.1.4 nn.84-87, based on a substantive due process analysis, the Court stated in BMW of North America, Inc. v. Gore, that “excessive punitive damages” are unconstitutional. The decision on “excessiveness” was based on a weighing of three factors: the degree of reprehensibility of the wrongful conduct; the relationship between the punitive damage award and civil penalties authorized or imposed by law in comparable cases; and the ratio between the harm or potential harm suffered by the plaintiff in terms of compensatory damages and the punitive damages award. The first factor focuses on the governmental end to deter reprehensible misconduct through punitive damage awards. The second factor focuses on the benefits achieved in terms of deterrence by civil penalties imposed by law, and the extent to which the punitive damage award aids a similar beneficial end. The third factor focuses on the extent of the burden of the punitive damage award, and whether the ratio of punitive damages to compensatory damages is so high as to constitute an excessive burden weighing all three factors together.

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61 444 U.S. 996, 998-1002 (1979) (Powell, J., concurring in the judgment).

§ 21.2.2.4  Means/End Reasoning in Categorical Tests Involving Elements to Meet

Categorical tests involving elements to meet also involve the same focus on ends, benefits, and burdens of governmental action. For example, as discussed at § 17.3.1.1 nn.280-84, to have standing to bring a lawsuit a plaintiff needs to establish an injury-in-fact, caused by the challenged conduct, redressable by the court. The first element, injury-in-fact, is focused on the government end of providing individuals with injury relief – the natural law maxim of “where there is a right, there should be a remedy, discussed at § 12.3.3 n.136. The redressability element is focused on whether the court can provide the individual with beneficial relief. The causation element is focused on the burden created by the challenged conduct. Each is part of standing analysis, although as discussed at § 17.3.1.3.C, because courts can usually redress constitutional injuries caused by the challenged conduct, the redressability element adds little to the requirement of causation.

A second example of a categorical rule seen from the perspective of ends, benefits, and burdens is the prohibitions on Bills of Attainder, discussed at § 23.2.2.1. To be a Bill of Attainder, a law must constitute “legislative punishment of an identifiable individual.” Thus, as stated in Nixon v. Administrator of General Services,63 the act must be “legislative”; it must be directed against “an identifiable individual”; it must constitute “punishment.” The first element focuses on determining whether the end of the governmental action is “legislative”; the second element focuses on whether the benefit to be achieved by the government regulation is directed against an “identifiable individual”; the third elements focuses on whether the burden of the government action involves “punishment” within the constitutional proscription against Bills of Attainder.

Even the requirement under the Commerce Clause that the government be regulating “commerce among the states” reflects the perspective of ends, benefits, and burdens. The end in this case is the regulation of commerce. The means elements of benefit and burdens are reflected in the requirement that the regulation be related, as noted at § 18.2.5 n.100, to some burden caused by the use “of the channels of interstate commerce,” as in the lottery case, Champion v. Ames; or the benefit of 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; or the benefit of regulating “those activities that substantially affect [burden] interstate commerce.”

§ 21.2.3  The Effect of Burdens in Triggering Levels of Review

Another issue requiring greater clarification in the modern natural era involves the issue of what kind of burden triggers what standard of review under various individual rights doctrines, including fundamental rights analysis. For example, the Court has applied strict scrutiny in cases involving significant burdens on the fundamental right to marry, as in Zablocki v. Redhail.64 The Court has also applied strict scrutiny for significant burdens on the right to travel in Shapiro v. Thompson65 and

Memorial Hospital v. Maricopa County. However, in cases involving less than substantial burdens on these fundamental rights, the Court has applied some version of rational review, but seemingly without the usual deference to the legislative branch typical of minimum rational review, as in Turner v. Safley, involving a ban on the right to marry of a prisoner which was found unreasonable, or Sosna v. Iowa, where Iowa’s decision to impose a one-year residency requirement before individuals could obtain a divorce in Iowa was viewed as reasonable. Similarly, in cases involving the right to vote, the Court has applied strict scrutiny for more severe burdens on the right to vote, as in Kramer v. Union Free School District No. 15, while only applying rational review to less severe burdens, such as restrictions on voting for a water reclamation district in Ball v. James, or limitations on the voting rights of prisoners, in Richardson v. Ramirez, or ballot access issues in the context of the freedom of association in Timmons v. Twin Cities Area New Party. The marriage cases are discussed at § 27.3.3.1.A; the right to travel cases at § 26.5.1; the access to court cases at § 26.5.2; the right to vote and access to the ballot cases at § 26.5.3; and the freedom of association at § 31.2.1.

Candid acknowledgment of the role the level of burden may play in determining the proper standard of review may also help explain the rationality review seemingly given in another case of a less than substantial burden on a fundamental right, the parental notification issue in Hodgson v. Minnesota, discussed at § 27.3.4.1. Similarly, in Planned Parenthood v. Casey, not every regulation of abortion was constitutionalized under a strict scrutiny approach, as discussed at § 27.3.4.1. Courts have also applied an undue/substantial burden versus less than undue/substantial burden analysis in the context of the unenumerated fundamental right of raising one’s children, as discussed at § 27.3.3.1.C, and the right not to have private medical information disclosed, as discussed § 27.3.3.4.

Given the Court’s recent cases, it can be predicted that concern for reasoned elaboration of the law will mean that every area involving unenumerated fundamental rights, discussed at §§ 26.5 & 27.3, and the unenumerated freedom of association, related to the textually specific right to assembly,

71 497 U.S. 417, 458-61 (1990) (O’Connor, J., concurring in part and concurring in the judgment in part) (abortion rights case dealing with parental notification, where constitutionality depended on a judicial by-pass option for the minor).
72 505 U.S. 833, 879-901 (1992) (joint opinion in Casey) (rational review applied to less than undue burdens on abortion choice; strict scrutiny applied only to the spousal notification provision which was held to constitute an undue burden on abortion choice).
discussed at § 31.2, will eventually be structured in terms of substantial or undue burdens triggering strict scrutiny, and less than substantial or undue burdens triggering some form of rational basis scrutiny. Indeed, in 2006, in *Beard v. Banks*, discussed at § 30.2.1.2, the Supreme Court extended the rational basis scrutiny used in *Turner v. Safley* to a case involving burdening a prisoner’s enumerated First Amendment right of freedom of speech, on the grounds that prisoners generally lose some rights when incarcerated. Presumably, the Court had in mind that under the normal First Amendment doctrine content-neutral regulations that even minimally burden First Amendment rights trigger intermediate scrutiny, discussed at § 29.2 nn.62-71, which the Court did not apply in the case. As discussed at § 30.2.1.2, probably the better analysis of the case would have been to recognize that prisons are “non-public” forums, and thus under standard First Amendment doctrine, discussed at § 29.5.1 nn.76-80, rational review of some kind, and more sensibly the 2nd-order rational review of *Turner v. Safley*, was the appropriate standard to apply.

As noted at § 16.4 nn.97-102, the doctrine applying some form of rational review in these cases is consistent with a Stage 6 approach to constitutional law, with the Court adopting an impartial spectator approach, rather than sitting as a super-legislature. Under this approach, basic principles of liberty and equality will be protected, but a number of collateral decisions regarding persons living together in peace and harmony will be made by democratically elected officials, and reviewed only under rational review.

In each of these cases, the Court will have to consider what form of rational review analysis should be applied. Although the Court has suggested it was applying minimum rational review in some of the cases cited above, as noted in discussing each decision at §§ 26.5 & 27.3, the reasoning in the opinions suggests more the “second-order” factor balancing rational review approach, discussed in § 7.2.1 text following n.42, and summarized in Table 7.2.73 Since these cases do involve burdening a “fundamental” right, even only minimally, something more than minimum rational review would be appropriate given the Court’s usual approach to determining what level of review to apply, discussed at § 26.1.2.1, where “fundamental” rights usually trigger a high level of scrutiny than burdens on “non-fundamental” rights.

In addition, sometimes a doctrine is not triggered unless a particular level of burden exists. For example, under Contracts Clause doctrine, discussed at discussed at § 22.1.4 n.28, it takes a substantial impairment of contract right to trigger analysis under the Contract Clause. Under the Takings Clause, discussed at § 22.2.5.2 nn.98-103, it takes substantial deprivation of property rights to trigger a regulatory takings analysis. Under the Article IV, § 2 Privileges and Immunities Clause

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analysis, discussed at § 20.3.3.2 nn.298-300, only burdens on rights “sufficiently basic to the livelihood of the Nation” trigger a privileges and immunities clause analysis.

§ 21.2.4 A Natural Law Focus on Making the Standards of Review More Analytically Coherent

Under the Court’s current approach, the various balancing tests regarding individuals rights under the Equal Protection Clause, Due Process Clause, First Amendment, Contracts Clause, Takings Clause, and other doctrines involving individual rights technically are phrased as involving different tests. When combined together, the number of tests number more than 40. An approach more focused on analytic rigor, however, would note that there are really just 7 different kinds of balancing tests used in all of these doctrines: the base level of minimum rational review, plus 6 heightened kinds of scrutiny, the “base plus six” model discussed at § 7.2.1, and summarized in Table 7.2.

A Court committed more to the analytic side of reasoned elaboration of the law would note that a danger of increased confusion and unpredictability exists if proliferation of levels continues past these 7 levels of review. This could happen if: (1) the Court adopts additional kinds of inquiries different than the three basic inquiries used under rational review, intermediate scrutiny, and strict scrutiny, discussed at § 21.2.4.1; (2) additional mixings and matchings occur for different kinds of scrutiny for the governmental interests, relationship to benefits, and burden inquiries, discussed at § 21.2.4.2; or (3) the "base plus six" standards are not clearly acknowledged, discussed at § 21.2.4.3. Increased confusion and unpredictability can also result if (4) juries are given too much leeway in the application of these tests in individual cases, discussed at § 21.2.4.4.

§ 21.2.4.1 The Problem of Adopting Additional Kinds of Inquiries

Two cases underscore the kind of problem created by the possible proliferation of additional kinds of inquiries. First, in the context of reviewing the constitutionality of a court injunction, the Court adopted in Madsen v. Women’s Health Center, Inc., discussed at § 29.6.1.2 nn.219-24, an analysis under the burden element of heightened scrutiny that was described as being somewhere between the intermediate “not substantially more burdensome” test and the strict scrutiny “least restrictive alternative” test. The Court stated that where basic intermediate review requires that the restriction be “narrowly tailored to serve a significant government interest,” the new standard requires that the restriction “burden no more speech than necessary to serve a significant government interest.” From the opinion, it is not clear exactly how much more stringent this test is than traditional intermediate scrutiny, nor are other precedents of any help, since the standard is not used in any other case.

As noted at § 7.2.1 text following n.42 & summarized in Table 7.2, the “base plus six” model gives the Court three well-formed options higher than intermediate review from which to choose – intermediate review with bite, loose strict scrutiny, or strict scrutiny. As discussed at § 29.6.1.2

74 See Kelso, Gaps, supra note 73, at 497 n.16.

n.227, the dissent in Madsen opted for strict scrutiny, concluding that “speech-restricting injunction[s]” should always be given strict scrutiny. As discussed at § 29.6.1.2 n.228-30, the majority could have achieved basically the same result it reached by adopting intermediate review with bite. Where the injunction at issue in Madsen was constitutional, it was because it was directly related to the perceived harms and was a close enough fit to satisfy the intermediate “not substantially more burdensome than necessary” test. Where the injunction was unconstitutional, it was because it was not directly related to perceived harms, or not a close enough fit, and thus substantially overbroad. In terms of predictable and stable levels of scrutiny, it would have been better if the majority in Madsen had cast the increased scrutiny for court injunctions as a case involving intermediate review with bite, rather than the new, unclear version of the narrowly drawn analysis which the majority actually adopted in Madsen.

The gender discrimination case of United States v. Virginia, discussed at § 26.3.1.2 nn.379-81, is another case of increased proliferation of inquiries leading to a confused result. Justice Ginsburg’s majority opinion initially cited the standard intermediate review doctrine that applies in a gender discrimination case, concluding that 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.’” However, the opinion then seemed to require that Virginia show an “exceedingly persuasive justification” for its gender discrimination at the Virginia Military Institute (VMI), not merely a substantial relationship to important government interests. As Chief Justice Rehnquist noted in his concurring opinion, adoption of the phrase “exceedingly persuasive justification . . . introduces an element of uncertainty” and “potential confusion” into the appropriate test, and is unnecessary to strike down the gender discrimination in VMI. If the Court wanted to adopt a higher level of scrutiny for gender discrimination cases than traditional intermediate review, it would be preferable to adopt one of the heightened standards under the “base plus six” model – intermediate review with bite, loose strict scrutiny, or strict scrutiny – rather than add into the mix another uncertain level of review, exceedingly persuasive analysis.

Just as the Court should remain predictable about the basic test to apply, the Court should remain predictable about the determination of what governmental interests are appropriate to consider in determining the constitutionality of legislation. As discussed at § 26.1.3 nn.83-99, under the Court’s usual approach, the Court uses any conceivable government interest to support a statute under rational review, the Court considers any actual or plausible governmental interest under intermediate review, and the Court considers only actual governmental purposes under strict scrutiny. To the extent Justice Ginsburg’s opinion in Virginia suggested that at intermediate review the Court will

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77 Id. at 534.

78 Id. at 559 (Rehnquist, C.J., concurring).

consider only actual governmental interests,\textsuperscript{80} the opinion was a departure from the Court’s traditional analysis, as discussed at § 26.3.1.2 n.382.

§ 21.2.4.2 Problems of Mixing and Matching Levels of Scrutiny

In addition to the three versions of rational review discussed earlier, it would be possible for the Court to add levels of review that mix inquiries currently used for rational review and intermediate scrutiny. For example, the Court could suggest that to be constitutional some governmental action must have a rational relationship to an important or substantial government interest. The Court appeared to do this in the voting rights case of \textit{Timmons v. Twin Cities Area New Party}.\textsuperscript{81} In \textit{Timmons}, the 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 \textit{Timmons} case is discussed at § 31.2.1 nn.6-7. Similarly, in \textit{Plyler v Doe},\textsuperscript{82} the Court stated that a statute denying free public education to the children of illegal immigrants could “hardly be considered rational unless it furthers some substantial goal of the State.” Later cases, however, have indicated that the intent in \textit{Plyler} was to apply a standard intermediate scrutiny kind of test.\textsuperscript{83} The \textit{Plyler} case is discussed at § 26.2.2.1.B nn.337-43.

Alternatively, the Court could suggest that the government action must have a substantial relationship to a legitimate government interest. The Court had done this in a number of Takings Clause cases, including \textit{City of Monterey v. Del Monte Dunes at Monterey, Ltd.}, citing \textit{Agins v. City of Tuburon},\textsuperscript{84} where the Court stated, “[A]lthough this Court has provided neither a definitive statement of the elements of a claim for regulatory taking nor a thorough explanation of the nature of applicability of the requirement that a regulation substantially advance legitimate public interests outside the context of required dedications or exactions, . . . [g]iven the posture of the case before us, we decline the suggestions of \textit{amici} to revisit these precedents.”

Each of these decisions is troublesome. In addition to creating additional levels of review without a demonstrated need for them, these cases violate the certainty gained under the “base plus six” model of knowing that each different level of review represents a step-ladder increase in the rigor of scrutiny over the previous level. For example, which level of scrutiny is more rigorous – the \textit{Timmons} rational relationship to important government interest test, the \textit{Agins/Del Monte Dunes} substantial relationship to legitimate government interest test, or the related Taking Clause case of \textit{Dolan v. City of Tigard}’s “rough proportionality” standard. Presumably \textit{Dolan} is more rigorous than

\begin{itemize}
  \item \textsuperscript{80} 518 U.S. at 535-36.
  \item \textsuperscript{81} 520 U.S. 351, 358, 369 (1997).
  \item \textsuperscript{82} 457 U.S. 202, 224 (1982).
  \item \textsuperscript{83} \textit{See} Kadrmas v. Dickinson Public Schools, 487 U.S. 450, 459 (1988).
  \item \textsuperscript{84} \textit{Del Monte Dunes}, 526 U.S. 687, 704 (1999), \textit{citing} Agins, 447 U.S. 255, 260 (1980).
\end{itemize}
In the case of Timmons or Agins/Del Monte Dunes, since the burden is on the government to justify the constitutionality of its action in Dolan, but the burden seems to be on the challenger in Timmons and Del Monte Dunes. Further, in Del Monte Dunes, the Court refused to apply the Dolan test outside the Dolan context of required dedications or exactions, suggesting it is a more rigorous approach. However, it is not clear from the ordinary meaning of words that the “substantial relationship” required in Nollan is less rigorous than the “reasonable proportionality” of Dolan. This aspect of the law would be considerably clarified by recasting Timmons and Agins/Del Monte Dunes as versions of second-order rational review, while casting Dolan as third-order rational review, since the government bears the burden in Dolan.

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. For less than severe burdens, however, the majority did not adopt any traditional standard of review. Since none of the opinions in Timmons demonstrated the traditional minimum rational review deference to governmental decisionmaking, as even the majority opinion that upheld the state law in Timmons did so only after a careful and detailed analysis of the government’s interests, the real choice that must be made in Timmons is whether to adopt a version of heightened rational review, either second-order or third-order, or to adopt intermediate review.

Justice Souter’s dissent in the case clearly opted for intermediate review, and thus has the advantage of clarity. By considering only those interests put forward by the government in litigation, Justice Stevens’ dissent also appeared to adopt an intermediate form of review. Because of its willingness to consider conceivable governmental interests, the majority opinion is best viewed as either second-order or third-order rational review under the “base plus six” model discussed at § 7.2.1. Since the Court appeared to adopt the view that the challenger had the burden of

85 512 U.S. 374, 388-91 (1994) (government bears the burden of proving “rough proportionality,” which is a different, more vigorous, level of review than minimum rationality).

86 Del Monte Dunes, 526 U.S. at 700-01 (jury instructions required challenger to demonstrate that the government action was unconstitutional); Timmons, 520 U.S. at 365-66 (analysis phrased in terms of what “[p]etitioners contend” and “petitioners urge”).

87 Del Monte Dunes, 526 U.S. at 704-05.

88 520 U.S. 351, 358 (1997); id. at 374 (Stevens, J., joined by Ginsburg, J., & Souter, J., dissenting); id. at 382 (Souter, J., dissenting).

89 Id. at 363-70.

90 Id. at 383 n.2 (Souter, J., dissenting).

91 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 approach of rational review, see § 26.1.3 nn.92-99.
establishing the constitutionality of the government action, the approach is best viewed as an example of second-order review. The majority’s language in *Timmons* about the government needing “important” interests to regulate, rather than merely “legitimate” interests – an intermediate requirement regarding government interests, rather than rational review – 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,” without any further finding that those interests were important or substantial.

The language in the *Timmons* opinion about the state’s interests needing to be “correspondingly weighty” given the statute’s burdens underscores that the *Timmons* analysis is a factor balancing test, not an minimum rational review element balancing test. Thus, it is best understood as adopting the kind of overall balancing of benefits versus burdens which takes place at second-order review. For this reason, the Court should recast the majority opinion in *Timmons* as an example of second-order rational review, instead of creating a new, rationally related to important government interest test, unused in any other context, and unnecessary to resolve the *Timmons* case.

The use in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.* of a substantial relationship to a legitimate government interest test is similarly a mistake. As with the term “correspondingly weighty” in *Timmons*, the greater than minimal rational review scrutiny required by use of the phrase “substantial relationship” in *Del Monte Dunes* is best handled by the factor balancing test of benefits and burdens of governmental action which takes place at second-order rational review. As discussed at § 22.2.5.1 nn.87-94, in 2005 in *Lingle v. Chevron USA, Inc.*, the Supreme Court unanimously rejected the “substantially advance” language in Takings Clause cases, viewing standard regulatory takings cases like *Penn Central Transportation Co. v. City of New York* as adopting a rational review balancing approach, consistent with the analysis suggested here.

Admittedly, the view adopted here that the Court should stick with the “base plus six” model for seven levels of review is somewhat arbitrary. For example, instead of two levels of heightened rational review being the second-order and third-order factor balancing tests, one could suggest that two levels of heightened rational review should be the substantially related to legitimate interests test of *Del Monte Dunes*, and then a substantially related to important government interests, but not irrationally burdensome analysis, an approach not used in any current case.

Such an approach would mirror the two heightened review levels between intermediate review and strict scrutiny, which increase the level of rigor on succeeding elements of the three basic inquiries of governmental ends, relationship to benefits, and burdens. If one dispensed with the factor balancing tests, it would also be consistent with the “step-ladder” approach of each succeeding level

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92 *See Del Monte Dunes*, 526 U.S. at 365-66; *Timmons*, 520 U.S. at 369-70 (citing to the similar voting rights case of *Burdick v. Takushi*, 504 U.S. 428, 437-38 (1992), and discussing whether the Court “rejected the petitioner’s argument,” suggesting that the challenger had the burden of proof).

93 520 U.S. at 364.

of review being clearly more rigorous than the earlier level. If one kept all these versions of heightened rational review, then there would be the muddle of whether the second-order factor balancing test is or is not more rigorous than the second-order element balancing test of being substantially related to legitimate government interests.

The advantage of the “base plus six” approach is that it builds on existing case law, adopting levels of scrutiny which appear in numerous existing precedents. Only a few cases, therefore, like Del Monte Dunes or Timmons, require reconceptualization. Further, given the number of second-order and third-order factor balancing tests in use, as summarized at § 21.2.2.2, the Court clearly has demonstrated its view of the utility of such factor balancing tests in many circumstances. In the absence of strong reasons to the contrary, the lessons of the common law support building on such existing precedent, where possible.95

As with rational review, as a theoretical matter the Court could also adopt levels of heightened scrutiny between intermediate review and strict scrutiny in addition to the intermediate review with bite and loose strict scrutiny standards, discussed at § 7.2.1 nn.36-42, and summarized in Table 7.2. For example, the Court could require, as a version of intermediate review with bite, the government to have a compelling government interest to regulate, but only require a substantial relationship between means and ends, and that the action not substantively burden more persons than necessary. Alternatively, as a version of loose strict scrutiny, the Court could require compelling government interests, a least restrictive alternative test, but only a substantial relationship, rather than a direct relationship, between means and ends.

Adoption of such tests, however, would only add uncertainty to the law in terms of rigor in the standards of review. Which version of intermediate review with bite is more rigorous – the current Central Hudson test (which adds to basic intermediate review only the strict scrutiny direct relationship requirement), or the version suggested just above (which adds to basic intermediate scrutiny only the strict scrutiny compelling government interest test)? Which version of loose strict scrutiny is more rigorous – Bush v. Vera (which only waters down the least restrictive alternative requirement of strict scrutiny), or the version suggested just above (which onlywaters down the direct relationship requirement of strict scrutiny)? By having only one kind of intermediate review with bite and one kind of loose strict scrutiny, the “base plus six” model preserves a system where each succeeding level of scrutiny is clearly more rigorous than the preceding level.

§ 21.2.4.3 Acknowledging the Six Standards of Heightened Review Under the “Base Plus Six” Model Discussed at § 7.2.1

In addition to these observations, it would help certainty and predictability in the law if the Court explicitly acknowledged the existence in current doctrine of the seven levels of scrutiny – the “base plus six” model of § 7.2.1 and Table 7.2. Explicit acknowledgment of only the three basic levels of element balancing tests – minimum rational review, intermediate scrutiny, and strict scrutiny – and no clear structured categorization of the various factor balancing tests in use, promotes neither certainty nor predictability in the law.

At rational review, this would mean acknowledging the role that "second-order" and "third-order" rational review, as defined at § 7.2.1, play in constitutional analysis. This would mean that the Court should squarely face that in some cases a real choice exists between whether to apply minimum rational review or either second-order or third-order rational review. For example, such a choice was faced in the 1985 Equal Protection case of *City of Cleburne v. Cleburne Living Center*.96 In that case dealing with discrimination against the mentally impaired, the majority opinion phrased its approach in terms of minimum rational review. Three Justices concurred in the judgment, but suggested that something more rigorous than minimum rational review was being applied.

Many commentators have likewise suggested that traditional minimum rational review was not applied in *Cleburne*. For example, Professor Tribe has noted that in *Cleburne* the Court did not substantially defer to the legislature’s judgment concerning the rationality of the statute as is usual under minimum rational review, but rather determined for itself “whether the policies hypothesized to save the challenged action were actually supported by fact.”97 Ninth Circuit Court of Appeals Judge Alex Kozinski has called this standard of review “robust and realistic rational basis review” rather than the minimum rational review applicable to standard social and economic regulations.98

More importantly, some of the conclusions reached in *Cleburne* suggest that the Court was implicitly engaged in a factor balancing inquiry, weighing the extent of the government’s benefit against the burden of the statute, rather than engaging in a separate element inquiry into whether there was any rational connection between the statute and its ends, or any rational justification for the burdens imposed by the statute. For example, the Court concluded that concern that the home for the mentally impaired was to be located on a flood plain could not rationally support banning the home since “nursing homes, homes for convalescents or the aged, or sanitariums” could all have been located on the spot.99

Applying traditional minimum rational review, one could argue that a legislator could have rationally concluded that the evacuation problems posed for persons who are mentally impaired, and thus not as able to appreciate the danger of a flood and follow orders, are different and greater than the problems posed by the evacuation of individuals with only physical ailments which limit their mobility, as in nursing homes or homes for the convalescent. Under traditional minimum rational review, that would make the statute constitutional. Under a second-order factor balancing approach, however, one could conclude that the burden on the mentally impaired was “unreasonable” or “clearly excessive” given whatever slight benefit the government might have in a slightly easier evacuation for nursing home members than members of a home for the mentally impaired.

96 473 U.S. 432, 449-50 (1985); *id.* at 458-60 (Marshall, J., joined by Brennan, J., and Blackmun, J., concurring in the judgment, but dissenting in part).

97 Laurence Tribe, American Constitutional Law 1444 (2d ed. 1988).

98 Parents Involved in Community Schools v. Seattle Sch. Dist. No. 1, 426 F.3d 1162, 1194 (9th Cir. 2005) (Kozinski, J., concurring).

99 473 U.S. at 450.
In 1993, a five-Justice majority ducked this issue in *Heller v. Doe*, suggesting that only minimum rational review exists. A four-Justice dissent supported the *Cleburne* kind of rational review. With the changing membership of the Court after 1993, the dissent may have had five votes for its position between 1994-2005, but possibly not today. Three of the dissenters in *Heller*, Justices Stevens, O’Connor, and Souter, were still on the Court in 2005 at the time of Justice O’Connor’s retirement. They would likely have been joined in a similar case between 1994-2005 by the two Clinton appointees to the Court, Justices Ginsburg and Breyer. However, on grounds of faithfulness to precedent, it is not certain that all five of these Justices would have supported the dissent in *Heller* had a case raising that issue come before the Court during that time. For example, Justice O’Connor joined a 5-Justice majority opinion in *Board of Trustees of the University of Alabama v. Garrett* which made reference, in passing, to *Cleburne* adopting the “minimum ‘rational basis’ review.” The make-up of the Court after Chief Justice Rehnquist’s death and Justice O’Connor’s retirement leaves this issue still somewhat speculative, though perhaps only the votes of Justices Stevens, Souter, Ginsburg, and Breyer would exist for second-order rational review today.

If a majority of the Court did decide that a *Cleburne*-kind of case justifies higher than minimum rational review, it would be useful if that Court explicitly adopted second-order rational review, with the elements of that standard of review as defined at § 7.2.1. Such an acknowledgment would not represent an additional proliferation in the levels of review. Because of skepticism of the legislative agenda, the Court currently does not substantially defer to state legislative judgments under dormant commerce clause analysis, discussed at §§ 20.3.2.1.C nn.181-84 & 20.3.2.1.D. nn.204-08, or under the Contract Clause when the state is altering its own contractual obligations, discussed at § 22.1.4 nn.29-33. Thus, this level of review already exists in the Court’s individual rights jurisprudence. Such an acknowledgment in *Cleburne*, or if not in *Cleburne* in other appropriate cases, would only mean that the Court would be candid in stating that for one or more of the reasons the Court usually gives for heightened scrutiny, discussed at § 26.1.2.1, the same lack of deference routinely applied in dormant commerce clause cases and some Contract Clause cases is appropriate to apply in this Equal Protection Clause case. As discussed at § 27.1.2.1 n.40, some substantive due process cases,


101 *Id.* at 336-37 (Souter, J., joined by Blackmun, J., Stevens, J., & O’Connor, J., dissenting).


103 *See, e.g.*, Brian B. v. Commonwealth of Pennsylvania Dep’t of Educ., 230 F.3d 582, 588, 590 (3rd Cir. 2000), *cert. denied*, 532 U.S. 972 (2001) (majority applied minimum rational review to hold there was no violation of equal protection where a Pennsylvania statute limited the education to youths convicted as adults and incarcerated in adult, county correctional facilities, but did not so limit education to youths incarcerated in state facilities; dissent applied a *Cleburne*-like rational review because “isolation of this particular group of school-age inmates awakens my skepticism.”). Even incarcerated persons, of course, have constitutional rights. *See, e.g.*, Turner v. Safley, 482 U.S. 78, 84-91 (1987) (ban on the right of a prisoner to marry failed rational review as not “reasonable” even given the government’s legitimate interest in prison security and general deterrence).
like United States Department of Agriculture v. Murry, are also suggestive of a “second-order” factor balancing approach, although the Court claimed to be applying only minimum rational review.

A second area where acknowledgment of the variations of rational review would aid clarification of the law involves Boerne v. Flores and Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank. In these cases, the Supreme Court required that when Congress legislates pursuant to its § 5 enforcement power under the 14th Amendment that “[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.” Given the level of scrutiny in both cases concerning whether Congress had satisfied this test, it is reasonably clear that these cases were not adopting the substantial deference standard of minimum rational review. Furthermore, the requirement of “congruence and proportionality” seems similar to the requirement of “rough proportionality” in Dolan, and thus tracks a factor balancing approach, rather than a minimum rational review element balancing approach. In both cases, however, it is unclear whether the challenger or the government has the burden of demonstrating whether “congruence and proportionality” exist. Explicit acknowledgment of the seven standards of review would raise the visibility of this question.

To the extent that the two cases themselves provide any guidance, they seem to point in opposite directions. Boerne seems to suggest that the burden is on the challenger, as the Court acknowledged the “broad” power of Congress under § 5 of the 14th Amendment. On the other hand, Florida Prepaid seems to put the burden on Congress to demonstrate congruence and proportionality. The Court stated in Florida Prepaid, “[F]or Congress to invoke § 5, it must identify conduct transgressing the Fourteenth Amendment’s substantive provisions, and must tailor its legislative scheme to remedying or preventing such conduct.” The burden also seems to be placed on Congress in Board of Trustees of the University of Alabama v. Garrett, where the Court stated, “Once we have determined the metes and bounds of the constitutional right in question, we examine whether Congress identified a history and pattern of unconstitutional . . . discrimination by the States.”

As a final point regarding variations in rational review, the statement that at second-order or third-order rational review the Court does not give the same kind of “substantial deference” to legislative judgments that the Court gives at minimum rational review does not mean that the Court gives no deference. 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, the Court


106 Florida Prepaid, 527 U.S. at 640-44; Boerne, 521 U.S. at 530-34.

107 521 U.S. at 536 ("broad" power entitled to "much deference").

108 527 U.S. at 639.

stated in Boerne v. Flores\textsuperscript{110} that Congress’ “conclusions are entitled to much deference.” In Mathews v. Eldridge,\textsuperscript{111} the Court stated that 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.” In Thornburgh v. Abbott,\textsuperscript{112} 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.”

Explicit acknowledgment of the seven levels of scrutiny would also help clarify various aspects of heightened scrutiny. As discussed in Chapters 29-30, the Court has struggled with the appropriate standard of review to apply to various kinds of free speech cases: content-based versus content-neutral regulations in both public and nonpublic forums; reasonable time, place, and manner regulations; regulations of commercial speech; and regulations of television and radio versus cable television regulations. As one example, during the 1990s the Court failed to produce any majority clearly adopting one standard of review in cable television cases, as discussed at § 30.3.1 nn.210-16. As discussed at § 30.4.1 nn.253-57, part of the problem may lie in the Court’s official focus only upon intermediate review or strict scrutiny as the only two heightened scrutiny choices. Some members of the Court perhaps think that strict scrutiny, applicable to newspapers and books, is too rigorous, while other members of the Court may feel that intermediate review, applicable to over-the-air radio and television, is too loose. Under the “base plus six” model, perhaps cable television regulation may be an appropriate area for intermediate review with bite, like regulations of commercial speech in Central Hudson, or loose strict scrutiny, following Bush v. Vera.

There are additional advantages to explicit acknowledgment of the “base plus six” model for standards of review. For example, in City of Erie v. Pap’s A.M.,\textsuperscript{113} both the plurality opinion of Justice O’Connor, and Justice Souter’s dissent, purported to apply to Erie’s regulation of nude dancing the content-neutral regulation of free speech test of United States v. O’Brien.\textsuperscript{114} However, because of a lack of attention to the elements of this test in both O’Brien and Justice O’Connor’s plurality opinion, the plurality opinion failed to apply O’Brien properly, and instead adopted a “watered-down” version of the O’Brien test. This fact is discussed at § 29.4.4.3 nn.160-75.

In this respect, the plurality opinion in Pap’s A.M. is similar to the Court’s opinion in the commercial speech case of Posadas de Puerto Rico Associates v. Tourism Co. of P.R. As discussed at § 30.3.2.1 nn.246-48, in Posados the Court watered-down the commercial speech test of Central Hudson. Eventually, in 44 Liquormart, Inc. v. Rhode Island, a majority of the Court, including the

\textsuperscript{110} 521 U.S. at 536.

\textsuperscript{111} 424 U.S. at 349.

\textsuperscript{112} 490 U.S. 401, 413-14 (1989).

\textsuperscript{113} 529 U.S. 277, 296 (2000) (plurality opinion of O’Connor, J., joined by Rehnquist, C.J., Kennedy, J., & Breyer, J.); id. at 310-11 (Souter, J., concurring in part and dissenting in part).

\textsuperscript{114} 391 U.S. 367 (1968).
author of Posadas, Chief Justice Rehnquist, acknowledged that Posadas represented an improper application of Central Hudson, and to that extent was overruled.115

An example of the benefits of paying close attention to means versus ends involves race-based affirmative action in education. As discussed at § 26.2.1.4.D nn.252-57, although Justice Powell’s concurrence in Regents of the University of California v. Bakke concluded there is a compelling government interest in a diverse student body, the more precise way to phrase the issue is whether having a diverse student body is directly related to a compelling interest in successful education.

§ 21.2.4.4 The Issue of Jury Unpredictability in Application of Legal Doctrine

Under the traditional common law in England, and as part of the colonial practice in America, juries determined law as well as fact in the cases that came before them. As Professor William Nelson noted in an article entitled, The Province of the Judiciary:

[Juries] were free to ignore judges' instructions on the law, for it was "not only [every juror's]
right but his Duty in that Case to find the Verdict according to his own best Understanding,
Judgment and Conscience, tho [sic] in Direct opposition to the Direction of the Court." The
jury system was valued precisely because it introduced into the "executive branch . . . a mixture
of popular power;" as a result, "the subject . . . [was] guarded in the execution of the laws," and
"no Man [could] be condemned of Life, or Limb, or Property or Reputation, without the
Concurrence of the Voice of the People." On the eve of the American Revolution, the power
of the jury to control the law was recognized up and down the Atlantic Coast, from Georgia to
New Hampshire, and was fundamental to the democratic order existing on the western shore
of the Atlantic.116

As Professor Nelson noted, this power of juries to determine law as well as fact persisted throughout the Revolutionary era and emerged with fervor during the debates on ratification of the Constitution, particularly among anti-Federalists who expressed concern that a powerful federal judiciary would infringe on the power of juries to determine law as well as fact. Throughout the 1790s, this pre-Revolutionary understanding of the jury's ultimate power to determine law as well as fact persisted not only in state courts, but in the newly established federal courts as well.117

In an article entitled, The Law-Finding Function of the American Jury, Professor Matthew Harrington noted:

115 44 Liquormart, Inc., 517 U.S. 484, 509-10 (1996) (Stevens, J., joined by Kennedy, J.,


117 Id. at 326-28.
At least three factors influenced the Framers' decision to curtail the jury's influence in the new national government. First, there was the belief that the jury was no longer integral to protecting the populace against the arbitrary actions of royal judges. The Revolution ensured that judges were responsible to the people through election by the people themselves or their legislatures. Second, the jury's power to review and nullify oppressive legislation was thought to be less important than before. The Revolution guaranteed that statutes would be enacted by democratically-elected legislatures. Finally, the ad hoc nature of jury verdicts made strong federalists wary of the jury's influence on the development of the legal environment. Most recognized that a stable legal regime was a prerequisite to the growth of American commerce.118

An emerging class of entrepreneurs agreed, as discussed at § 13.1 n.15. Professor Nelson noted:

Businesses were disturbed at having their rights and liabilities determined by "the fluctuating estimates of juries" whose "utterly indefinite and uncertain" behavior provided investors with "no rule for their future conduct." Counsel accordingly argued "that juries ought by the court to be restrained and kept within the proper and established rules." . . .

Under the system adopted in the early nineteenth century, judicially administered common law became a default norm that civil juries could not surmount. Certainty and stability thus were preserved, and elites routinely remained in a position to guide the direction of society. But the people could change law through politics if they organized and made the necessary effort to change it.119

This increased court control over the law was ensured in practice by courts beginning to overturn jury verdicts under the familiar standard today of courts ruling "as a matter of law" that "no reasonable juror could find otherwise," the "clearly erroneous" standard of review, discussed at § 4.2.4.120 The increased control was also aided by the increased professionalism of the bar, and by more systematic reporting of decisions that occurred in the 19th century. In contrast, during the 18th century, as Professor Harrington noted:

The jury's power over law was aided by the fact that few judges in the colonial period had formal legal training; many were simply administrative or legislative officers whose position gave them the right to adjudicate disputes, or prominent members of the community. Knowledge of the law was not a prerequisite to being a judge. As a result, the judge who presided at the trial did not look all that much different from the jury." In background, experiences, and outlook [juries] were much like the litigants whose disputes they determined, and not very different from the judges who oversaw them." They were neighbors from nearby towns, who shared the same common beliefs and assumptions as the parties before them. Their

120 See id. at 340-49.
lack of formal training meant that colonial judges did not usually instruct the jury on the law. Even when they did, judges were quick to advise the jury that they were not bound by the judge's view of the law as stated in the charge.121

By the 1820s, the jury's power over law had all but disappeared in civil cases. The jury's law-finding function in criminal cases was to survive much longer, however. Professor Harrington noted:

Adherence to the view of the jury as a bulwark of liberty meant that many judges were more reluctant to intrude upon the jury's power to bring in a general verdict in criminal trials. Constitutional prohibitions on double jeopardy also meant that the power to grant new trials in criminal cases was severely limited. The inability to order a new trial in cases where the jury brought in a verdict of acquittal made it difficult to enforce complete compliance with the court's instructions. The jury's power to acquit "in the teeth of both law and facts" meant that it would always retain some variant of its earlier law-finding function. Nonetheless, by the end of the nineteenth century, judges shed their earlier hesitance and took upon themselves the power to grant new trials in cases of conviction [where they concluded the jury had not properly applied the law to the facts]. More importantly, judges also began to instruct juries that they were bound by the law as stated in the charge. They increasingly sought to prevent counsel from advising the jury of its right to nullify and prohibit lawyers from making . . . legal argument to the jury.

Nonetheless, allowing juries to bring in a general verdict still puts courts in a difficult position. The only way to really prevent a jury from taking upon itself the power to declare law is to require it to bring in a special verdict. Otherwise, as Justice Story was forced to admit in [United States v.] Battiste, the jury would always retain a residual – and essentially unreviewable – power over law. A general verdict is, after all, "necessarily compounded of law and of fact; and includes both." Therefore, a verdict of acquittal always raises the possibility that the jury has completely ignored the charge and nullified the law. The Constitution's protection against double jeopardy means that a verdict of acquittal is unassailable. The law thus recognizes in the jury a power to declare the law while, at the same time, denying that it has the right to exercise it. To some degree, therefore, instructing juries that they must follow the law as stated in the charge is of symbolic effect, to the extent a criminal jury might still bring in a verdict of acquittal against its instructions. The principle of non-coercion combined with the power to bring in a general verdict makes complete supervision of the jury impossible.122

By the early part of the twentieth century, the modern role of judge and jury had been established in most state and federal courts. That role has been established in England earlier toward the end of the 18th century, where English judges had made progress toward establishing their monopoly over legal questions, as well telling jurors what they thought of the evidence and questioning the

121 Harrington, supra note 118, at 378-79.

122 Id. at 379-80, 434, citing, inter alia, United States v. Battiste, 24 F. Cas. 1042, 1043 (C.C.D. Mass. 1835).
jury on its reasoning if disagreeing with the verdict. In England today, trial by jury has almost disappeared from civil litigation except where a person's reputation is at stake, for example in suits for libel.\footnote{See generally Jonathan T. Molot, \textit{An Old Judicial Role for a New Litigation Era}, 113 Yale L.J. 27, 66-68 (2003) (role of English judge in 18\textsuperscript{th} century); Hein Kötz, \textit{Civil Justice Systems In Europe and the United States}, 13 Duke J. Comp. & Int'l L. 61, 73-76 (2003) (English practice today).}

Over time, most judges and lawyers have come to believe that allowing juries to be the ultimate arbiters of the law invites inconsistent and arbitrary results. While the role of the jury in colonial America reflected a State 3 moral reasoning commitment to customary practice, discussed at § 15.4.1 nn.50-56, the modern approach of the role of judge versus jury is more consistent with a Stage 6 commitment, discussed at § 15.4.1 nn.77-81, to reasoned elaboration of the law and ensuring that all individuals, in each case, are treated with equal concern and respect consistent with the rule of law, with reasoned principled application of the law done by judges, subject to judicial review.
CHAPTER 22: ECONOMIC RIGHTS: THE CONTRACTS AND TAKINGS CLAUSES

Some provisions in the Constitution involving economic rights are structural protections. The Commerce Clause places limits on federal regulation of commerce, although, as interpreted today, these are modest limits, as noted at §§ 18.2.5 & 18.5. The Constitution also limits the ability of states to discriminate against interstate economic activity. In addition to specific limitations, like duties on imports and exports, discussed at § 18.6.1, the Court has developed the dormant commerce clause doctrine to prevent states from “excessively burdening” interstate commerce, discussed at § 20.3.2. The Article IV, § 2 Privileges and Immunities Clause requires states to provide nonresidents the same rights given to residents for activities “sufficiently basic to the livelihood of the Nation” unless the state has a “substantial reason” for the difference in treatment, discussed at § 20.3.3.

Other protections involving economic rights provide direct protection to individuals and flow from the First Amendment, the 13th Amendment, or the Fifth and 14th Amendments. The 13th Amendment’s ban on slavery or involuntary servitude is discussed at § 25.1. The economic rights protected against state infringement by the 14th Amendment’s Privileges or Immunities Clause are discussed at § 25.3. Economic rights protected against state infringement by the 14th Amendment’s Equal Protection Clause, and against federal infringement by the Equal Protection component of the Fifth Amendment’s Due Process Clause, are discussed at §§ 26.1.1 & 26.4.1. Economic rights protected against infringement by the states under the 14th Amendment Due Process Clause, and against federal infringement by the Fifth Amendment Due Process Clause, are discussed at §§ 27.1.2.1 & 27.1.2.4. The First Amendment protection for commercial speech is discussed at § 30.3.2.

The remaining protections in the Constitution for economic rights are the Article I, § 10, cl. 1 Contracts Clause, which prevents states from passing any “Law impairing the Obligation of Contracts,” and the Fifth Amendment Takings Clause, which provides “nor shall private property be taken for public use, without just compensation.” It is applied to the states by the 14th Amendment Due Process Clause. The Contracts Clause is discussed at § 22.1, and the Takings Clause at § 22.2.

§ 22.1 The Contracts Clause

As discussed at § 22.1.1, Chief Justice John Marshall laid the foundation for the Contracts Clause to become a significant restraint upon state action by holding that the Clause not only covered state interference with private contracts, but also various contractual dealings with the states themselves. During the first part of the formalist era, from 1873 to 1900, the Contracts Clause continued as a significant limit on state power. Between 1900 and 1937, however, the clause was less frequently applied for two main reasons: (1) the states more carefully defined and protected the extent of their regulatory police powers, and (2) the Court began to rely primarily on substantive due process as a restraint of state action affecting contract or property interests, as discussed at § 27.3.2.1.

During the Holmesian era, from 1937-1954, reasonableness review of economic legislation under equal protection or substantive due process theories was replaced with minimum rational review, with the result that those clauses became only slight restraints on state power, as discussed at §§ 26.1.1.1 & 27.1.2.1. Similarly, the Contracts Clause review took on the deference to government aspects of minimum rational review.
This situation continued during most of the instrumentalist era, from 1954-1986. Near the end of that era, however, when several particularly severe retroactive adjustments of contract rights were enacted without emergency justification, the Contracts Clause was brought back to life to a limited extent. By the end of the instrumentalist era, the Court had developed a formulaic methodology for Contracts Clause analysis, which in some cases constitutes a level of review more exacting than minimum rational review. The steps in this Contracts Clause analysis follow modern 3-part means/end reasoning (ends, benefits achieved, burdens imposed), discussed at § 21.2.2.2, with a substantial burden requirement before the Clause is triggered, noted at § 21.2.3 text following n.73. The relevant questions are:

(1) Has a state law, in fact, operated as a substantial impairment of a contractual relationship (preliminary substantial burden requirement).

(2) If so, the state must have a legitimate public purpose (the end requirement).

(3) If that is shown, the next inquiry is whether the adjustment of rights and responsibilities of contracting parties is of a character appropriate to the public purpose justifying the legislation's adoption (the means requirement). As discussed at § 22.1.4, this test mirrors minimum rational review under the Equal Protection and Due Process Clauses, including a focus on both the benefits achieved by the statute and the statute’s burdens. In contrast, if the subject-matter of the state law raises special concerns, such as when the state is impairing the contract obligations of the state’s own contracts in a manner that favors the state, or if the legislation is not one of general application, but only touches a more narrowly defined group of individuals in society, less deference is given to the state's action and the Court will apply a “second-order” kind of rational review analysis, as defined at § 7.2.1 and summarized in Table 7.2. As is true of both minimum and “second-order” rational review, the challenger has the burden to establish that the law is unconstitutional.1

§ 22.1.1 The Original Natural Law Era

In an opinion by Chief Justice Marshall, the Court held in 1810 in Fletcher v. Peck2 that the Contracts Clause limits the power of states to modify their own contracts, as well as contracts already existing between private parties. 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 that the land grant was a contract within the meaning of the Contract Clause and could not be retroactively altered.

In reaching this conclusion, the Court did not limit its analysis to the specific intent of the framers and ratifiers. As Professor Jefferson Powell has noted:


2 10 U.S. (6 Cranch) 87 (1810).
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.”3

Thus, the general background moral principle against unjust interference with the “lives and fortunes of individuals” implicit in several cited constitutional provisions determined the outcome in the case. In terms of interpretation styles, this reflects a natural law approach to constitutional interpretation, and its focus on general principles, discussed at §§ 12.2.1.3 & 12.2.2.3, and reasoning by analogy, discussed at § 12.2.2.2, rather than a formalist approach, which involves greater focus on specific historical intent, discussed at § 9.2.1.3.

In several additional cases, the Marshall Court underscored the breadth of what is a protected contract. For example, in New Jersey v. Wilson,4 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,5 Chief Justice Marshall wrote for the Court that a state legislature could not change the provisions of the corporate charter issued to Dartmouth College because that charter was a contract. As Professor Powell noted, “Again, Marshall considered the moral and political implications of permitting a state legislature to intervene in settled expectations, and again he concluded for the Court that the protection contemplated by the contracts clause should be extended to a situation not envisaged by the clause’s framers.”6 Adopting a natural law focus on both literal meaning and the purpose, or spirit, of the text, discussed at § 12.2.1.1, as well as reliance on background moral principles and reasoning by analogy, as opposed to the formalist greater reliance on literal meaning and specific historical intent alone, discussed at §§ 9.2.1.1 & 9.2.1.3, Marshall stated:

It is more than possible, that the preservation of rights of this description [rights under corporate charters] was not particularly in the view of the framers of the constitution, when the clause under consideration was introduced into that instrument . . . . [But to exclude such rights, it] is


4 11 U.S. (7 Cranch) 164 (1812).

5 17 U.S. (4 Wheat.) 518 (1819).

6 Powell, supra note 3, at 98.
not enough to say, that this particular case was not in the mind of the Convention, when the article was framed, nor of the American people, when it was adopted. . . . The case being within the words of the rule, must be within its operation likewise, unless there be something in the literal construction, so obviously absurd or mischievous, or repugnant to the general spirit of the instrument, as to those who expound the constitution in making it an exception.7

However, the Marshall Court did create some limitations on the Contracts Clause. With respect to whether the Contracts 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. Crowninshield8 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,9 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.10

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 Contracts 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 Contracts Clause. The Taney Court also held in West River Bridge Co. v. Dix11 that a state legislature could not convey away the power of eminent domain. However, the Taney Court used the Contracts 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.12

In applying the Contracts Clause doctrine, courts during the natural law era distinguished between direct impairments of contract rights, where any impairment, no matter how small, triggered Contracts 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

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10 Id. at 332-34 (Marshall, C.J., joined by Duvall & Story, JJ., dissenting).
in *Green v. Biddle*, 13 “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*, 14 “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, with the key distinction being whether the impairment concerned the contract terms directly, or only remedial issues. The preference of original natural law doctrine for categorical tests is discussed at § 4.2.1 nn.32-33.

**§ 22.1.2 The Formalist Era**

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* 15 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*, 16 “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 Contracts Clause to invalidate state laws in 39 cases. 17

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 to invalidate legislation that “unreasonably” impinged on contract or property rights, as discussed at § 27.3.2.1. This precluded the need for Contracts Clause review.

An important change occurred in 1934. A 5-4 Court held in *Home Building & Loan Association v. Blaisdel* 18 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 reasonable rental value to the mortgagee. As noted at § 9.3.2 n.75, looking predominantly to literal text and specific historical intent, four extreme formalists said in dissent, “A candid consideration of the history and

13 21 U.S. (8 Wheat.) 1, 84 (1823).
14 71 U.S. 535, 553 (1866).
16 209 U.S. 349, 357 (1908).
17 Wright, supra note 12, at 64.
18 290 U.S. 398 (1934).
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.\textsuperscript{19} 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.”\textsuperscript{20} Looking to prior Court opinions from the founding era, the majority noted that those opinions had given greater weight in interpreting the Contracts 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 \textit{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.”\textsuperscript{21}

In \textit{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 consideration of 5 factors. As with all factor approaches, as discussed at §§ 21.2.2.2-21.2.2.3, these 5 factors reflected a 3-part means/end analysis (ends, benefits achieved, burdens imposed). Under \textit{Blaisdell}, the statute was constitutional because it advanced “legitimate” ends of society, given the emergency created by the Depression (factors 1 and 2 in \textit{Blaisdell}); the means adopted in the moratorium statute reflected “reasonable” conditions appropriately tailored to advance its ends (factors 3 and 4); and the statute was not “unreasonably” burdensome because it was temporary in duration and limited to the exigency which called it forth (factor 5).\textsuperscript{22}

On the other hand, reflecting the view that unreasonable substantial impairments of the rights of contract remedies were not permissible, the Court held a year later in \textit{W.B. Worthen Co. v. Kavanaugh}\textsuperscript{23} that a state could not impair a contractual obligation where the state statute “cut down the security of a mortgage without moderation or reason or in the spirit of oppression. . . . . With studied indifference to the interests of the mortgagee or to his appropriate protection [the state] has taken from the mortgagee the quality of an acceptable investment for a rational investor.” The decision in \textit{Worthen} was unanimous.

\begin{footnotes}
  \item Id. at 453-54 (Sutherland, J., joined by Van Devanter, McReynolds & Butler, JJ., dissenting).
  \item Id. at 426 (Hughes, C.J., for the Court).
  \item Id. at 428-29, quoting Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 286 (1827).
  \item See Energy Reserves, 459 U.S. at 410 n.11, citing Blaisdell, 290 U.S. at 444-47.
  \item 295 U.S. 56, 60 (1935).
\end{footnotes}
§ 22.1.3 The Holmesian Era

During the Holmesian era, the Blaisdell holding, and its focus on reasonable state regulation, was initially followed in cases like Honeyman v. Jacobs. In 1939, the Court applied in Jacobs the approach that only substantial infringement of contract rights will trigger Contracts Clause review where the state is merely altering the form of a contract remedy. The Court also indicated that where the Clause was triggered, review would be for the “reasonableness” of the state action as in Blaisdell.

After Jacobs, however, Contracts Clause review for “reasonableness” began to follow the minimum rational review test of “rationality” that emerged on the Court during the Holmesian era for economic and social legislation challenged under the Equal Protection Clause and Due Process Clause. Those Equal Protection and Due Process cases are discussed at §§ 26.1.1.1 & 27.1.2.1. As discussed there, the minimum rational review test, with its substantial deference to government, requires the challenger to meet a burden of showing either that the government is not advancing a legitimate government end, or there is no rational relationship between the government action and advancing the government end, or the action imposes an irrational burden.

As discussed at § 7.2.1, this kind of three-part element inquiry of minimum rational review differs from the “second-order” factor-balancing review of Blaisdell, where no substantial deference is given to the government, and all the means/end considerations are weighed together in an overall determination of “reasonableness,” not mere “rationality,” but with the burden still on the challenger to establish the unconstitutionality of the government action. It is also different than the “third-order” factor-weighing “reasonableness” review of Lochner, discussed at § 27.3.2.1, where the burden was on the government to justify its action. Holmesian-era Contracts Clause cases like East New York Savings Bank v. Hahn in 1945 more clearly adopted the substantial deference to government approach of minimum rational review, with only brief consideration of legitimate government interests, rational relationship between means and ends, and no irrational burden, although Hahn cited Blaisdell, despite Hahn not adopting a factor balancing approach. 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.

§ 22.1.4 The Instrumentalist Era

Contracts Clause cases during the instrumentalist era continued the low level of Contracts Clause review for state statutes regulating contracts generally. Indeed, the Court limited Contracts Clause review even more than during the Holmesian era. In El Paso v. Simmons, 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 Contracts 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 Contracts Clause review.27 Further, the Court continued 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."28 This decision reflects the liberal predisposition to be not so concerned with state regulation of economic activity in the public interest, noted at §§ 11.3.3 n.61 & 21.2.1.2.

Two cases during the 1970s, however, breathed some new life into the Contracts Clause. Without specifying that they were applying a higher level of scrutiny, the Court held in United States Trust Co. v. New Jersey29 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 the law invalid, saying it was not “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 commuter deficits 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 the Blaisdell kind of overall factor weighing approach to determine overall “unreasonableness” of the action. This reflects a “second-order” kind of rational basis scrutiny.

Reflecting their stronger liberal predisposition to be not so concerned with state economic regulation, Justice Brennan, dissenting, with Justices Marshall and White, urged a unified interpretation reflecting minimum rational review of all constitutional provisions that protect private property. The dissent wanted greater deference to legislative decisions when undertaking Contracts Clause review, as is done in substantive due process cases, concluding that the bondholders' welfare was adequately policed by political processes and the bond marketplace.30 However, this view did not prevail.

In Allied Structural Steel Co. v. Spannaus,31 the Court invalidated a law that required private employers who provided pension benefits to pay a pension funding charge if they terminated the 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. The Court said the law imposed a substantial impairment of a contractual relationship, an impairment that was retroactive, immediate, and severe, and applied here only because a state office was being closed by an employer who had voluntarily created a pension plan, and not because of a broad, generalized economic or social problem. Further, the law imposed

27 Id. at 503-04.
28 Id. at 515.
30 Id. at 33 (Brennan, J., joined by White & Marshall, JJ., dissenting).
an unexpected liability in a field not before subject to regulation. Using Blaisdell as its model for analysis, the Court held that the challenger had met the burden to overcome the presumption of “necessity and reasonableness” of the government’s action.

Justice Brennan, again dissenting with Justices Marshall and White, would have limited the Contracts Clause to legislation that dilutes obligations rather than imposes new duties. In addition, he again argued for a unitary approach that would test all economic regulations by the minimum rational review test of what is rationally related to promoting the general welfare. The majority’s approach, he said, vested it with broad discretion to protect interests that appeal to the Court. Yet there is no reason to give contract-rooted expectations greater protection than property rights.32

The precise circumstances in which the Court would apply the higher, non-deferential Blaisdell factor standard of review toward state laws that retroactively modify existing contracts was left rather vague in Allied Structural Steel. Justice Blackmun attempted to remedy this situation in Energy Reserves Group, Inc. v. Kansas Power & Light Co.33 In Energy Reserves, the buyer of intrastate gas contended that in accord with a new Kansas law, price escalation under a pre-existing purchase contract was limited by § 109 of a federal act to $163 per million Btus. The seller argued that Kansas could not apply its law retroactively, so that prices under the contract could escalate to the upper federal limit of $2.078 per million Btu. The Court upheld the Kansas law, thus allowing a state-imposed contract modification.

The Court first held that the law did not substantially impair a contract relationship, and thus did not even pass the threshold inquiry. In addition, the Court noted that the law was a reasonable means to accomplish legitimate state purposes, and the seller's reasonable expectations were not impaired because the parties were operating in a heavily regulated industry. Thus, even if the state regulation had constituted a substantial impairment, the challenger had not met its burden of showing that the law did not have a legitimate public purpose, or that the modification was not rationally related to that public purpose given the substantial deference to the government appropriate for the case. The stricter standard of United States Trust and Allied Structural Steel, where the Court gives less deference to state justifications, did not apply, because Kansas did not impair (1) its own contractual obligations or (2) the obligations of a narrow class of contract actors, but was a law of general applicability. Thus, the kind of non-deferential “second-order” factor balancing test concerning “necessity and reasonableness” of United States Trust and Allied Structural Steel did not apply.

§ 22.1.5 The Modern Natural Law Era

In recent years the Court has followed the precedents of the instrumentalist era. They are viewed as reflecting an appropriate balance between the needs of state regulation and the protection of individual contract rights. This doctrine is now established in the law, even though the approach reflects a balancing test, different than the categorical approach of the original natural law era. In the only few Contracts Clause cases considered since 1986, the Court has not found a violation.

32 Id. at 251 (Brennan, J., joined by White & Marshall, JJ., dissenting).

For example, 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 the mining estate, even though owners of the surface estate had entered contracts waiving damage claims resulting from removal of the coal. The Court found a substantial contract impairment, but said that restraining the companies was rationally related to protecting the environment under a substantial deference approach. The Court explicitly acknowledged that the Contracts Clause is not to be read literally, but, as under a natural law approach, in light of its purpose, context, history, and precedents.

In *General Motors Corp. v. Romein*, the Court found no substantial contract impairment because no contract term was burdened in the case. The Court sustained a 1987 Michigan statute that required employers to reimburse disabled employees for workers' compensation benefits withheld because the workers could receive wage-loss compensation from other employer-funded sources – even with respect to injuries which occurred before the effective date of the law. The Court said there was no contractual agreement regarding the workers' compensation terms because Michigan law did not incorporate into employment contracts a right of the employer to rely on past disability compensation periods as "closed." Thus, the Contracts Clause did not apply at all.

§ 22.1.6 Federal Impairment of Contracts

There is no federal Contracts Clause. However, if federal law applies to private or government contracts, the Court will engage in review under the Due Process Clause of the Fifth Amendment. Under a substantive due process analysis for economic regulations, as discussed at § 27.1.2.1, the Court applies a presumption of constitutionality and requires a challenger to show under minimum rational review that the legislature acted in an arbitrary and irrational way. This use of minimum rational review under the Due Process Clause mirrors the minimum rational review used for general regulations substantially impairing contract rights under the Contracts Clause.

The Court considered another avenue for reviewing impairment of contracts by federal legislation in *Eastern Enterprises v. Apfel*. In *Apfel*, the Court said that Congress may impose retroactive liability to some degree, particularly if confined to short and limited periods required by the practicalities of producing national legislation. However, Justice O'Connor said for the Court. “Our decisions have left open the possibility that legislation might be unconstitutional if it imposes severe

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34 480 U.S. 470, 502-06 (1987). The Court also refused to find that there had been a compensable "taking". *Id.* at 498-502, discussed at § 22.2.5.1 n.93.

35 503 U.S. 181, 187-88 (1992). The Court also held that the 1987 statute did not violate substantive due process because it was a rational means toward a legitimate legislative purpose of equalizing payments made by employers who thought such coordination payments were not authorized for injuries prior to 1982 with those who thought they were authorized. *Id.* at 191-92.


retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of that liability is substantially disproportionate to the parties' experience.”

Giving more specific content to this general observation, a four-Justice plurality concluded that such a substantial impairment resulted in a taking under Takings Clause analysis. They held that a taking had occurred when the government purported to change the worker benefit plan of a mining company which had been out of the coal business for many years in order to require guarantees of lifetime benefits to the widows of deceased coal miners. In doing so, they applied the *Penn Central* Takings Clause test, discussed at § 22.2.4, which is a “second-order” factor-weighing approach focusing on the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the government action. Justice Kennedy, concurring in the judgment, would have invalidated the Act as a violation of the Due Process Clause, using standard minimum rational review, rather than under the Takings Clause. He said that in all previous cases of a regulatory taking a specific property right or interest had been at stake. He said, "The difficulties in determining whether there is a taking of a regulation even where a property right or interest is identified ought to counsel against extending the regulatory takings doctrine to cases lacking this specificity.”

Justice Breyer dissented with Justices Stevens, Souter, and Ginsburg. Breyer opened by agreeing with Justice Kennedy that the Takings Clause did not apply. Thus, this additional kind of review of the four-Justice plurality opinion in *Apfel* does not command majority support. In his dissent, Justice Breyer, differing with Justice Kennedy, concluded that under minimum rational review it was not unconstitutional under the Due Process Clause for Congress to impose on Eastern a liability for the future health care of minors whom it long ago employed. The reasons were: (1) the liability extends only to minors whom Eastern itself employed, (2) the company had led its employees to believe that they would continue to receive medical benefits, and (3) Eastern continued to obtain profits from the coal mining industry for many years after it discontinued mining. Thus, Eastern could not show that the law was an irrational burden that unfairly upset legitimately settled expectations of Eastern that it would remain free of future health care liability for the workers whom it employed.

§ 22.2 The Takings Clause

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 it for a public use; and (4) how to measure just compensation.

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38 Id. at 528-29.

39 Id. at 522-29.

40 Id. at 542 (Kennedy, J., concurring in the judgment and dissenting in part).

41 Id. at 550 (Stevens, J., joined by Souter, Ginsburg & Breyer, JJ., dissenting).
Regarding whether property is involved, while the ultimate issue of whether something is a property interest under a Takings Clause analysis 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.\footnote{See generally United States v. Powelson, 319 U.S. 266, 279 (1943).} For example, in \textit{Phillips v. Washington Legal Foundation},\footnote{524 U.S. 156, 165 (1998) (citations omitted).} the majority held that interest earned on client’s funds held in a state-created IOLTA program 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. Not surprisingly, this rule has become firmly embedded in the common law of the various States.” Also focusing on state property law, 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 \textit{not} the client’s ‘property.’”\footnote{Id. at 183 (Breyer, J., joined by Stevens, Souter & Ginsburg. JJ., dissenting).}

As for what constitutes a taking, it has always been the law that when the United States takes physical possession of private property through the power of "eminent domain" the government must pay just compensation, unless the property constitutes a public nuisance or another exception exists, discussed at § 22.2.5.3. Reflecting existing understandings, the United States was specifically held to have the right of eminent domain in 1875.\footnote{Kohl v. United States, 91 U.S. (1 Otto) 367, 371-77 (1876).} The Court has also held states have eminent domain power.\footnote{See, e.g., Contributors to Pennsylvania Hospital v. Philadelphia, 245 U.S. 20, 23-24 (1917).} More difficult issues of determining whether a taking exists in non-eminent domain cases are discussed at §§ 22.2.1-22.2.5.

A taking must be for a public use. If not, a taking of property violates due process, even if compensation is provided. Such was the case in \textit{Missouri Pacific Railway Co. v. Nebraska},\footnote{164 U.S. 403, 416-17 (1896).} 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. The Supreme Court has never held, however, that any government eminent domain proceeding was not for a public use. As Justice O’Connor noted in her dissent in 2005 in \textit{Kelo v. City of New London, Conn},\footnote{125 S. Ct. 2655, 2673 (2005) (O’Connor, J., joined by Rehnquist, C.J., and Scalia and Thomas, JJ., dissenting).} 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.”

\footnotesize{\textsuperscript{42} See generally United States v. Powelson, 319 U.S. 266, 279 (1943).}  
\footnotesize{\textsuperscript{43} 524 U.S. 156, 165 (1998) (citations omitted).}  
\footnotesize{\textsuperscript{44} Id. at 183 (Breyer, J., joined by Stevens, Souter & Ginsburg. JJ., dissenting).}  
\footnotesize{\textsuperscript{45} Kohl v. United States, 91 U.S. (1 Otto) 367, 371-77 (1876).}  
\footnotesize{\textsuperscript{46} See, e.g., Contributors to Pennsylvania Hospital v. Philadelphia, 245 U.S. 20, 23-24 (1917).}  
\footnotesize{\textsuperscript{47} 164 U.S. 403, 416-17 (1896).}  
\footnotesize{\textsuperscript{48} 125 S. Ct. 2655, 2673 (2005) (O’Connor, J., joined by Rehnquist, C.J., and Scalia and Thomas, JJ., dissenting).}
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 Thomas concluded that related provisions in the Constitution and early legislative practice also indicated the framers adopted the phrase “use” to limit the grounds on which eminent domain could proceed. 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 and in [*Hawaii Housing Authority v.*] *Midkiff* through oligopoly resulting from extreme wealth.” In such cases, a legislative taking was warranted to eliminate the harmful use and directly 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, “Without exception, our cases have defined that concept broadly, reflecting our longstanding policy of deference to legislative judgments in this field. . . . 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.” This deferential standard of review echoes the rational-basis test used to review economic regulation under the Due Process and Equal Protection Clauses. The determination that a rational-basis standard of review is appropriate 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.

A court applying rational-basis review under the Public Use Clause should strike down a taking that, by a clear showing, is intended to favor a particular private party, with only incidental or pretextual public benefits, just as a court applying rational-basis review under the Equal Protection Clause must strike down a government classification that is clearly intended to injure a particular class of private parties, with only incidental or pretextual public justifications.

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49 *Id.* at 2677-82 (Thomas, J., dissenting).


51 *Id.* at 2663.

52 *Id.* at 2669 (Kennedy, J., concurring).
Finally, 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, cited at § 22.2 nn.43-44, the Court had to decide what compensation was due from the attorney keeping a client’s property in the IOLTA account. In Brown, Justice O’Connor joined the four dissenters in Phillips to hold that since no net interest could have been earned on the funds deposited in the IOLTA account, no compensation was due.

The Fifth Amendment Takings Clause initially applied only to the federal government, as did all of the Bill of Rights provisions, discussed at § 27.2.1 n.95. In 1897, in Chicago, Burlington & Quincy Railroad v. Chicago, the Takings Clause became the first clause in the Bill of Rights incorporated into the Due Process Clause of the 14th Amendment and thus made applicable against the states under the “selective incorporation” doctrine, as discussed at § 27.2.2 n.107. Actually, 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. Following 1897, incorporation against the states under the Due Process Clause became the standard Court doctrine.

By 1897, most state constitutions had similar Takings Clause provisions. Incorporation thus meant only a national minimum approach towards Takings Clause doctrine would now apply, not that a new obligation was being imposed upon most states. In contrast, at the time of ratification of the Bill of Rights in 1791, only Massachusetts and South Carolina had similar kinds of 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

56 166 U.S. 226, 241 (1897).
sometimes turned out to be virtually worthless.  

Toward the end of the 18th century, and after the adoption of the Takings Clause applicable against the federal government, 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."  

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 statutorily ban themselves from taking property to promote private development as in *Kelo*.  

The wisdom of using eminent domain to promote private development is, of course, separate from the constitutional issue. Such development has been done with some regularity since the 1950s in terms of slum clearance, particularly of poor minority neighborhoods, often to build highways to ease commuting from the predominantly white suburbs to downtown offices. In *Kelo*, the waterfront development affected a predominantly white community, and perhaps for that reason got greater media attention. In *Kelo*, as of 6 months after the decision, the controversy surrounding the development project stopped the project even though the city won the lawsuit and could proceed.

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62 On the constitutional and public policy issues surrounding *Kelo* from the perspective of individual property owners, including discussion of the use of eminent domain for slum clearance, see Gideon Kanner, *The Public Use Clause: Constitutional Mandate or "Horatory Fluff"?*, 33 Pepp. L. Rev. 335 (2006); *Kelo*, 125 S. Ct. at 2677 (O’Connor, J., joined by Rehnquist, C.J., and Scalia and Thomas, J.J., dissenting); 125 S. Ct. at 2686-87 (Thomas, J., dissenting).
§ 22.2.1 The Original Natural Law Era

From the beginning of the Constitution’s ratification, the Court enforced the Takings Clause when the case involved physical invasions of property. This was clear from Justice Chase's 1798 statement in *Calder v. Bull*[^63] that it would be unconstitutional to "take property from A and give it to B."

The Court would also find a taking where a regulatory act had direct physical consequences. For example, in *Yates v. Milwaukee*,[^64] decided in 1870, a city declared in an ordinance that a particular riparian owner's wharf was a nuisance, and therefore subject to physical removal. The city was held to have taken property from the riparian owner whose wharf was thereby declared illegal. The city could not avoid paying compensation simply by a declaration that the owner's wharf was a nuisance. Reflecting the natural law focus on purpose, discussed at § 12.2.1.1, the Court said that a usage had actually to qualify as a nuisance, and thus support the purpose behind the nuisance exception, before it could be prohibited without compensation.

A similar result was reached in *Pumpelly v. Green Bay Co.*[^65] There, 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.” A statute cannot “inflict irreparable and permanent injury” on property and “subject to total destruction” without providing just compensation. As in *Yates*, the purpose behind the Takings Clause, rather than whether there literally was a physical taking, controlled the outcome.

In each of these cases, there were direct physical effects of the government regulation on the private owner’s property. In none of these cases were regulatory acts that had only indirect effects on a property’s owners use of the property or its property value held to be a taking. This focus on actual physical occupation or direct physical effects is consistent with Stage 3 concrete operational thought and its focus on concrete events, discussed at § 15.4.1 nn.50-56.

§ 22.2.2 The Formalist Era

After the Civil War, as states increasingly sought to achieve public objectives by regulating the use of property, rather than by taking exclusive possession of it, the Court was increasingly faced with determining when, if ever, such regulations would amount to a taking. In a series of decisions from 1877 to 1900, the Court backed away from reading the Takings Clause in light of its purpose and focused more on literal physical occupation.

[^63]: 3 U.S. (3 Dall.) 386, 388 (1798).
[^64]: 77 U.S. (10 Wall.) 497, 504-07 (1870).
[^65]: 80 U.S. (13 Wall.) 166, 177-78 (1872).
In 1877, in *Railroad Co. v. Richmond*, 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* or *Yates*, the Court gave a more literal reading to the language of the Takings Clause. The Court said, "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*, 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 and physical invasion of property and not merely a temporary inconvenience with respect to its use.

Professor Kris Kobach has speculated that this change was at one with a broader judicial current—a gradual withdrawal by the Court in its willingness to enforce national rights against the states. He pointed out that a few years later, in 1887 in *Mugler v. Kansas*, the Court stated that state actions falling under the broad umbrella of "police powers" to ban property uses "prejudicial to the public interests" were free of the compensation requirement. Consistent with this comment, the Court also decided in *Mugler* that banning the manufacture of liquor did not constitute a taking from a manufacturer even though its machinery and buildings were much reduced in value. The Court said, in an opinion by Justice Harlan, "[A] prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot in any sense, be deemed a taking or an appropriation of property for the public benefit."

Still, the Court had not overruled *Yates*. However, the Court gave the case a new characterization in 1900 in *Scranton v. Wheeler*. In *Scranton*, the federal government had built a pier that ran laterally along a bank, extending entirely across the front of plaintiff's land. The Court distinguished *Yates*, saying that it was a case in which a city had arbitrarily and capriciously attempted to destroy or remove a wharf that was not an obstruction to navigation. In *Scranton*, however, government action had resulted only indirectly and incidentally in the loss of a citizen's right of access to navigation—a right never exercised before the Government constructed its wharf. Three Justices dissented, saying that the Court in *Yates* had held that riparian rights, when recognized as existing by state law, are a valuable property, and the subject of compensation when taken for public use.

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66 96 U.S. 521, 529 (1878).
68 123 U.S. 623, 669-70 (1887).
71 179 U.S. 141, 157-58 (1900); id. at 177-79 (Shiras, J., joined by Gray & Peckham, JJ., dissenting).
The Court's discussion of the relative arbitrariness or reasonableness of the government's action mirrored what was happening in its substantive due process cases. As discussed at § 27.3.2.1 nn.148-56, three years earlier, in 1897, the Court had invalidated a state law on substantive due process grounds in *Allgeyer v. Louisiana*.\(^\text{72}\) Eight years later, in 1905, the Court struck down a maximum-hours law on the ground that it was an unreasonable interference with the right to contract in *Lochner v. New York*.\(^\text{73}\) In contrast to these decisions, most state regulations raising takings issues were held to be reasonable by the formalist-era Court.

For this reason, absent a substantive due process argument, after *Scranton* the states seemed to be required to award just compensation only when state action resulted literally in a physical taking and not merely a devaluation. Justice Holmes disagreed with this view. For a Holmesian, the focus of Takings Clause doctrine should be on the functional consequences of regulation, rather than whether literally there was a physical taking.

In 1922, Justice Holmes was able to express those views when writing for the Court in *Pennsylvania Coal Co. v. Mahon*.\(^\text{74}\) A state law banned coal mining that threatened surface structures. A mining company challenged application of that law as a taking where the company, before enactment of the legislation, 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 Pennsylvania law did go too far since there was a complete destructive of the ability to mine coal. Narrowly speaking, *Mahon* was consistent with *Pumpelly* and *Transportation Co.* because there was a complete destruction of value. Thus, formalist and Holmesian Justices joined in an 8-1 result in the case.

Despite recitation of this Holmesian functional analysis in *Mahon*, later case results during the formalist era were more consistent with the earlier formalist-era analysis. Thus, the magnitude of a regulation's impact could be quite substantial without causing a taking. For example, in *Village of Euclid v. Ambler Realty Co.*,\(^\text{75}\) 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. In *Miller v. Schoene*,\(^\text{76}\) when government officials cut down cedar trees to save an apple crop, it was not held a taking but, rather, the removal of a nuisance. Thus, the formalist Court reached results consistent with the viewpoint it had attributed to *Yates* and *Pumpelly* in *Transportation Co.*, *Scranton*, and *Mahon*.

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\(^{72}\) 165 U.S. 578, 589 (1897).

\(^{73}\) 198 U.S. 45, 52-60 (1905).

\(^{74}\) 260 U.S. 393, 415-16 (1922).

\(^{75}\) 272 U.S. 365, 384-85, 394-97 (1926).

\(^{76}\) 276 U.S. 272, 277-81 (1926).
§ 22.2.3 The Holmesian Era

Under a pure Holmesian approach, the deference-to-government posture of the Holmesian view can lead to a view that significant impacts on a person’s property are not substantial enough to be a taking under the *Mahon* approach. This would be particularly true for liberal Holmesians, who, like liberal instrumentalists, have a predisposition to defer to government regulation over economic matters. For example, liberal Holmesian Justice Brandies was the sole dissenter in *Mahon*.77

In addition, the Holmesian-era Court stated in 1945 that the determination of whether the taking is for a public use is basically a legislative function.78 However, the Court did retain the power to decide when a regulation or other government action went "too far" under *Mahon*, and thus constituted a taking. Applying this test, the Court found a taking in *United States v. Causby*,79 when 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. The vast majority of Takings Clause cases during the Holmesian era, however, involved the unquestioned case of a taking by eminent domain.80

§ 22.2.4 The Instrumentalist Era

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*.81 In that 1978 case, the Court held that application of the New York City Landmarks Preservation Law to the Grand Central Terminal building was not a taking. The City had refused permission to build a 50-story office building atop the terminal. However, Penn Central Transportation was free to apply for another form of development and its air rights over the terminal could be used on other nearby parcels to build office floors there.

In deciding the 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

77 260 U.S. at 416-22 (Brandeis, J., dissenting).
78 United States ex rel. TVA v. Welch, 327 U.S. 546, 551 (1946).
79 328 U.S. 256 (1946).
Takings Clause doctrine. The Court noted that even if the land use law had “significantly diminished the value of the Terminal site” that was just the beginning of the analysis. In deciding whether that diminution constituted a taking, 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.

Applying this approach, the Court concluded that the restrictions were reasonably related to promotion of the general welfare. Indeed, the Court noted that the landmarks law applied to all buildings in 31 historical districts and to over 400 individual landmark buildings. The law was also viewed as being not arbitrary or unduly harsh, in that it permitted reasonable beneficial use of the Terminal and a reasonable rate of return with chances to enhance the Terminal and other nearby properties. This approach is reflective of a “second-order” rational review approach, as discussed at § 22.2.5.1 nn.91-94, in that the Court balanced all the factors of ends, benefits, and burdens together to determine whether the regulation was “reasonable” or a “taking” occurred, rather than the minimum rational review approach of separate elements requiring only the minimal showing of legitimate ends, rational promotion of benefits, and no irrational burden.

Justice Rehnquist, dissenting with Justices Burger and Stevens, said the lost opportunity of using the air rights above the railroad station should be given greater weight in this balancing approach. Focusing on the profits lost by being denied the ability to use the air rights to build the 50-story tower, the dissent concluded that the regulation went “too far” and there was a taking of those rights from the property owner that was not offset by the ability to use the air rights on other buildings or the increase in value of Grand Central Terminal attributable to similar land-use restrictions on neighboring properties.

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 during the instrumentalist era 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 uses. Based on straight-forward economic theory, conservative jurists typically view lost economic opportunities equally as lost returns on current investments. The Court majority in Penn Central, and later cases, however, have typically given lost opportunities much less weight in terms of deciding whether a particularly diminution in value goes “too far” to constitute an “unreasonable” action, and thus is a taking.

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83 Id. at 138-40 (Rehnquist, J., joined by Burger, C.J., and Stewart, J., dissenting).

§ 22.2.5  The Modern Natural Law Era

Since 1986, in the post-instrumentalist era, the Court has attempted to find ways to clarify when a taking will be found. In general, the Court has given owners somewhat greater protection than provided by the deference-to-government use of the Mahon test during the Holmesian era and the Penn Central test of the instrumentalist era, while not substantially departing from the Mahon/Penn Central framework. Four main issues frame the Court’s recent Takings Clause cases. Those issues are: (1) what is the appropriate standard of review to apply to the case, discussed at § 22.2.5.1; (2) how and when to establish when a substantial deprivation of property rights takes place to trigger some form of Takings Clause review, discussed at § 22.2.5.2; (3) what exceptions exist, such as the exception for public nuisances, where just compensation does not have to be paid despite what otherwise would be viewed as a taking of property rights, discussed at § 22.2.5.3; and (4) how to deal with the problem of temporary takings, where the government diminution of property rights comes to an end after some period of time, discussed at § 22.2.5.4.

§ 22.2.5.1  Standards of Review in Modern Takings Clause Cases

Three different standards of review exist in modern Takings Clause cases. These standards vary depending upon whether the government action is: (1) a physical occupation of property; (2) a general government regulation affecting property rights; or (3) a government exaction of property rights tailored for a specific individual.

Based upon cases going back to Calder v. Bull in 1798 that it would be unconstitutional to "take property from A and give it to B," discussed at § 22.2.1 n.63, the Court applies a per se rule that any physical occupation of property, no matter how minor, constitutes a taking of property. For physical occupations, including the power of eminent domain, the only question is determining how much compensation must be paid. For example, in Loretto v. Teleprompter Manhattan CATV Corp.,85 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,86 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 second category of Takings Clause cases involves general government regulations, such as zoning laws or environmental regulations, that affect property rights. For these cases, to trigger Takings Clause review, the challenger seemingly must show that there is a “substantial deprivation” of property rights, as discussed at § 22.2.5.2, similar to the “substantial impairment” requirement under the Contracts Clause, discussed at § 22.1.4 n.27. Once such a substantial deprivation is proved, the question then becomes what is the test to determine whether a taking has occurred.

The modern natural law era for the Takings Clause in terms of the appropriate standard of review began in 1987 with *Nollan v. California Coastal Commission.* In *Nollan,* the Court held that the California Coastal Commission took the property of beachfront owners when it conditioned a grant of permission to rebuild their house on their transferring to the public an easement across their beachfront property. The Commission justified the condition on the ground that the new house would increase blockage of a view of the ocean and would increase private use of the shore front. The Court said that requiring an uncompensated conveyance of an easement on these facts would be a taking and that requiring it as a condition for issuing a land use permit was also a taking.

Justice Scalia explained for the Court that land use regulation does not effect a taking if it does not deny an owner economically viable use of the land and substantially advances legitimate state interests, which may include scenic zoning, landmark preservation, and residential zoning. The Court assumed, *arguendo,* that the Commission could refuse to issue a permit or issue it on condition that the public continue to be able to see the beach, as by requiring a height limit, a width restriction, or a ban on fences. Here, however, the condition did not further the end advanced in justification because the easement did not improve the public view of the beach. If California wants an easement across the Nollan's property, Justice Scalia said, it must pay for it.

By phrasing the test as “substantially advancing a legitimate government interest,” Justice Scalia adopted language that had appeared in earlier instrumentalist-era cases. For example, in *Penn Central Transportation Co. v. City of New York,* the Court had talked about the government having a “substantial public purpose” and the government regulation not being “unduly burdensome.” In *Agins v. Tiburon,* the Court cited opinions referring to whether the government action “substantially advances legitimate state interests” or “denies an owner economically viable use of this land.” However, the Court also noted in *Agins* that the Takings Clause decision “necessarily requires a weighing of public and private interests.”

From the perspective of the “base plus six” model of standards of review, discussed at § 7.2.1, the *Nollan* test created a mixed standard of review, adopting the “legitimate” government interest language of rational basis review, but the “substantial relationship” language of intermediate scrutiny. Further, on one hand, the phrasing ignored the “substantial public purpose” language in *Penn Central* by referring in *Nollan* to mere “legitimate” interests. On the other hand, the phrasing ignored the fact that *Agins* said the relevant test involved “weighing of public and private interests,” not an element balancing test like minimum rational review or intermediate scrutiny.

In addition, it is clear that, despite reference to the existence of “substantial public purposes” in *Penn Central,* the liberal instrumentalist majority that decided *Penn Central* thought they were adopting a version of rational basis review, not a version of intermediate scrutiny. Indeed, in *Nollan* itself, Justice Brennan, joined by Justice Marshall in dissent, said that the Court was imposing a discredited standard of precision. It is enough that the state could rationally have decided that the measure

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might achieve the state's objective. Thus, it was not a taking that the new house blocked visual access while the condition sought to preserve lateral access. Further, the lateral access condition served to dissipate the impression that the beach which lay behind the wall of homes along the shore is for private use only. It was merely a reasonable property use restriction to provide that any project which intensifies development along the crowded coast must be offset by gains in public access. Justice Blackmun, also dissenting in *Nollan*, said the Court should not impose a “close nexus” or “substantial relationship” requirement because ordinarily a state's exercise of its police power need be no more than rationally based, and the easement was rationally related to public access to the beach.\(^{90}\)

As discussed at § 21.2.4.2, phrasing doctrine in terms of mixed standards of review adds unnecessary unpredictable and complexity to the law. Some instrumentalist Justices, such as Justices Brennan, Marshall, and Blackmun in *Nollan*, tended to minimize Takings Clause review by adopting language similar to a minimum rational review standard. The next level up in terms of the “base plus six” model of review is the “second-order” standard of review that involves a 3-part factor balancing of governments end, benefits, and burdens, which is used, for example, under the Contracts Clause in *United States Trust Co.* and *Allied Structural Steel*, as discussed at § 22.1.4 n.29-33, or the *Pike v. Bruce Church* dormant commerce clause analysis, discussed at § 20.3.2.1.D n.204.

This “second-order” factor balancing approach actually reflects what the Court has been doing in applying the *Penn Central* test in recent cases. For example, in *Palazzolo v. Rhode Island*,\(^{91}\) the Court called for using the general *Penn Central* test of determining whether there has been a taking by considering the oft-cited factors of whether fairness requires compensation in view of “a complex of factors including the regulation’s economic effects on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action.”\(^{92}\) The character of the government action reflects a concern with government ends, the regulation’s economic effects focuses on both the benefits and burdens of the statutory means, and interference with investment-backed expectations focuses on burdens on the landowner.

From this perspective, the language in cases focusing on “substantial” governmental interests and “substantial advancement” merely reflect the fact the government is likely to win the 3-part “second-order” factor balancing approach when such substantial interests and advancement are present. Similarly, the language about “denial of economically viable uses” reflects the greater likelihood that the challenger will prevail the more economically viable uses are denied. All of these considerations are weighed one against the other. None are determinative on their own. As stated in *Agins*, cited at § 22.5.2.1 n.89, the test involves a “weighing of public and private interests.”

\(^{90}\) *Id.* at 842 (Brennan, J., joined by Marshall, J., dissenting); *id.* at 865 (Blackmun, J., dissenting).

\(^{91}\) 533 U.S. 606 (2001).

\(^{92}\) *Id.* at 617.
A similar totality-of-the-circumstances approach appeared in *Keystone Bituminous Coal Association v. DeBenedictis*. In an opinion by Justice Stevens, the Court held that the Pennsylvania Subsidence Act, which required 50% of the coal beneath certain structures to be kept in place, was not a taking. The reason was that the coal companies had not shown, based on a totality of the circumstances, that the law did not substantially advance the state's legitimate interest in protecting dwellings, public buildings, and cemeteries from actions that are tantamount to a public nuisance, or that the law denied the companies an economically viable use of their land. Instead, the Act protected dwellings, public buildings, and cemeteries by minimizing subsidence in certain areas. Also, it was not shown that the Act made it impossible for coal operators to engage profitably in their business or that there was an undue interference with investment-backed expectations. There was no evidence as to how much coal was left in the ground solely because of the Act, nor was there evidence that mining in any specific area became unprofitable.

In *Lingle v. Chevron USA, Inc.*, a unanimous Supreme Court rejected the “substantially advance” language of *Nollan, Agins*, and other cases. The Court specifically noted that this kind of intermediate, heightened scrutiny used under the Equal Protection and Due Process Clauses in some cases was inappropriate for the issue involved in Takings Clause cases of the extent of the impairment on individual property rights. The Court noted that the “substantially advance” language had crept into Takings Clause cases without any clear justification provided by the Court, and it was inconsistent with the purposes of Takings Clause analysis to focus on the deprivation to the individual, not the extent of the relationship between the government’s action and advancing the government’s ends. 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.

In applying the *Penn Central* test, the Court has held 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*, as a complete deprivation is the equivalent of a physical occupation.

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96 *Lingle, 544 U.S. at 538.* Justice Blackmun, dissenting in *Lucas*, noted that the *per se* rule departed from the case-by-case nature of takings cases, and was unsupported by precedent and history. Justice Stevens, also dissenting in *Lucas*, said that the new *per se* rule was unsound in
The 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.\textsuperscript{97} There the Court held that where a city makes an adjudicative decision to condition the approval of a 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, as called for in Nollan, but also that the degree of the exaction demanded by the city bears a "rough proportionality" to the projected impact of the proposed development.\textsuperscript{98} 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."\textsuperscript{99} The Court was not satisfied with the city's findings, and remanded for consideration.

The Court justified its Dolan decision in terms of consistency with related constitutional law doctrines. The Court noted that when the government singles out an individual for a search and seizure under the Fourth Amendment,\textsuperscript{100} or singles out a government worker for discipline because of speaking on a matter of public concern under the First Amendment,\textsuperscript{101} the Court does not apply a deferential minimum rational review standard. Instead, it applies a real balancing of individual versus governmental interests, and the burden is on the government to show that its action, in this balance, is constitutional. Noting that the Takings Clause is "as much as part of the Bill of Rights as the First Amendment or Fourth Amendment," the Court held that a similar standard of rational review balancing, with the burden on the government, should be applied where an individual property owner is singled out for a permit condition.\textsuperscript{102} In the terminology of the "base plus six" model of review, discussed at § 7.2.1 text following n.42, this level of review reflects the "third-order" rational review balancing test, since the burden has shifted to the government to justify their action.

Four Justices dissented in Dolan. Both the dissent of Justice Stevens, joined by Justices Blackmun and Ginsburg, and the dissent of Justice Souter, disagreed with the majority that the burden should

\textsuperscript{97} 512 U.S. 374 (1994).

\textsuperscript{98} Id. at 385-91.

\textsuperscript{99} Id. at 391.


\textsuperscript{101} See, e.g., Pickering v. Board of Education of Will County, Illinois, 391 U.S. 563 (1968), discussed § 30.2.2.1 nn.178-81.

\textsuperscript{102} 512 U.S. 392 & n.8.
have been shifted in this case. Both dissents would have just applied the standard *Penn Central* analysis even to a case of a government exaction tailored to a specific individual.  

§ 22.2.5.2 What Burdens Trigger Takings Clause Analysis

In cases involving general government regulations, analyzed under the *Penn Central* test, as discussed at § 22.2.4 n.81-82, the Court typically requires that the government action constitute a “significant” or “substantial” deprivation of property to trigger Takings Clause analysis. This is similar to the requirement of a “substantial impairment” to trigger the Contracts Clause, discussed at § 22.1.4 n.27, or an impairment of a right “sufficiently basic to the livelihood of the Nation” to trigger the Article IV, § 2, Privileges and Immunities Clause, discussed at § 20.3.3.2 nn.298-300. As noted at § 22.2.5.1 nn.85-86, in cases of physical occupations there is no such inquiry, since any physical occupation is a taking. In cases like *Dolan*, discussed at § 22.2.5.1 nn.97-103, the “rough proportionality” test applies to any diminution in property rights, whether substantial or not. The question of how to determine whether a “substantial deprivation” exists to trigger Takings Clause analysis thus only applies to modern regulatory cases.

Naturally, as in *Lucas v. South Carolina Coastal Council*, where there is a complete deprivation of economically viable uses of land, a substantial deprivation exists. However, even for lesser deprivations, the Court will find a “substantial restriction” on property rights. As indicated in *Penn Central Transportation Co. v. City of New York*, such a finding is not the end of the Takings Clause analysis, it is only the beginning. In *Penn Central*, once such a “substantial restriction” was assumed, Justice Brennan tested whether New York’s Landmarks Preservation Law, as applied, was a regulatory taking, by asking whether the property owner proved that the effects on its rights in a parcel, considered as a whole, were not sufficiently related to the general welfare or were unduly harsh. As discussed at §§ 22.2.4 nn.81-82 & 22.2.5.1 nn.91-94, this involves weighing the factors of the economic impact of a regulation, its interference with reasonable investment backed expectations, and the character of the governmental action.

In other cases, no substantial deprivation of property rights has been found. For example, in *FCC v. Florida Power Corp.*, an FCC order requiring a reduction in what power companies could charge cable operators under pole attachment agreements was held to be analogous to a rate regulation, and subject to the substantial deprivation analysis, and not a physical occupation. The case was unlike *Loretto*, where requiring landlords to permit tenants to hook up for $1 was a physical occupation, since the power company here was not required to enter the pole contracts. In

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103 *Id.* at 396-407 (Stevens, J., joined by Blackmun & Ginsburg, JJ., dissenting); *id.* at 411-14 (Souter, J., dissenting).


106 *Id.* at 128-38.

Bowen v. Gilliard, there was no substantial deprivation of a property interest where a child’s support entitlements were reduced when a parent applied for family aid under the Aid to Families with Dependent Children Act. The reason was that Congress, having instituted a social welfare program, is not bound to continue it at all, much less at the same benefit level. Congress merely made an adjustment in a welfare program.

There is a question, however, whether under current doctrine the three-factor Penn Central balancing test must always be done, even for minor deprivations of property rights, or whether in fact a substantial deprivation requirement is necessary to trigger the Penn Central test. For example, in Bowen v. Gilliard, the Court stated, “Whatever the diminution in the child’s right to have support funds used for his or her ‘exclusive benefit’ may be, it is not so substantial as to constitute a taking under our precedents.” However, despite this seeming categorical statement, the Court then considered the other Penn Central factors of reasonable investment-backed expectations and the character of the government action, which also supported the finding that no taking had occurred in the case.

Clear resolution of this issue may make little difference in practice, as minor deprivations of property rights have never supported a finding of a taking under the Penn Central analysis. Thus, for a litigant to have any real chance of success under Penn Central a substantial deprivation of property rights is essential, whether or not necessary to “trigger” the Penn Central test. A Stage 6 concern with reasoned elaboration of the law, however, would support such a “substantial deprivation” triggering requirement to make Takings Clause doctrine similar to the requirement of a “substantial impairment” of contract rights to trigger the Contracts Clause, discussed at § 22.1.4 n.27, or an impairment of a right “sufficiently basic to the livelihood of the Nation” to trigger analysis under the Article IV, § 2, Privileges and Immunities Clause, discussed at § 20.3.3.2 nn.298-300.

§ 22.2.5.3 Exceptions to Takings Clause Analysis

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, 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 titled was acquired. Inquiry into those limits, Justice Scalia noted, ordinarily entails analysis of, among other things, the harm to public lands or adjacent private property posed by the owner's proposed use, the social value of the proposed use, and the ease with which harm can be avoided by the owner and the government or adjacent owners. Justice Scalia stated:

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109 Id. at 607.
As it would be required to do if it sought to restrain Lucas in a common-law action for public
nuisance, South Carolina must identify background principles of nuisance and property law that
prohibit the uses he now intends in the circumstances in which the property is presently found.
Only on this showing can the State fairly claim that, in proscribing all such beneficial uses, the
Beachfront Management Act is taking nothing.111

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.,112
“[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.”
In cases where property was appropriated for military use, just compensation has more often been
provided,113 although 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.” 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.114

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, as stated by Justice Scalia, 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.115

Among Justices who joined Justice Scalia’s majority opinion in Lucas, only Justice Thomas remains
on the Court. The liberal predisposition of Justices Stevens, Souter, Ginsburg, and Breyer on
Takings Clause issues 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.

111 Id. at 1031-32.


113 See United States v. Russell, 80 U.S. (13 Wall.) 623 (1871); Mitchell v. Harmony, 54 U.S.
(13 How.) 115 (1852).

114 See Jennifer Chapman, Navigable Purpose? Prove It. Rethinking the Role of the
Navigational Servitude in Regulatory Takings Claims After Lucas v. South Carolina Coastal

115 Lucas, 505 U.S. at 1032-35 (Kennedy, J., concurring in the judgment).
A case exploring the contours of the second exception regarding background principles of state law already in place is Palazzolo v. Rhode Island. In Palazzolo, the state created a coastal resources Council which, in 1971, designated all salt marshes as coastal wetlands which could be developed only by obtaining a special exception on showing a compelling public purpose which provides benefits to the public as a whole as opposed to individual or private interests. In 1978, petitioner acquired title to some upland and some salt marshes as sole shareholder of a corporation whose charter was revoked for failure to pay corporate income taxes. In 1985, petitioner asked for a special exception to build a private beach club by filling 11 acres. The Council denied the application and the Rhode Island courts affirmed the decision. The Rhode Island Supreme Court held that petitioner’s claim was not ripe, that he had no right to challenge regulations adopted before he acquired title, and that his claim of being denied all beneficial use was contradicted by evidence that he had $200,000 in development value remaining on part of his property. Finally, the court said that petitioner could not recover under the more general Penn Central test because, in view of when he acquired title, he had no reasonable investment-backed expectations affected by the regulation.

Writing for the Court, Justice Kennedy said first that the claim was ripe because it had become clear by a final decision of the Council that it would bar petitioner from engaging in any filling or development activity on the wetlands. On the merits, the petitioner’s claim was not barred by the fact that he acquired title after the regulations were in place. The state should not have power thus to insulate particular exercises of its regulatory power from claims that they are so unreasonable or onerous as to compel compensation. Justice Kennedy said that it would be illogical and unfair to bar a regulatory takings claim because of the post-enactment transfer of ownership where the steps necessary to make the claim ripe could not have been taken, or as here were not taken, by the previous owner. Concluding, he said that “a regulation that otherwise would be unconstitutional absent compensation is not transformed into a background principle of the State’s law by mere virtue of the passage of title.” The case was remanded to the Rhode Island courts for examination of the facts in light of the Penn Central analysis that had not been undertaken by those courts. As to how that should be done, Justice Kennedy said only that the claim was not barred by the mere fact that title was acquired after the effective date of the state-imposed regulation.

Justice O’Connor, concurring, provided advice on how the Penn Central claim should be considered. She said that, in determining what fairness requires, a court should consider how the time at which petitioner acquired title helped shape the reasonableness of his investment-backed expectations. No set formula should be used. Justice Scalia, also concurring but disagreeing with Justice O’Connor, said that a restriction that does not form part of the background principles of the state’s law of property and nuisance should have no bearing on the determination of whether a restriction is so substantial as to constitute a taking. Putting it another way, the investment-backed expectations of which the law should take account do not include the assumed validity of a restriction that in fact deprives property of so much of its value as to be unconstitutional.

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117 Id. at 639-40.

118 Id. at 632 (O’Connor, J., concurring); id. at 636 (Scalia, J., concurring).
Justice Ginsburg, joined by Justices Souter and Breyer, said she agreed with Justices O’Connor that the transfer of title can impair a takings claim. However, she thought that the petitioner’s claim was not ripe because it was still uncertain what development could occur on petitioner’s land. Justice Breyer, dissenting, was concerned that changes in land ownership could be made for the sole purpose of producing a nonusable portion and, thus, strategically creating a takings claim. Justice Stevens agreed with Justice Kennedy that the claim was ripe, but said that the taking, if any, occurred before petitioner acquired title and, therefore, petitioner lacked standing to contend that promulgation of the regulations constitute a taking of any part of the property he subsequently acquired.119

The net result of the myriad opinions is that the lower courts have to speculate a bit on the extent to which petitioner’s expectations should be regarded as reduced or eliminated by the fact that the regulations had been passed before he acquired title. Since Justice O’Connor’s view had the support of Justices Souter, Ginsburg, and Breyer, and was mentioned favorably in passing by Justice Stevens, it would seem reasonable for the lower courts to adopt that approach.120 With Justice Alito replacing Justice O’Connor in 2006, however, there may be a 5-Justice majority now on the Court for Justice Kennedy’s approach, to the extent that approach is different than Justice O’Connor’s, which is not clear from the opinions in Palazzolo, since Kennedy and O’Connor both agreed that the Penn Central test should be applied on remand, both agree that Penn Central is a case-by-case inquiry, and both agree that the quality of investment-backed expectations is part of the test.

§ 22.2.5.4 Cases Involving Temporary Deprivations of Property Rights

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 First English Evangelical Lutheran Church of Glendale v. County of Los Angeles,121 the Court held that the Fifth and 14th Amendments require compensation for the time that a landowner's property has been taken by a land-use regulation that denies the property owner "all use of the property," consistent with Lucas. Here, a church was prevented from rebuilding its facilities by an interim flood protection ordinance. Justice Rehnquist said that temporary takings which, as here, deny a landowner all use of his property, are not different in kind from permanent takings. They involve the same kind of substantial deprivations that fall within the Takings Clause, since the Clause is designed to bar government from forcing some people alone to bear public burdens which should borne by the public as a whole.

Justice Stevens dissented in the case, joined by Justices Blackmun and O’Connor. He said that the enactment of a flood protection plan could not itself be a taking, and thus the Court wrongly assumed that the complaint alleged an unconstitutional taking. Second, the dissent stated that not

119  Id. at 645 (Ginsburg, J., joined by Souter & Breyer, JJ, concurring); id. at 637 (Stevens, J., concurring).

120  Id. at 654 n.3 (Ginsburg, J., joined by Souter & Breyer, JJ, concurring); id. at 643-45 (Stevens, J., concurring).

all ordinances that would constitute a taking if permanent also constitute takings if they are in effect for only a limited time. The reason is that repeal will, in most cases, mitigate the diminution in value to the point where it is not a taking. In addition, the dissent stated that the Court erred in concluding that the Takings Clause, rather than the Due Process Clause, is the primary constraint on unfair procedures in land-use cases, and due process does not require compensation because of delays in property development caused by fairly conducted administrative or judicial proceedings.122

In Tahoe-Sierra Preservation Council, Inv. v. Tahoe Regional Planning Agency,123 the Court remanded for a lower court to consider whether a taking occurred in light of the factors made relevant by Penn Central. The narrow holding, stated by Justice Stevens, was that a temporary building moratorium on development while a planning agency creates a plan, is not per se a taking of property 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 accord with Justice O’Connor’s opinion in Palazzo, the court should make a careful examination and weighing of all of the relevant circumstances in light of fairness and justice to determine whether there has been a temporary taking. Justice Stevens added, “It may well be true that any moratorium that lasts for more than one year should be viewed with special skepticism.”124 However, no set rule should be established and the duration of the restriction is simply one of the important factors to consider. The Court should avoid the temptation to adopt a per se rule favoring either owner or government.

Chief Justice Rehnquist dissented, with Justices Scalia and Thomas. The Chief Justice rested his dissent on Lucas v. South Carolina, where the Court had held that there is a taking when the government deprives owners of all economically viable use of their land. The Chief Justice admitted that this principle did not apply in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like.125 These kinds of short-term delays are a long-standing feature of state property law and part of a landowner’s reasonable investment-backed expectations. However, here the respondent had caused petitioner’s total inability to use his land for nearly 6 years. Such action was held compensable when the government condemned leasehold interests to pursue a war effort.126 Justice Thomas said in a separate dissent, joined by Justice Scalia, that he would support a rule that regulations prohibiting all productive uses of property are subject to the Lucas per se rule, regardless of whether the property so burdened retains a theoretically useful life and value if, and when, the “temporary” moratorium is lifted.127

122 Id. at 322-23 (Stevens, J., joined by Blackmun & O'Connor, JJ., dissenting).


124 Id. at 341.

125 Id. at 343 (Rehnquist, C.J., joined by Scalia & Thomas, JJ., dissenting), citing Lucas, 505 U.S. 1003, 1011-19 (1992).

126 Id. at 347-51. See also First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987); United States v. Petty Motor Co., 327 U.S. 372 (1946).

127 Id. at 355 (Thomas, J., joined by Scalia, J., dissenting).
The end result of these temporary regulation cases is that landowners are given an opportunity to claim a taking when their property is affected for a limited time. In these situations neither the government nor the owner is to be affected by a *per se* rule. The outcome will depend on a close look at all circumstances in terms of the factors outlined in *Penn Central*.

### § 22.2.6 An Overview and Review

As these cases indicate, determining how much regulation is "too far" has not been an easy task for the Court. In his treatise on American constitutional law, Professor Tribe said that the problem has "predictably plagued the Court for over six decades, and the attempt to differentiate ‘regulation’ from ‘taking’ has become ‘the most haunting jurisprudential problem in the field of contemporary land-use law . . . one that may be the lawyer’s equivalent of the physicist’s hunt for the quark.”

The difficulty of resolving taking issues is perhaps one reason why the Court has not adopted a single unitary test under the Takings Clause, much less a single approach for judicial review of economic regulations under the Due Process Clause, Contracts Clause, and Takings Clause. While judicial review of most economic regulations under the Due Process Clause has proceeded under minimum rational review since 1937, as discussed at § 27.1.2.1, the Court majority clearly believes that a slightly higher level of “second-order” or “third-order” rational review is appropriate in many cases for protecting contract and property interests via judicial review under the Contracts Clause and Takings Clause.

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, noted at § 22.2 n.58, of limited or no protection from government appropriation.

Under current law, unless one of the exceptions to takings analysis applies, such as background principles of a state’s law of property or nuisance law place limits on intended uses, discussed at § 22.2.5.3, there is a taking of private property if the government, by its actions:

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1. acquires physical possession of all or a part of an owner's property, as in *Loretto*;\(^\text{131}\)
2. denies all actual use of property, as in *First English Evangelical Lutheran Church*,\(^\text{132}\) or all economically viable use of property, as in *Lucas*;\(^\text{133}\)
3. regulates the use of property where it  
   (a) creates a substantial deprivation of property rights; and  
   (b) is unduly harsh so the owner is forced to bear burdens which, in fairness, should be born by all, under the *Penn Central* test;\(^\text{134}\) or
4. requests a dedication of some property from a specific individual in return for consent to develop the rest of the property, as opposed to a generally applicable government statute or zoning ordinance, and the government cannot show a "rough proportionality" between the harm caused to the public by the individual’s proposed development and the burden on the individual of the government-imposed dedication, as in *Dolan*.\(^\text{135}\)

Five consequences of a taking are: (1) compensation is due, even if the taking is temporary; (2) value is determined at the time the taking occurs; (3) value is measured by the owner's loss, not the taker's gain; (4) fair market value is the normal measure of recovery – what a willing buyer would pay in cash to a willing seller at the time of the taking; and (5) if a temporary taking has occurred, the government must provide just compensation for the period during which the taking was effective.\(^\text{136}\)

A taking has been found in circumstances where: (1) the government acquired possession of property permanently or temporarily\(^\text{137}\); (2) the government activity made private use of the property

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\(^{131}\) *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 425-28 (1982) (cable facilities required to be attached to apartment buildings in 1 1/2 cubic feet of space).


\(^{136}\) These five consequences are noted in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 314-22 (1987).

impracticable or impossible\textsuperscript{138}; (3) the government barred a use, creating a commercial impracticability\textsuperscript{139}; (4) government regulation did not sufficiently advance a legitimate interest\textsuperscript{140}; or (5) the government imposed retroactive liability on a limited class of parties that could not have anticipated the liability, and liability was substantially disproportionate to the parties' experience.\textsuperscript{141}

A taking was not found in which a public purpose was sufficiently furthered or economically viable uses remained where: (1) part of the property was destroyed as a nuisance\textsuperscript{142}; (2) particular uses were prohibited\textsuperscript{143}; (3) use was regulated to achieve a public benefit\textsuperscript{144}; (4) price or rent control was imposed\textsuperscript{145}; or (5) entitlement payments were terminated.\textsuperscript{146}

\footnotesize
\textsuperscript{138} Griggs v. Allegheny County, Pa., 369 U.S. 84 (1962) (noise from aircraft takeoff and landing); United States v. Causby, 328 U.S. 256 (1946) (low air flights destroyed a business); Portsmouth Harbor Land & Hotel Co. v. United States, 260 U.S. 327 (1922) (military fired guns over land).

\textsuperscript{139} First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987) (all use was denied by a flood plain regulation); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) (mining barred below surface structures).

\textsuperscript{140} Nollan v. California Coastal Comm’n, 483 U.S. 825 (1987) (a Coastal Commission, to protect public's visual access, conditioned a building permit on an easement for public access which did not increase visual access); Nectow v. City of Cambridge, 277 U.S. 183 (1928) (zoning where not justified by public health, safety, or welfare).


\textsuperscript{142} Miller v. Schoene, 276 U.S. 272 (1928) (red cedars were destroyed to protect an apple crop, and the owner did not get removal expense for the felled trees).

\textsuperscript{143} Goldblatt v. Town of Hempstead, N.Y., 369 U.S. 590 (1962) (no showing of adverse impact on land value where excavation was barred to protect the water table); Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (residential zoning).

\textsuperscript{144} Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987) (50% of coal beneath certain structures had to be left in place where loss of profitable use was not shown); Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980) (a shopping center was required to allow some free speech activity where this was not shown to interfere with the value of the property); Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978) (an owner was not allowed to use the air rights above an historic building but there was not a total bar to use and continuing profit).

\textsuperscript{145} Yee v. City of Escondido, 503 U.S. 519 (1992) (rent control ordinance, applied to mobile home park, was not a physical taking); FCC v. Florida Power Corp., 480 U.S. 245 (1987) (reasonable reduction in rates power companies could charge cable operators under pole attachment contracts).

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, discussed at § 17.2.4.4 nn.274-77.
CHAPTER 23: NON-ECONOMIC INDIVIDUAL RIGHTS

All individuals rights protections in the Constitution involving non-economic rights other than the First Amendment, Fifth Amendment Due Process Clause, or Civil War Amendments are included in the original Constitution or the initial ten Amendments, the Bill of Rights. To ensure ratification, the supporters promised the states that they would draft a Bill of Rights. 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 of the Constitution 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

On this issue, 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." Jefferson further noted that a written Bill of Rights would place a "legal check . . . into the hands of the judiciary," a body that merited "great confidence" if "rendered independent, and kept strictly to their own department."²

The first eight of these Amendments provide for a range of civil liberties protections. Each of these Amendments is discussed in Chapter 23, with the exception of the Fifth Amendment Takings Clause, discussed at § 22.2, the Fifth Amendment Due Process Clause as applied to civil matters, discussed in Chapter 27, and the First Amendment, discussed in Chapters 29-32. The Ninth Amendment is discussed in Chapter 24. The Tenth Amendment is discussed at § 18.4.

The first eight Amendments involving civil rights – the Second, Third, and Seventh Amendments – are discussed at § 23.1. This section also addresses the civil rights provision of the Full Faith and Credit Clause, Article IV, § 1. Those Bill of Rights provisions involving criminal rights – the Fourth, Fifth, Sixth, and Eighth Amendments – are discussed at § 23.2. This section also addresses the criminal rights provisions in the original Constitution of the Bill of Attainder Clause, Ex Post Facto Clause, Habeas Corpus Clause, and the Extradition Clause.

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.

§ 23.1 Civil Rights Protections: The Second, Third & Seventh Amendments & The Full Faith and Credit Clause of Article IV, § 1

§ 23.1.1 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, discussed at § 27.2.1 n.95, the Court held in 1875 in United States v. Cruikshank,3 that the Second Amendment has “no other effect than to restrict the powers of the National Government.” For state legislation, however, 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.4

This Cruikshank holding was reaffirmed on several occasions during the 19th century.5 However, all of these cases were decided before the Court began to hold that 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 § 27.2.2 n.107. Thus, it is not likely that the current Court would consider these holdings as binding precedents. The modern doctrine by which most Bill of Rights provisions have been incorporated into the 14th Amendment, and thus made applicable against the states, discussed at § 27.2.4 nn.120-27, seems equally applicable to the Second Amendment, as noted at § 27.2.5.1 text following n.128. The Cruikshank doctrine is thus inconsistent with modern doctrine regarding incorporation. Inconsistency with related doctrines is one of the additional reasons that justifies overruling a precedent from a natural law tradition, as noted at § 12.2.2.2 nn.67-70. Nevertheless, based on the doctrine that lower courts should follow Supreme Court precedents directly on point until the Court decides otherwise, noted at § 4.3.4 n.100, lower courts properly continue to hold that the Second Amendment has no applicability against the states.6

The major Supreme Court case to consider possible limits on the right of the people protected by the Second Amendment is United States v. Miller,7 decided during the Holmesian deference-to-government era in 1939. That case upheld the constitutionality of a federal statute that made it

3 92 U.S. 542, 552-53 (1875).
criminal to transport in interstate commerce a shotgun with a barrel less than 18 inches in length. The Court said this law did not violate the Second Amendment because: (1) there was “no evidence” in the record that such a gun has a “reasonable relation to the preservation or efficiency of a well regulated militia,” and (2) the Court understandably 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 the 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.” Despite this language in Miller, it has been noted that dicta in other Supreme Court cases, both before and after Miller, can be used to support an individual right to keep and bear arms.³

Three possible ways of interpreting the Miller case were explored by the Fifth Circuit Court of Appeals in 2001 in United States v. Emerson.⁹ In Emerson, the Fifth Circuit noted that the Fourth, Sixth, Seventh, and Ninth Circuits had decided cases holding that the Second Amendment merely recognizes the right of a state to arm its militia. This has been called a “collective rights” interpretation of the Amendment. The First and Third Circuits have found an individual right to bear arms, but only for members of the militia, and then only if the federal and state governments fail to provide the firearms necessary for such military service. This has been referred to as the “sophisticated collective rights” model. The majority opinion in Emerson rejected both of these theories in favor of a third approach, the “individual rights” model. Under this approach, the Second Amendment recognizes the right of individuals to keep and bear arms regardless of whether they are actually a member of a militia. This right, however, is subject to reasonable regulation (e.g., the possession of guns may be denied to minors, incompetent persons, and felons). The majority then applied these principles to hold that an injunction against the possession of a weapon by an individual under a restraining order was a reasonable regulation, in the particular case a restraining order granted to the wife against the husband in the context of a divorce proceeding.

The method of interpretation used by the majority in Emerson included reference to each of the kinds of interpretation materials that are considered appropriate by the natural law approach to decisionmaking. For the sources of text, context, and history, there are competing interpretations as between some version of the “collective rights” model and the “individual rights” model.

Regarding text, the literal text of the Second Amendment refers to the “right of the people to keep and bear arms.” This reference to the right of the “people,” rather than the right of the “states,” to keep and bear arms, supports the individual rights model. On the other hand, reference to the right to “bear arms,” rather than the right to “own firearms,” suggests that the Second Amendment is more about “bearing arms” for military use in a state militia. The first clause of the Second Amendment, referring to the purpose of the provision – “A well regulated Militia, being necessary to the security of a free State” – also supports the collective rights model, as the Supreme Court noted in Miller.


The context of the Second Amendment supports the individual rights model. The Second Amendment is part of the Bill of Rights. As the district court noted in *Emerson*, "Of the first ten Amendments to the Constitution, only the Tenth concerns itself with the rights of the states, and refers to such rights in addition to, not instead of, individual rights. Thus the structure of the Second Amendment, viewed in the context of the entire Bill of Rights, evinces an intent to recognize an individual right retained by the people."

Arguments of history point in both directions. Regarding specific historical arguments surrounding the drafting and ratification of the Second Amendment, inferences can be drawn in both directions. As the district court noted in *Emerson*:

Madison's original plan was to designate the amendments as inserts between specific sections of the existing Constitution, rather than as separate amendments added to the end of the document. Madison did not designate the right to keep and bear arms as a limitation of the militia clause of Section 8 of Article I. Rather, he placed it as part of a group of provisions (with freedom of speech and the press) to be inserted in "Article 1st, Section 9, between Clauses 3 and 4." Such a designation would have placed this right immediately following the few individual rights protected in the original Constitution, dealing with the suspension of bills of attainder, habeas corpus, and ex post facto laws. Thus Madison aligned the right to bear arms along with the other individual rights of freedom of religion and the press, rather than with congressional power to regulate the militia.

On the other hand, it has been noted that Madison’s original draft of the Second Amendment also included a clause concerning conscientious objectors. This clause only makes sense in the context of viewing the Amendment as focused on service in militias. While Congress deleted this provision on the grounds that allowing judges to define conscientious objectors under such a clause would interfere with the right of states to determine military eligibility, that deletion does not affect viewing the rest of the Amendment as focused on state militia matters.

While there is little specific historical evidence during the ratification of the Second Amendment, statements made during the ratification debates of the original Constitution, and thereafter, tend to support an individual rights model. As the district court noted in *Emerson*:

The framers thought the personal right to bear arms to be a paramount right by which other rights could be protected. Therefore, writing after the ratification of the Constitution, but before the election of the first Congress, James Monroe included "the right to keep and bear arms" in a list of basic "human rights" which he proposed to be added to the Constitution.

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11 *Id.* at 606.

The Massachusetts convention . . . ratified the Constitution with an attached list of proposed amendments. . . . Samuel Adams proposed that the Constitution:

[B]e never construed to authorize Congress to infringe the just liberty of the press, or the rights of conscience; or to prevent the people of the United States, who are peaceable citizens, from keeping their own arms; or to raise standing armies, unless when necessary for the defence of the United States, or of some one or more of them; or to prevent the people from petitioning, in a peaceable and orderly manner, the federal legislature, for a redress of their grievances: or to subject the people to unreasonable searches and seizures.13

On the other hand, the Pennsylvania convention debated 15 amendments, one of which concerned the right of the people to be armed. As the district court noted in Emerson, that amendment on the right to bear arms read:

That the people have a right to bear arms for the defence of themselves and their own State, or the United States, or for the purpose of killing game; and no law shall be passed for disarming the people or any of them, unless for crimes committed, or real danger of public injury from individuals; and as standing armies in time of peace are dangerous to liberty, they ought not to be kept up; and that the military shall be kept under strict subordination to and be governed by the civil power.14

The Second Amendment, as eventually drafted, focused only on the right to bear arms, and not for the purpose of killing game. This suggest that the Second Amendment was intended to be narrower than the Pennsylvania proposed amendment, and only focused on militia matters.

Arguments of general history also point in both directions. A review of both English history, and the history of the colonial experience, indicates attention was focused predominantly on possessing arms in the context of obligation to serve in government-run militias. As noted by the district court in Emerson:

A review of English history explains the founders' intent in drafting the Second Amendment. As long ago as 690 A.D., Englishmen were required to possess arms and to serve in the military. This obligation continued for centuries, requiring nobility, and later commoners, to keep arms and participate in the militia. The obligation to keep arms was not simply to provide military service in the king's army; English citizens were also required to provide local police services, such as pursuing criminals and guarding their villages. . . .

As in England, the colonial militia played primarily a defensive role, with armies of volunteers organized whenever a campaign was necessary. Statutes in effect bore evidence of an individual right to bear arms during colonial times. For example, a 1640 Virginia statute required "all masters of families" to furnish themselves and "all those of their families which

13 46 F. Supp. 2d at 604-06 (citations omitted).
14 Id. at 605 (citations omitted).
shall be capable of arms . . . with arms both offensive and defensive." A 1631 Virginia law required "all men that are fittinge to beare armes, shall bring their pieces to church . . . for drill and target practice."\footnote{Id. at 602-03 (citations omitted).}

On the other hand, some aspects of the general historical background support the individual rights position. For example, it has been noted:

\footnote{Id. at 602, 604 (citations omitted).}

\begin{quote}
[B]y the middle of the seventeenth century, however, the sovereign jeopardized the individual right to bear arms. Charles II, and later James II, began to disarm many of their Protestant subjects. James II was an unpopular king whose policies stirred great resentment among both the political and religious communities of England. Eventually, James II fled England during what was later termed the Glorious Revolution. In the aftermath of the Glorious Revolution, Parliament passed the English Bill of Rights in 1689, codifying the individual right to bear arms. The Bill of Rights provided that "the subjects which are Protestant may have arms for their defense suitable to their conditions and as allowed by law."

The framers also saw an armed populace as the safeguard of religious liberty. Zachariah Johnson told the Virginia convention their liberties would be safe because “the people are not to be disarmed of their weapons. They are left in full possession of them. The government is administered by the representatives of the people, voluntarily and freely chosen. Under these circumstances should anyone attempt to establish their own system [of religion], in prejudice of the rest, they would be universally detested and opposed, and easily frustrated. This is the principle which secures religious liberty most firmly.”\footnote{Id. at 602, 604 (citations omitted).}

Arguments regarding practice and precedent are more on the side of the collective rights model of interpretation. The Supreme Court, and no federal Court of Appeals until the Fifth Circuit in \textit{Emerson}, has ever ruled in favor of the individual rights model. Legislative and executive practice also does not suggest much support for the individual rights model, although the minimal amount of gun control legislation actually passed does suggest legislative reluctance to regulate in this area. In 2001, Attorney General John Ashcroft indicated his view that the Second Amendment constitutionalized an individual right to own guns, a position at odds with the official view of the Justice Department in every preceding Administration.

Even if the Second Amendment were viewed as creating a fundamental individual right to own guns, and thus the “pure collective rights” model were rejected, that right would not be absolute. Under \textit{Miller}, it could be argued that even if an individual right were recognized, it would protect only the possession of weapons suitable for use in a situation where the militia might be called upon to act. This would follow the “sophisticated collective rights” view of the Second Amendment.

Even if one adopted a pure “individual rights” model of the Second Amendment, that understanding might be affected by the modern view regarding unenumerated fundamental rights that only
substantial or undue burdens trigger strict scrutiny, while less than substantial burdens only trigger some version of rational review, as discussed at § 21.2.3. Although the Second Amendment is a textually specific enumerated right, not an unenumerated fundamental right, this approach was implicitly adopted by the Fifth Circuit in Emerson,\(^n\) which applied only rational review to the federal statute limiting gun possession for a person under a restraining order to stay away from another individual. Indeed, as a concurring opinion noted in Emerson, the majority’s discussion of Second Amendment theories was merely \textit{dicta} since the majority held that the gun owner’s right of possession could be limited, a result appropriate under any of the three theories.

For these reasons, even though there has been much recent academic commentary on the Second Amendment,\(^n\) it is unclear from a practical perspective what difference it makes. Legislatures rarely pass gun control legislation. Even under the Fifth Circuit approach, that which is passed would almost inevitably be viewed as a less than substantial burden on whatever gun right exists, and thus would trigger a rational review kind of approach anyway in virtually every case under the individual rights model. Even if one rejected that analysis, considerations similar to those under First Amendment free speech doctrine regarding secondary effects, reasonable time, place, or manner regulations, or prior restraints, discussed at §§ 29.4.4.1-29.4.4.2 & 29.6.1.1, might be used to limit any Second Amendment right that was held to exist, particularly for reasons of national security and concern with activities of possible terrorists.\(^n\) As of October, 2006, no federal or state statute ultimately has ever been struck down as unconstitutional under the Second Amendment.\(^s\)

Nevertheless, from a conservative formalist perspective, Justice Thomas supplied some relevant observations in his concurring opinion in \textit{Printz v. United States}.\(^n\) He said in a footnote, “In \textit{Miller}, we determined that the Second Amendment did not guarantee a citizen a right to possess a sawed-off shotgun because that weapon had not been shown to be ‘ordinary military equipment’ that could ‘contribute to the common defense.’” Justice Thomas then observed that the Court in \textit{Miller} had not attempted to define the substantive right protected by the Second Amendment. He observed in a subsequent footnote, “Marshaling an impressive array of historical evidence, a growing body of scholarly commentary indicates that the ‘right to keep and bear arms’ is, as the Amendment’s text suggests, a personal right.” Justice Thomas’ formalist predisposition to give heavy weight to implications from literal text and historical intent would lead him to conclude that a personal right had been granted or acknowledged – at least unless very strong historical evidence could be found to the contrary.

\(^{17}\) 270 F.3d at 261-65; \textit{id.} at 272-74 (Parker, J., specially concurring).

\(^{18}\) \textit{See, e.g.}, Symposium: The Second Amendment and the Future of Gun Regulation: Historical, Legal, Policy, and Cultural Perspectives, 73 Fordham L. Rev. 475-730 (2004), and sources cited therein.

\(^{19}\) \textit{See, e.g.}, David G. Browne, \textit{Treating the Pen and the Sword as Constitutional Equals: How and Why the Supreme Court Should Apply its First Amendment Expertise to the Great Second Amendment Debate}, 44 Wm. & Mary L. Rev. 2287, 2303-18 (2003).

Of course, without regard to direct gun control legislation, there is a related question of whether the Second Amendment could be used as a barrier to state tort litigation against the gun industry, to the extent that state or federal legislation, such as the proposed federal Protection of Lawful Commerce in Arms Act, does not effectively limit such lawsuits. The theory would be that the Second Amendment limits such lawsuits, just as there are First Amendment limitations on state defamation lawsuits under *New York Times Co. v. Sullivan*, discussed at § 30.2.1.1 nn.149-58.


§ 23.1.2 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 20.1.4.2.B nn.90-93.

§ 23.1.3 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*:

Although the thrust of the Amendment was to preserve the right to jury trial as it existed in 1791, it has long been settled that the right extends beyond the common-law forms of action recognized at that time. Mr. Justice Story established the basic principle in 1830:

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“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 . . . . In a just sense, the amendment then may well be construed to embrace all suits which are not of equity and admiralty jurisdiction, whatever might be the peculiar form which they may assume to settle legal rights.”

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.23

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.24 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.'”25 An important aspect of this doctrine is that 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.26

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.27 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.28 The issue regarding which constitutional rights can be waived (“alienable”) and which cannot (“inalienable” rights) is discussed at § 24.1 text following n.14.

While most of the Bill of Rights provisions have been incorporated into the Due Process Clause of the 14th Amendment, and thus made applicable against the states, discussed at § 27.2.4 nn.120-27, the Supreme Court has not incorporated the Seventh Amendment into the 14th Amendment, as noted at § 27.2.5.1 text following n.128. 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.29

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.30 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.,31 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.

The Seventh Amendment does not apply to suits against the United States. As the Court noted in Lehman v. Nakshian:

27 Id. at 718-21.


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. Jury trials, for example, have not been made available in the Court of Claims for the broad range of cases within its jurisdiction under 28 U.S.C. § 1491 . . . And there is no jury trial right in this same range of cases when the federal district courts have concurrent jurisdiction. See 28 U.S.C. §§ 1346(a)(2) and 2402. Finally, in tort actions against the United States, see 28 U.S.C. § 1346(b), Congress has similarly provided that trials shall be to the court without a jury. 28 U.S.C. § 2402.32

§ 23.1.4 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.33

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. Chief Justice John Marshall stated for a United States Circuit Court, while riding circuit in 1813 in Peck v. Williamson,34 “To us it appears very clear that the constitution makes a pointed distinction between the faith and credit, and the effect, of a record in one state when exhibited in evidence in another. With respect to the former, the Constitution is peremptory that it must have full faith and credit; with respect to the latter, it provides that congress may prescribe the effect thereof. Unless Congress had prescribed its effect, it should be allowed only such as it possesses on common-law principles. In our opinion Congress have not prescribed its effect. To suppose that they have is to believe that they use the words ‘faith and credit’ in a sense different from that which they have in the clause of the Constitution upon which they were legislating.” In reaching this conclusion, Chief Justice Marshall noted that other Justices, in their circuit opinions, had reached a different result.


33 Act of May 26, 1790, ch. 11, 1 Stat. 122.

34 19 F. Cas. 85, 85 (C.C.N.C. 1813).
Based on the natural law focus on purpose, as well as literal text, the Supreme Court held soon after *Peck* 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.” Five years later, in 1818, Chief Justice Marshall acknowledged the *Mills* precedent and wrote for the Court in *Hampton v. M’Connel*, “[T]he judgment of a state court should have the same credit, validity, and effect, in every other court in the United States, which it had in the state where it was pronounced.”

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."

. . . . We have recognized, instead, that "it is frequently the case under the Full Faith and Credit Clause that a court can lawfully apply either the law of one State or the contrary law of another." We thus have held that a State need not "substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate."
With respect to other states’ laws in cases involving multi-state elements, the Court held in *Allstate Insurance Co. v. Hague*\(^{39}\) that the test under the Full Faith and Credit Clause and the Due Process Clause is the same: whether the state has a sufficient contact or aggregation of contacts creating state interests that would make the application of its law neither arbitrary nor fundamentally unfair. In *Sun Oil v. Wortman*,\(^{40}\) the Court held that the *Allstate* test only applied to "nontraditional" choice-of-law rules. When a state is applying a traditional choice-of-law rule – *i.e.*, one that was accepted at the time that the Full Faith and Credit and Due Process Clauses were ratified and whose acceptance has continued into the present – that choice-of-law rule is validated by its history and practice without regard to the *Allstate* test.

As might be expected, based on the limitations of Stage 3 concrete operational thought, discussed at § 15.4.1 nn.50-56, traditional choice-of-law rules during the original natural era focused on concrete presence or activity in the state, particularly for contract or tort issues.\(^{41}\) Similar to modern doctrine regarding Due Process limits on personal jurisdiction, discussed at § 17.2.3.2, modern choice of laws, based on the abstract reasoning capabilities of formal operational thought, follows a broader factor-weighing approach in terms of fundamental fairness and general state interest in the litigation.\(^{42}\) In either case, the Court's repeated statements that a state is not compelled to substitute the statutes of other states for its own statutes dealing with the same subject matter, leave little room for vigorous use of the Full Faith and Credit Clause to impose one state’s law on another.

A classic example of Full Faith and Credit Clause applied to such issues involves workers’ compensation law. In these cases, the issue is whether to apply the workers compensation law where the individual resides, and typically sues; the law of the state where the injury occurred; the law of the state where the employer, if a corporation, is incorporated; or some other choice. The Supreme Court has indicated that the choice of law decision made by a state in such a case rarely

\(^{39}\) 449 U.S. 302, 312-313 (1981) (Brennan, J., plurality opinion); *id.* at 332 (Powell, J., joined by Burger, C.J., and Rehnquist, J., dissenting). In *Allstate*, only Justice Stevens appeared to view the test under the two Clauses as somewhat different. *Id.* at 320 (Stevens, J., concurring in the judgment).

\(^{40}\) 486 U.S. 717, 728-29 (1988).


will implicate the Full Faith and Credit Clause. In this, and many other areas, state legislatures have moved in to fill gaps. As had been noted:

However, the prevailing assumption that legislatures are extremely reluctant (or worse incapable) to enact choice-of-law rules is not based on reality. As illustrated earlier, during the last fifty years, state legislatures have been routinely enacting unilateral choice-of-law rules interspersed with substantive rules in areas such as insurance contracts, franchises, dealerships, consumer protection, construction contracts, workers’ compensation, public contracts, and other densely regulated areas. But choice-of-law legislation is not confined to those areas, nor is it confined to unilateral rules. Although only one state has enacted a comprehensive choice-of-law codification [perhaps not surprisingly Louisiana with its civil law Code tradition], many other states have enacted statutes dealing with major and significant choice-of-law questions. In addition to the choice-of-law provisions in the Uniform Commercial Code, which are too numerous to cite and which are in force in all states, several states have enacted choice-of-law rules on matters such as contractual choice of law and forum, statutes of limitation, interstate arbitration, decedents estates, marital property, premarital agreements, partnerships; wrongful death; notice and proof of sister-state and foreign law, child and spousal support, child custody, and even the discipline of members of the bar.

Perhaps the greatest area of contemporary concern under the Full Faith and Credit clause involves issues of marriage and divorce, in particular the issue of 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, which do not involve formal court judgments. 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 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.

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45 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).
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 about these cases:

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.46

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,”47 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.48

With respect to the issue of same-sex marriages, the issue is complicated by the provision in the federal Defense of Marriage Act of 1996, codified as 28 U.S.C. § 1738C, dealing with the obligation to recognize same-sex marriages. It provides: “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


48 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 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).
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.” Given Congress’ ability under the text of the Full Faith and Credit Clause to prescribe the “effect” of proceedings in another state, this would make it more difficult to justify giving such same-sex marriages in one state preclusive effect in another state. In 2005, in Wilson v. Ake, a federal district court upheld the Defense of Marriage Act as not violating full faith and credit, due process, or equal protection principles.

Despite extensive commentary both supporting giving such same-sex marriages full faith and credit, and denying it, the likely reality, as discussed at § 26.4.6 nn.47-86, is that the Northern “Blue States” are likely to recognize same-sex marriages or civil unions in the near future, with the examples of Vermont, Massachusetts, and Connecticut likely joined in the near future by New Jersey, California, and other such states; the “Midwest, Plains, and Western” Red States will grant equal kind of rights in terms of health, pension, medical visitation, and other such rights, but not civil union or marriage status; and the “Deep South” Red States will limit rights generally. Response to the full faith and credit issue in these states may well mirror this receptiveness, with some “Blue States” giving full faith and credit to marriages legal in other states, prior to recognizing such marriages in their own states.

Eventually, as with the issue of interracial marriages, where the full faith and credit issue was mooted by the Supreme Court in Loving v. Virginia, discussed at § 26.2.1.1.D n.132, which struck down all bans on interracial marriages, the Supreme Court will likely eventually join the educated, enlightened view of Western Europe and Canada, discussed at §§ 16.1 text following n.5 & 16.2.4, which supports equal rights for gays and lesbians. This will moot the full faith and credit issue with respect to same-sex marriages as well.

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52 388 U.S. 1, 9-11 (1967).
§ 23.2 Criminal Defendants’ Rights

The subject of defendant’s constitutional rights in criminal proceedings is detailed in a number of treatises specifically devoted to criminal law.\textsuperscript{53} These rights include those in the Fourth, Fifth, Sixth and Eighth Amendments to the Constitution, as well as provisions in Article I, § 9 concerning no Bill of Attainder, no Ex Post Facto Laws, and a right of Habeas Corpus, and the Article IV, § 2, cl. 2 Extradition Clause. These clauses are typically not covered in the standard first year Constitutional Law course, but are reserved for an upper-level course on Criminal Procedure. For this reason, given the focus of this book, as stated in § 1.3.4, the intent in this book is not to provide a detailed analysis of these provisions. Rather, by providing several examples from cases recently decided, the point is made that the same decisionmaking styles and eras can be observed in cases on criminal procedure as in other areas of constitutional law.

There is, of course, the preliminary decision whether a particular punishment is criminal or civil. As has been noted, “The Bill of Rights affords important procedural protections to those subjected to criminal investigation, indictment, or prosecution that are not available to defendants in civil actions. That the Framers of the Constitution and Bill of Rights incorporated these protections indicates their belief that society holds a unique interest in limiting the state's power to stigmatize and punish and, to this end, that criminal procedures should guarantee protections transcending those offered to citizens subjected to civil suit or regulation.”\textsuperscript{54}

In 1963, in \textit{Kennedy v. Mendoza-Martinez},\textsuperscript{55} the Court weighed seven factors to determine whether a sanction is civil or criminal whenever there is any doubt: “Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment – retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned.”  In 1997, in \textit{Hudson v. United States}, the Court underscored that whether:

\begin{quote}
    a particular punishment is criminal or civil is, at least initially, a matter of statutory construction. A court must first ask whether the legislature, "in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other." Even in those cases where the legislature "has indicated an intention to establish a civil penalty, we have inquired further whether the statutory scheme was so punitive either in purpose or effect," as to "transfor[m] what was clearly intended as a civil remedy into a criminal penalty."
\end{quote}


\textsuperscript{54} Aaron Xavier Fellmeth, \textit{Civil and Criminal Sanctions in the Constitution and Courts}, 94 Geo. L.J. 1, 7-8 (2005).

\textsuperscript{55} 372 U.S. 144, 167-68 (1963) (citations omitted).
In making this latter determination, the factors listed in *Kennedy v. Mendoza-Martinez* provide useful guideposts . . . . It is important to note, however, that "these factors must be considered in relation to the statute on its face," and "only the clearest proof " will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty.56

In short, the Court reaffirmed in *Hudson* a presumption that a sanction is whatever Congress said it was for purposes of determining whether the criminal procedure protections in the Constitution apply. The Court noted, however, that Congress could be mistaken. If the defendant can show that the sanction is more like a criminal one, judged by factors enumerated in *Mendoza-Martinez*, then the protections would apply notwithstanding Congress's intent that they should not.

§ 23.2.1 The Fourth, Fifth, Sixth, and Eighth Amendments

With respect to criminal defendant’s rights, the liberal instrumentalist predisposition to protect the unempowered in society, noted at §§ 11.2.1.2 nn.19-20 & 11.3.3 n.61, 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, noted at § 10.2.1.2 nn.16-18, and formalist judges, based on fixed, static interpretation grounded in literal text and specific historical intent, noted at §§ 9.2.1.1 nn.4-6, 9.2.1.3 nn.35-36 & 9.2.2.1 nn.37-39, tend to embrace more limited readings of these constitutional provisions. Natural law judges tend to reach conclusions intermediate between these two extremes based on arguments of text, context, history, practice, precedent, and interpretive prudential considerations, without preconceived predispositions.

§ 23.2.1.1 The Fourth Amendment: Protection Against Unreasonable Searches and Seizures

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

The first issue under the Fourth Amendment is whether a “search” or “seizure” has in fact occurred. The burden is on the challenger to establish that in fact a search or seizure, which could include an arrest, has taken place to trigger the Amendment. For example, in *Florida v. Riley*, 57 the plurality opinion of Justice White, joined by Chief Justice Rehnquist, and Justices Scalia and Kennedy, noted that “there is nothing in the record or before us to suggest that helicopters flying at 400 feet are sufficiently rare in this country to lend substance to respondent's claim that he reasonably anticipated


that his greenhouse would not be subject to observation from that altitude.” Thus, the observation of an individual’s greenhouse by the police from a helicopter was not constitutionally a “search” or “seizure” because the defendant had not shown that the greenhouse was not in “plain view.” Justice O’Connor, concurring in the judgment, similarly placed the burden of proof on the defendant to establish that a “search” had occurred because the greenhouse was not in “plain view.”

Once the defendant meets the burden of establishing that a search, seizure, or arrest has occurred, the burden shifts to the government to establish the “reasonableness” of the action, both as to the initial stop, and whether later actions were “reasonably related” to the circumstances that justified the stop. In determining whether any particular search, seizure, or arrest is “reasonable,” the Court uses a “third-order” rational review balancing test. The Court weighs the government’s interest and needs in law enforcement against individual privacy rights and the availability to the government of less burdensome means of operation.

This use of third-order rational review is similar to other cases of third-order rational review where the government has singled out individuals for direct regulation, such as the government regulating the speech of government employees on matters of public concern under the First Amendment Pickering doctrine, discussed at § 30.2.2.1 nn.178-81, or, as the Court noted in Dolan, comparing the Dolan test to the Fourth Amendment, singles out individuals for exactions under Takings Clause doctrine, discussed at § 22.2.5.1 nn.97-103.

In deciding whether a search has occurred, the Court considers the issue from both the subjective perspective of whether an individual in fact had an expectation of privacy and an objective perspective of whether a reasonable person would have a legitimate expectation of privacy. As phrased initially by Justice Harlan concurring in Katz v. United States,60 the touchstone of the analysis is whether a person has a “constitutionally protected reasonable expectation of privacy.” As restated in Smith v. Maryland,61 “Katz posits a two-part inquiry: first, has the individual manifested a subjective expectation of privacy in the object of the challenged search? Second, is society willing to recognize that expectation as reasonable?”

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In practice, the second part of this inquiry does most of the work. This is consistent with most constitutional doctrines, such as the objective test for determining executive officials’ immunity from prosecution for damage actions based upon objective belief in the reasonableness of the conduct, discussed at § 20.1.4.2.B nn.84-87. It is also consistent with much contracts, torts, and statutory interpretation doctrine, which uses objective reasonable person standards to resolve issues, noted at §§ 3.2 nn.27-31 & 6.2.1.1 nn.9-23. Such an approach is not only easier in terms of proof, since determining subjective mental states is difficult, but is also consistent with a natural law focus on reasoned elaboration of the law, discussed at § 12.2.2.2 nn.60-70, and the principle that “persons should behave reasonably under the circumstances,” noted at § 12.2.2.3 text following n.81.

Like most constitutional rights, as discussed at § 24.1 text following n.14, the Fourth Amendment protection against search and seizures can be waived, as long as that waiver is “voluntary.” As the Court noted in *Schneckloth v. Bustamonte*, the burden is on the government to establish the voluntariness of the consent based upon a totality of the circumstances approach. The Court stated in *Schneckloth*, “Some of the factors taken into account have included the youth of the accused; his lack of education; or his low intelligence; the lack of any advice to the accused of his constitutional rights; the length of detention; the repeated and prolonged nature of the questioning; and the use of physical punishment such as the deprivation of food or sleep.” Justice Douglas, Brennan, and Marshall dissented in *Schneckloth*, and would have required a higher standard of a “knowing and intelligent” waiver. The standard usually requires the government to advise the person of the right, rather than the “lack of any advice” being merely a factor in the decision regarding “voluntariness.”

As discussed at §§ 23.2.1.2 n.101 & 23.2.1.3 n.157, the “knowing and intelligent” waiver standard is used for the waiver of most Fifth and Sixth Amendment rights, which involve “the validity of a defendant's decision to forego a right constitutionally guaranteed to protect a fair trial and the reliability of the truth-determining process.” In contrast, as the Court noted in *Schneckloth*, the “protections of the Fourth Amendment are of a wholly different order, and have nothing whatever to do with promoting the fair ascertainment of truth at a criminal trial. Rather, . . . the Fourth Amendment protects the 'security of one's privacy against arbitrary intrusion by the police.’”

In *Georgia v. Randolph*, the Court was faced with co-occupants, one of whom consented to a search, and the other did not. The Court noted that while the Fourth Amendment “recognizes a valid warrantless entry and search of premises when police obtain the voluntary consent of an occupant who shares, or it reasonably believed to share, authority over the area in common with a co-occupant who later objects to the use of evidence so obtained,” where the co-occupant is physically present at the scene, and refuses to consent, “a physically present co-occupant’s stated refusal to permit entry prevails, rendering the warrantless search unreasonable and invalid as to him.” Chief Justice Roberts and Justices Scalia dissented on the ground that one shares the risk that a co-occupant will consent to a search. Justice Thomas dissented, noting that the co-tenant could have turned over the evidence to the police himself. Justice Alito took no part in the decision or consideration of the case.

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62 412 U.S. 218, 222-27, 236-42 (1973) (citations omitted); id. at 275-76 (Douglas, J., dissenting); id. at 276-77 (Brennan, J., dissenting); id. at 277-80 (Marshall, J., dissenting).

63 126 S. Ct. 1515, 1518-19 (2006); id. at 1534-35 (Roberts, C.J., joined by Scalia, J., dissenting); id. at 1541-43 (Thomas, J., dissenting).
Consistent with the literal text of the Fourth Amendment, for most searches a warrant and probable cause to search are required, and that warrant must describe with particularity the place to be searched and the person or things to be seized.\textsuperscript{64} However, consistent with a natural law focus on purpose and practicality, in addition to literal text, the Court has permitted “anticipatory” search warrants based upon affidavits establishing probable cause that at some future time certain evidence of a crime will be located at a particular place, and that anticipatory warrant does not itself need to specify what the “triggering” condition will be for that warrant to be executed.\textsuperscript{65} Further reflecting a concern with purpose and practicality, the Court has created the “emergency aid” doctrine that permits warrantless entry of premises when officers are presented with circumstances that would lead a reasonable officer to believe that one or more occupants of the home are seriously injured or in danger of being seriously injured, such as a threat of on-going violence in the home.\textsuperscript{66}

Based on the same reasons of purpose and practicality, the Court has permitted exceptions to the warrant and probable cause requirements when “special needs, beyond the normal need for law enforcement” make those requirements impracticable, as noted in \textit{Griffin v. Wisconsin}.\textsuperscript{67} Consistent with an instrumentalist predisposition to be sensitive to potential criminal defendant’s rights, in many of these cases instrumentalist Justices, like Justices Brennan, Marshall, and Stevens, have been in dissent, having a more limited view of when special needs exist.

For example, over the dissents of Justices Brennan, Marshall, and Stevens, the Court upheld in \textit{Michigan Department of State Police v. Sitz}\textsuperscript{68} the use of a sobriety traffic checkpoint. The Court concluded that the state's checkpoint program was constitutional, adopting a standard third-order rational review 3-part means/end balancing test, focused on the state's interest in preventing drunk driving (end), the extent to which that could be accomplished through the checkpoint program (benefit of the means), and the degree of intrusion the stops involved (burden). Over the dissents of Justices Brennan and Marshall, the Court upheld in \textit{United States v. Martinez-Fuerte}\textsuperscript{69} the brief, suspicionless seizures of motorists at a fixed Border Patrol checkpoint designed to intercept illegal aliens. Without dissent, the Court suggested in \textit{Delaware v. Prouse}\textsuperscript{70} that a similar type of roadblock with the purpose of verifying drivers' licenses and vehicle registrations would be permissible.

\begin{itemize}
  \item \textsuperscript{65} See, e.g., United States v. Grubbs, 126 S. Ct. 1494, 1500-02 (2006).
  \item \textsuperscript{67} 483 U.S. 868, 873 (1987).
  \item \textsuperscript{68} 496 U.S. 444, 445 (1990); \textit{id.} at 456 (Brennan, J., joined by Marshall, J., dissenting); \textit{id.} at 460 (Stevens, J., joined in part by Brennan & Marshall, JJ., dissenting).
  \item \textsuperscript{69} 428 U.S. 543, 561-62 (1976); \textit{id.} at 567 (Brennan, J., joined by Marshall, J., dissenting).
  \item \textsuperscript{70} 440 U.S. 648, 663 (1979).
\end{itemize}
In contrast, in *Indianapolis v. Edmond*, the Court held that a drug interdiction checkpoint violated the Fourth Amendment. Despite illegal narcotics traffic, the Court majority explained that a “general interest in crime control” did not justify the stops. The Court distinguished the sobriety checkpoints in *Sitz* on the ground those checkpoints were designed to eliminate an “immediate, vehicle-bound threat to life and limb” from drunk driving. Consistent with his Holmesian predisposition for deference to government, Chief Justice Rehnquist dissented, refusing to distinguish this roadblock from those in *Sitz* and *Martinez-Fuerte*. Based on literal application of those precedents, Justices Scalia and Thomas joined this dissent in part, although Justice Thomas noted in a separate dissent, “I rather doubt that the Framers of the Fourth Amendment would have considered ‘reasonable’ a program of indiscriminate stops of individuals not suspected of wrongdoing.”

In *dicta*, the Court noted in *Edmond* that despite their conclusion that a generalized interdiction checkpoint looking for drugs was unconstitutional, “[T]he Fourth Amendment would almost certainly permit an appropriately tailored roadblock set up to thwart an imminent terrorist attack.” Focused on the issue of “imminence” in a case decided after 9-11, the Eleventh Circuit struck down in *Bourgeois v. Peters* a city policy requiring all persons wishing to participate in a protest near a military base to submit to a magnetometer search before entering the protest site. The court stated, “While the threat of terrorism is omnipresent, we cannot use it as the basis for restricting the scope of the Fourth Amendment's protections in any large gathering of people. In the absence of some reason to believe that international terrorists would target or infiltrate this protest, there is no basis for using September 11 as an excuse for searching the protestors.” In *MacWade v. Kelly*, the Second Circuit upheld a program of random, suspicionless searches of subway riders’ belongings to look for explosives to protect New York subways from terrorist attack.

The Court has used the special needs exception to uphold certain kinds of drug testing programs at schools, drug testing programs in employment, or for administrative inspections for a variety of

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71 531 U.S. 32, 43-44 (2000); id. at 48 (Rehnquist, C.J., joined in part by Scalia & Thomas, JJ., dissenting); id. at 56 (Thomas, J., dissenting).

72 387 F.3d 1303, 1311 (11th Cir. 2004).

73 460 F.3d 260, 267-75 (2nd Cir. 2006).


administrative reasons, provided those searches are appropriately limited. In a case focusing on drug searches at schools, an Eighth Circuit panel distinguished the Supreme Court’s cases dealing with student-athletes or students in competitive extracurricular activities, cited at § 23.2.1.1 n.74, to hold that a public school’s practice of subjecting all students to random, suspicionless searches of their persons and belongings because of concerns with drug use and violence was not justified by the “special needs” exception. On the other hand, because of the diminished expectation of privacy that students have in the school context, it has been argued that the Court should adopt a more flexible standard regarding whether “anonymous tips” should be viewed as giving the government “reasonable suspicion” to search students and their belongings in the school context.

In Ferguson v. City of Charleston, the Court considered a city policy setting forth procedures for maternity patients suspected of drug use to be identified, and their urine tested for the presence of illegal drugs, including cocaine. Patients with positive drug screens could avoid prosecution by entering a substance abuse clinic. The policy contained detailed procedures concerning the chain of custody and the particular offenses with which the women could be charged, and allowed for interrogation regarding the source of their drugs. Consistent with Edmond, the Court held that a “general interest in crime control” could not justify the searches, and that, as the program had been structured, even if the “ultimate goal” was the health and well-being of the mother and her fetus, the “immediate objective” and “primary purpose” of the program was an interest in crime control.

Concurring in the judgment only, Justice Kennedy rejected the distinction between “immediate” and “ultimate” goals as inconsistent with the Court’s precedents, and not useful, since “[b]y very definition, in almost every case the immediate purpose of a search policy will be to obtain evidence.” He did embrace the concept of looking to the “primary purpose” of the government action, however, noting, “The special needs cases we have decided do not sustain the active use of law enforcement, including arrest and prosecutions, as an integral part of a program which seeks to achieve legitimate, civil objectives. . . . Under these circumstances, while the policy may well have served legitimate needs unrelated to law enforcement, it had as well a penal character with a far greater connection to law enforcement than other searches sustained under our special needs rationale.”

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77 Doe v. Little Rock Sch. Dist., 380 F.3d 349, 354-57 (8th Cir. 2004).


79 532 U.S. 67, 79-86 (2002); id. at 88-89 (Kennedy, J., concurring in the judgment).
Chief Justice Rehnquist, and Justices Scalia and Thomas, dissented in Ferguson, and would have upheld the policy based on the “special need” to facilitate “treatment and protect both the mother and unborn child.” Justice Scalia also dissented on the ground that in his view the patient voluntarily consented to the urine sample, and thus no Fourth Amendment issue was raised. Given that Chief Justice Roberts and Justice Alito would likely vote with Justices Scalia and Thomas in such a case today, Justice Kennedy’s approach probably represents the current controlling doctrine on this issue.

That approach may have some relevant for the issue of data collection of DNA. All fifty states have enacted laws authorizing the use of DNA databases to store the genetic profiles of those convicted of certain criminal offenses. Under the DNA Identification Act of 1994, the FBI established the Combined DNA Index System (CODIS), allowing local and state forensic laboratories to exchange and compare DNA profiles electronically. Under the DNA Analysis Backlog Elimination Act of 2000 (DNA Act), federal government officials were granted the authority to collect DNA samples from persons convicted of certain federal offenses for inclusion in CODIS. It has been questioned whether such collection is constitutional, since the “primary purpose” of such collection is a “generalized interest in law enforcement.” However, at a minimum, unlike Edmond or Ferguson, the purpose is not to collect the information to prosecute an individual for some immediate offense, where the individual’s privacy interest would be stronger, but to aid future law enforcement efforts, including helping to prove that the individual is not the perpetrator of some later crime. In any event, either on grounds of “special needs,” or as consistent with third-order rational review balancing for “reasonableness,” federal Circuits have uniformly upheld suspicionless collection of DNA samples from convicted felons for inclusion in a law enforcement database.

The formalist focus on fixed constitutional meaning at the time of ratification can occasionally yield results more protective of individual rights than judges in the Holmesian or natural law tradition. For example, in Kyllo v. United States, a combination of formalist and instrumentalist-leaning Justices joined forces to conclude that thermal imaging aimed at a private home to detect relative amounts of heat was an unconstitutional search within the meaning of the Fourth Amendment. The

80 Id. at 92-99 (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., as to Part II, dissenting).


votes of formalist Justices Scalia and Thomas can be explained by noting that the result in *Kyllo*
“assure[d] preservation of that degree of privacy against government that existed when the Fourth
Amendment was adopted,” and thus supported a static, fixed interpretation of the Fourth
Amendment. For the instrumentalist or instrumentalist-leaning Justices Souter, Ginsburg, and
Breyer, the case fit the general reasoning of the instrumentalist-era case of *Katz v. United States*, where electronic eavesdropping by means of a listening device placed on the outside of a telephone
booth was held to be a search. In dissent, Justices Stevens, joined by Chief Justice Rehnquist and
Justices O’Connor and Kennedy, concluded that the thermal imaging was aimed at a house in plain
view, and thus the doctrine that observation of objects in “plain view” are not searches should apply.

Despite *Kyllo*, the Court has decided that use of a dog to sniff out drugs, or other illegal contraband
contained in objects, is not a search within the Fourth Amendment. Using a balancing approach,
the Court concluded in *Illinois v. Caballes* that individuals do not have the same expectation of
privacy from that kind of activity that they do from the use of thermal imaging technology. Justice
Souter and Ginsburg dissented from this conclusion.

In *Atwater v. City of Lago Vista*, Justice Souter, joined by Chief Justice Rehnquist and Justices
Scalia, Kennedy, and Thomas, held that traditional common-law history and more recent legislative
and executive practice support the view that it is constitutional for the police to make a warrantless
arrest for a minor criminal offense, such as a misdemeanor seat-belt violation punishable only by
a fine. Justice O’Connor, departing from her usual voting pattern, joined Justice Stevens, Ginsburg,
and Breyer in dissent, concluding that under instrumentalist-era precedents such an arrest would be
“unreasonable” and thus in violation of the Fourth Amendment.

A similar result regarding a warrantless investigatory stop occurred in *Illinois v. Wardlow*. In
*Wardlow*, the individual’s presence in an area of heavy narcotics trafficking, combined with his
unprovoked flight upon noticing the police, gave the police “reasonable suspicion” to conduct a brief
investigatory *Terry* stop, so-called after the famous case of *Terry v. Ohio*. Justice Stevens, joined
by Justices Souter, Ginsburg, and Breyer, agreed that the decision on whether “reasonable
suspicion” exists is a case-by-case inquiry, but concluded on these facts that no “reasonable
suspicion” existed.

A particularly troublesome set of areas for Fourth Amendment doctrine concerns its application to
modern technology, computers, the Internet, and the war on terror. For example, a tricky issue exists
regarding the extent to which “encryption” technology should be viewed as creating a “reasonable

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85 389 U.S. 347, 352-54 (1967); *id.* at 364 (Black, J., dissenting).

86 543 U.S. 405, 407-08 (2005); *id.* at 410 (Souter, J., dissenting); *id.* at 419-20 (Ginsburg, J.,
joined by Souter, J., dissenting).

87 532 U.S. 318, 326-54 (2001); *id.* at 360 (O’Connor, J., joined by Souter, Ginsburg & Breyer,
JJ., dissenting).

88 528 U.S. 119, 124-26 (2000), *citing* *Terry v. Ohio*, 392 U.S. 1, 30 (1968); *id.* at 126 (Stevens,
J., joined by Souter, Ginsburg & Breyer, JJ., concurring in part and dissenting in part).
expectation of privacy” that would require a warrant based upon probable cause to decipher. A second set of issues involve the particularity requirement when searching materials stored on computers. A third set of issues involve electronic surveillance of various types and when those constitute a search. A fourth set of issues involve the warrant requirement in the context of searches connected to the war on terror. However, the major issue there does not involve the warrant procedures of the Foreign Intelligence Surveillance Court (FISA Court), pursuant to the Foreign Intelligence Surveillance Act of 1978 (FISA), whose proceedings are kept secret on grounds of national security. Rather, the major issue is the extent to which the President can evade that statutory alternative based on inherent executive power. Based on the Court failing to uphold an argument for inherent executive authority to constitute military tribunals to try enemy combatants in Hamdan v. Rumsfeld in 2006, discussed at § 27.4.8 nn.409-16, the Court would be unlikely to grant the President inherent executive authority to depart from the procedures of the FISA Act, as noted at § 19.3.3 n.58.

For searches in violation of the Fourth Amendment, the Court applies an exclusionary rule to deny the fruits of that search in most later criminal proceedings. This doctrine was discussed and defended in the famous 1961 case of Mapp v. Ohio, which extended application of the exclusionary rule in federal court proceedings, which had existed at least since 1914 in Weeks v. United States, to state court proceedings. Mapp was decided over the dissents of Holmesian Justices Frankfurter, Harlan, and Whittaker, who counseled continued adherence to the Holmesian-era case of Wolf v. Colorado that had not applied the exclusionary rule to the states, over the dissents of instrumentalist Justices Douglas, Murphy, and Rutledge. The Court has indicated, however, that exclusionary rule only applies for “bad faith” violations of the Fourth Amendment. The Court held in United States

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v. Leon\textsuperscript{94} that the exclusionary rule would not apply where officers in “good faith” rely on a search warrant issued by a detached and neutral magistrate, even if that warrant is ultimately found to be unsupported by probable cause. The Court indicated that the test for “good faith” is one of “objective reasonableness,” based on what a reasonably well-trained officer would have known\textsuperscript{95}

In \textit{Pennsylvania Board of Probation v. Scott},\textsuperscript{95} the Supreme Court was faced with the question whether to apply the exclusionary rule to bar the introduction at parole revocation hearings of evidence seized in violation of the parolees’ Fourth Amendment rights. The split seen in other cases between the conservative concern with states’ rights versus the liberal emphasis on individual civil rights, noted at § 4.4.2, was evidenced in the reasoning of the Justices. So, too, was the difference between natural law judges who tend to follow only the core holdings of precedents, like Justices O’Connor and Kennedy, versus a natural law judge who tends to follow the general reasoning of instrumentalist-era precedents, like Justice Souter, discussed at § 12.3.2.

In \textit{Scott}, Justices O’Connor and Kennedy joined Justice Thomas’ majority opinion which noted that no core holding of any prior precedent had explicitly addressed the applicability of the exclusionary rule in parole revocation hearings, and that in terms of structural arguments regarding our federal system the Court has “long been adverse to imposing federal requirements upon the parole systems of the States.” In contrast, Justice Souter, joined in dissent by Justices Ginsburg and Breyer, argued that the deterrent function of the exclusionary rule is implicated just as much in a parole revocation proceeding as in a criminal trial. Thus, the reasoning of prior Court precedents applying the exclusionary rule to criminal trials despite the loss of potentially reliable evidence should be extended to apply the exclusionary rule to parole revocation hearings.\textsuperscript{96}

Regarding the general reasoning of the instrumentalist-era cases, Justice Souter noted that cases involving the ordinary administration of the criminal law, such as criminal trials or parole hearings, implicate different kinds of concerns than noncriminal cases, such as civil tax proceedings or deportation proceedings, or specialized kind of criminal proceedings, such as habeas petitions or grand jury proceedings. Thus, it is understandable that in these other contexts the Court’s precedents had held that the benefits of the exclusionary rule “would be so marginal as to be outweighed by the incremental costs.” In contrast, “a revocation proceeding often serves the same function as a criminal trial, and the revocation hearing may very well present the only forum in which the State will seek to use evidence of a parole violation, even when that evidence would support an independent criminal charge. The deterrent function of the exclusionary rule is therefore implicated as much by a revocation proceeding as by a conventional trial.”\textsuperscript{97}

\textsuperscript{94} 468 U.S. 897, 918-25 (1984).


\textsuperscript{96} \textit{Id.} at 369 (Thomas, J., opinion for the Court); \textit{id.} at 370 (Souter, J., joined by Ginsburg, J., & Breyer, J., dissenting).

\textsuperscript{97} \textit{Id.} at 370-72 (Souter, J., joined by Ginsburg, J., & Breyer, J., dissenting).
In a stronger instrumentalist dissent, Justice Stevens urged the Court to view the exclusionary rule as constitutionally required, and thus no balancing of the value of its deterrent effect versus the loss of reliable evidence need be done.98 The conservative majority on the Court naturally disagreed.

In terms of trends in criminal justice law generally, including the Fourth Amendment, the increased conservative predisposition of a majority of members on the Supreme Court has resulted in more case outcomes reflective of a conservative, law-and-order perspective, although clearly balanced by the natural law perspective usually reflecting the controlling votes in decided cases.99 Faced with Fourth Amendment doctrine not as protective of individuals since 1986 as during the instrumentalist era from 1954-86, and in particular the “core” liberal instrumentalist era from 1963-69, as noted at §§ 7.3.2 nn.128-30 & 11.2.2.2, some state Supreme Courts have interpreted their state Constitutions to grant individuals greater protection from searches and seizures than under federal law.100

§ 23.2.1.2 The Fifth Amendment: Grand Jury Indictment, Double Jeopardy, Privilege Against Self-Incrimination, and Due Process of Law

Regarding criminal matters, the Fifth Amendment provides for four separate protections: grand jury indictment for most crimes, the double jeopardy protection from being tried twice for the same crime, the privilege against self-incrimination, and the right to due process of law. Specifically, the Fifth Amendment provides, “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.” The protections of the Fifth Amendment concerning the Due Process Clause as applied to civil matters are discussed in Chapter 27, and the Takings Clause is discussed at § 22.2.

The Supreme Court noted in Schneckloth v. Bustamonte,101 “Almost without exception, the requirement of a knowing and intelligent waiver has been applied . . . to those rights which the Constitution guarantees to a criminal defendant in order to preserve a fair trial.” Thus, a “knowing and intelligent” waiver is required to waive “the right to be free from twice being placed in jeopardy” and “rights in trial-type situations, such as the waiver of the privilege against compulsory self-incrimination before an administrative agency or a congressional committee.” Rule 7(b) of the Federal Rules of Criminal Procedure permits a defendant charged with a noncapital offense to

98 Id. at 369-70 (Stevens, J., dissenting).


waive the right to a grand jury indictment and allow prosecution by information,102 and the failure to assert a defect in grand jury indictment in a pretrial motion can waive the right to raise that defense.103 Because of the heightened concern in capital cases, for which the death penalty could be imposed, the requirement of a grand jury indictment cannot be waived in such cases. Similarly, most due process rights can be waived, except for the core rights to life, liberty, or property, such as due process protections in a capital murder case or the “beyond a reasonable doubt” standard in criminal cases.104 The general issue regarding which constitutional rights can be waived (“alienable” rights) and which cannot (“inalienable” rights) is discussed at § 24.1 n.15, including the extent to which an implicit waiver of a right can occur through the individual refusing to sue for violations of that right.

A. Requirement of Grand Jury Indictment

The Fifth Amendment requires a legally constituted and unbiased grand jury for felony indictments. A federal district court is authorized to summon "legally qualified" citizens for grand jury service. Once impaneled, the grand jury serves until discharged by the court, generally for a term no longer than 18 months. Under current federal law, the grand jury must be composed of 16 to 23 members, but an indictment requires only 12 votes. Jurors voting to indict do not need to be present at every grand jury session, and any number of jurors may be replaced upon a showing of cause. The prosecutor may also resubmit evidence to succeeding grand juries if unable to obtain an indictment from a previous grand jury.105

As has been noted, “The Attorney General, or any attorney authorized by the Attorney General, may conduct grand jury proceedings in the federal courts. There is no general obligation to present exculpatory evidence to the grand jury. In addition, the prosecutor is under no obligation to give the grand jury legal instructions. The prosecutor is, however, obligated to refrain from certain improper conduct in bringing and presenting the government's case. For instance, the prosecutor may not deliberately delay bringing an indictment to gain a tactical advantage, and preindictment delay may not prejudice the defendant. Nevertheless, there is a strong presumption that the prosecutor has behaved properly in conducting the grand jury proceedings. A motion alleging

102 Fed. R. Crim. P. 7(b). See United States v. Ferguson, 758 F.2d 843, 850 (2nd Cir. 1985) (just as defendant can waive trial by jury, defendant can waive similar right of indictment by grand jury).

103 United States v. Ramirez, 324 F.3d 1225, 1227-28 (11th Cir.) (per curiam), cert. denied, 540 U.S. 881 (2003).

104 See, e.g., David J. D’Addio, Note, Sentencing After Booker: The Impact of Appellate Review on Defendant’s Rights, 24 Yale L. & Pol'y Rev. 173 (2006) (“should a defendant chose to waive [the right to a jury trial] (in a plea, for instance), due process still requires a judge to find those ‘essential’ aggravating facts beyond a reasonable doubt, rather than by a preponderance of the evidence.”).

defects in an indictment usually must be raised prior to trial.\textsuperscript{106}

The grand jury determines whether there is probable cause to believe that a crime has been committed. This is intended to protect citizens against unfounded prosecutions. In terms of operating procedures, Rule 6(e)(2) of the Federal Rules of Criminal Procedure prohibits grand jurors, government attorneys, and government personnel assisting in the grand jury process from disclosing grand jury matters. To preserve secrecy, only jurors, witnesses, and the prosecuting attorney are permitted in the grand jury room. A stenographer, recording device operator, or interpreter, if necessary, may also be present. While the grand jury is deliberating or voting, only the jurors may be present. Neither a target nor a witness has the right to counsel in the grand jury room, although a witness may leave the grand jury room to consult with counsel.\textsuperscript{107}

The government or the defendant may challenge a grand jury on the grounds that the jurors were improperly selected or not legally qualified. The Jury Selection and Service Act of 1968 and the Sixth Amendment require that jurors be selected from a fair cross-section of the population, as discussed at § 23.2.1.3 n.169. Absent a showing of prejudice to the defendant, federal courts generally may not dismiss an indictment for errors in grand jury proceedings. If a trial results in a conviction, previous errors in grand jury proceedings will be deemed harmless because the trial jury's subsequent guilty verdict is viewed as ratifying the grand jury’s finding of probable cause to indict. Accordingly, a post-conviction appeal of a violation of grand jury procedures will result in neither reversal of the conviction nor dismissal of the indictment.\textsuperscript{108}

As noted at § 27.2.5.1 text following n.128, along with the Seventh Amendment right to a jury trial in civil cases, the Supreme Court has not incorporated the Fifth Amendment requirement of grand jury indictment into the 14\textsuperscript{th} Amendment and made it applicable against the states.\textsuperscript{109} This preserves state flexibility to charge individuals through means other than grand jury indictment, such as filing an “information” with the court and then submitting the case to an “arraignment” hearing conducted by a judge or magistrate. Nevertheless, about half the states, through their respective state constitutions or by state statutes, guarantee a right to grand jury indictment in felony criminal cases. Commentators are split over whether the grand jury requirement is an effective bulwark against government abuse and tyranny.\textsuperscript{110}

\textsuperscript{106} Id. at 230-33 (citations omitted).

\textsuperscript{107} Id. at 247-48 (citations omitted).

\textsuperscript{108} Id. at 233-34 (citations omitted).


B. Protection Against Double Jeopardy

The text of the Fifth Amendment provides that no person shall “be subject for the same offense to be twice put in jeopardy of life or limb.” Under a long line of Court precedents, the Double Jeopardy Clause protects against re-prosecution after acquittal, re-prosecution after conviction (which might be attempted to get conviction of a greater offense or imposition of a longer sentence), or multiple punishments for the same crime.\(^{111}\) Although the text of the Clause mentions only harms to “life or limb,” it is well settled that the Double Jeopardy Clause covers imprisonment and monetary penalties. This is based on the purpose behind the Clause to protect individuals from unfair, onerous prosecutions, and specific historical evidence surrounding its drafting – including an early draft of the Clause which provided that “[n]o person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offence.”\(^{112}\) In *Benton v. Maryland*,\(^{113}\) the Court held that this guarantee "represents a fundamental ideal in our constitutional heritage, and that it should apply to the States through the Fourteenth Amendment." However, reflecting the “dual theory of sovereignty,” the Double Jeopardy Clause does not prevent independent prosecutions by the federal government and a state, or by two or more states, for the same offense. Since such prosecutions would be by different government entities, they would not involve any one government entity placing the person in “double jeopardy.”\(^{114}\)

In terms of deciding whether two counts of an indictment represent the “same” offense, the Court has long held, pursuant to the formalist-era case, *Blockburger v. United States*,\(^{115}\) that the Double Jeopardy Clause prohibits successive prosecutions for the same act under two criminal statutes unless “each provision requires proof of an additional fact which the other does not.” Under this doctrine, if two statutes involve the “same elements,” such that one is a “lesser-included” offense of the other, in the sense that each element of one statute is included in the other statute, multiple prosecutions cannot take place.\(^{116}\)

\(^{111}\) See Department of Revenue v. Kurth Ranch, 511 U.S. 767, 769 n.1 (1994), and cases cited therein.


\(^{115}\) 284 U.S. 299, 304 (1932).

A majority composed of functional liberal Holmesians and liberal instrumentalists held in *Grady v. United States*\(^{117}\) that the Double Jeopardy Clause also bars a subsequent prosecution if, to establish an essential element of an offense charged in that prosecution, the government will prove “conduct” that constitutes an offense for which the defendant has already been prosecuted. Their view was that the prosecution involving the “same conduct” should be viewed as equivalent to a prosecution involving the “same elements” under *Blockburger*. Once Justices Brennan and Marshall left the Court in the early 1990s, the more conservative, less instrumentalist Court overruled this expansion of the Double Jeopardy Clause in *United States v. Dixon*.\(^{118}\) The Court noted that unlike the *Blockburger* analysis, whose definition of what prevents two crimes from being the same offence has deep historical roots and has been accepted in numerous precedents, *Grady* lacked constitutional roots. The Court noted that the "same-conduct" rule announced in *Grady* is “wholly inconsistent with earlier Supreme Court precedent and with the clear common-law understanding of double jeopardy.” Inconsistency with related holdings and substantial error are two of the additional grounds to overrule precedent from the natural law perspective, as discussed at §§ 7.3.3.2 & 7.3.3.4.

The Double Jeopardy Clause only prevents multiple criminal proceedings and punishments for the same crime, not two independent proceedings, one criminal and one civil. As discussed at § 23.2 nn.55-56, in determining whether a particular proceeding is civil or criminal, the Court weighs a number of factors to determine whether the “civil” sanction serves the purposes of retribution and deterrence, and thus should be viewed as “criminal,” as opposed to furthering non-punitive objectives.\(^{119}\) Not surprisingly, in reaching decisions on this question, liberal instrumentalist Justices tend to find more statutory provisions are “criminal” and thus trigger the protections of the Double Jeopardy Clause, while conservative formalist and Holmesian Justices tend to find more provisions are “civil,” with the natural law Justices often split in the middle.\(^{120}\)

As an additional aspect of double jeopardy law, it should be noted that formalist Justices Scalia and Thomas have indicated their view that while the Double Jeopardy Clause prohibits re-prosecution after acquittal or conviction, its literal text does not prohibit multiple punishments. Such multiple punishments should therefore be analyzed only under the Eighth Amendment Cruel and Unusual


\(^{118}\) 509 U.S. 688, 704 (1993), citing, inter alia, Gavieres v. United States, 220 U.S. 338, 345 (1911) (in a subsequent prosecution, "[w]hile it is true that the conduct of the accused was one and the same, two offenses resulted, each of which had an element not embraced in the other." ) (Justices White, Blackmun, Stevens & Souter disagreed with this conclusion to overrule *Grady*).

\(^{119}\) For a case involving the determination whether a statute is “civil” or “criminal” in the context of the Double Jeopardy Clause, see United States v. Halper, 490 U.S. 435, 446-51(1989).

\(^{120}\) See, e.g., Department of Revenue of Montana v. Kurth Ranch, 511 U.S. 767, 776-82 (1994) (majority opinion of Stevens, J., joined by Blackmun, Kennedy, Souter & Ginsburg, JJ.) (tax on possession and storage of dangerous drugs criminal); id. at 785 (Rehnquist, J., dissenting); id. at 792-93 (O’Connor, J., dissenting); id. at 805-08 (Scalia, J., joined by Thomas, J., dissenting) (tax civil).
Punishments and Excessive Fines Clauses, and a Due Process Clause limitation that the punishments be properly authorized by law.\textsuperscript{121} At least one recent commentator has supported this position.\textsuperscript{122}

\textbf{C. Privilege Against Self-Incrimination}

The Fifth Amendment provides that no person “shall be compelled in any criminal case to be a witness against himself.” Two main consequences flow from this: (1) except in limited circumstances, such as to impeach the testimony of an accused who testifies at trial, no “testimonial” evidence of an accused can be used by the government at trial without the accused’s consent; and (2) the accused failure to testify cannot be used against the accused to raise an inference of guilt.

As stated in \textit{Schneckloth v. Bustamonte}, discussed at § 23.2.1.2 n.101, as an aspect of trial procedure, a “knowing and intelligent” waiver is required to waive the privilege against self-incrimination. To ensure that any waiver of the right is “knowing,” the Court stated in \textit{Miranda v. Arizona}:

Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him. The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned.\textsuperscript{123}

This \textit{Miranda} right applies to any “custodial interrogation.” The Court stated in \textit{Miranda} that by “custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.”\textsuperscript{124}

As with the Fourth Amendment, subject to limited exceptions, the Court applies an exclusionary rule to prevent evidence from being used in court gained by means of a violation of \textit{Miranda}.\textsuperscript{125}

\textsuperscript{121} \textit{Id.} at 798-99 (Scalia, J., joined by Thomas, J., dissenting).


\textsuperscript{123} 384 U.S. 436, 444-45 (1966).

\textsuperscript{124} \textit{Id.} at 444.

\textsuperscript{125} \textit{See generally} Kirsten Lela Ambach, \textit{Note, Miranda’s Poisoned Fruit Tree: The Admissability of Physical Evidence Derived from an Unwarned Statement}, 78 Wash. L. Rev. 757,
Holmesian Justices Clark, Harlan, Stewart, and White dissented in *Miranda* on the grounds the *Miranda* rule should not be imposed on the criminal justice system, reflecting their Holmesian deference-to-government predispositions.126

Although it was not clear in *Miranda* whether the *Miranda* right was constitutionally compelled, or adopted as a matter of prudential judgment by the Court, the Court held in *Dickerson v. United States*127 that *Miranda* was a constitutional doctrine. This conclusion reflects a natural law concern with reasoned elaboration of the law, since if *Miranda* were merely prudential, it could not properly be applied by the Court against state criminal proceedings, since the United States Supreme Court has no prudential supervisory authority over the states under the “dual theory of sovereignty.” As a constitutional doctrine, it can be applied against the states, like most Bill of Rights provisions, as discussed at § 27.2.4. Further, as a constitutional right, it cannot be altered by congressional statute. Without regard to whether he would have adopted *Miranda* as an original matter, Holmesian Chief Justice Rehnquist noted for the Court in *Dickerson* that considerations of *stare decisis* support continued adherence to *Miranda*, including the fact that *Miranda* has “become embedded in routine police practice to the point where the warnings have become part of our national culture” and no “special justifications” exist to warrant the overruling of *Miranda*,128 consistent with the natural law approach to precedents discussed at § 12.2.2.2 nn.67-68, and elaborated at § 7.3.3.

Dissenting in *Dickerson*, formalist Justices Scalia and Thomas noted that language in *Miranda*, and holdings of court precedents since *Miranda*, had viewed *Miranda* as based on prudential considerations. Thus, Congress should be permitted to modify its waiver provisions by statute,129 just as Congress can modify any of the Court’s prudential doctrines, such as those regarding standing, noted at § 17.3.1.4. Justice Scalia also noted that given this understanding that *Miranda* was not constitutionally required, the Court’s doctrine in *Miranda*, as applied by the majority in *Dickerson*, “has come to stand for the proposition that the Supreme Court has power to impose extraconstitutional constraints upon Congress and the States.”130 If Justice Scalia’s understanding of *Miranda* and its progeny were correct, such a power would be inconsistent with the *Marbury v. Madison* theory of judicial review, and entitled to no *stare decisis* effect, as inconsistent with related doctrines on the limits of judicial review.

757-69 (2003), and sources cited therein.

126 384 U.S. at 499-501 (Clark, J., dissenting); id. at 504 (Harlan, J., joined by Stewart & White, JJ., dissenting).


128 Id. at 443-44.

129 Id. at 450-57 (Scalia, J., joined by Thomas, J., dissenting).

The decision whether some evidence is “testimonial” or “non-testimonial” has created some difficult issues of drawing lines. For example, the Court has held that a handwriting exemplar, voice exemplar, drawing of blood for testing, or compelling a defendant to try on clothes are “non-testimonial,” but subjecting a defendant to heart rate, blood pressure, breathing, and electrodermal responses of a lie-detector test is “testimonial,” even if the accused remains silent during the test. Similarly, there are also issues whether in any particular case the individual is in “custody” because the individual has been deprived of “freedom of action in any significant way” to trigger application of *Miranda*, and the issue whether the accused has “waived” the privilege against self-incrimination, through words or conduct. There are also issues of whether physical evidence derived from “voluntary” statements, which were nonetheless obtained in violation of *Miranda*’s higher requirement of a “knowing and intelligent” waiver, should be able to be used at trial, or can “voluntary” statements obtained in violation of *Miranda* be used at a sentencing hearing, even if not at trial. In such cases, conservative formalist and Holmesian Justices tend to permit such evidence to be used, while liberal instrumentalist Justices tend to vote to exclude such evidence. The Court has held that interrogations in violation of *Miranda* will not support a claim for damages under § 1983, because there is no violation unless evidence is used at trial.

The second aspect of the privilege against self-incrimination is that the accused can refuse to testify at trial, and this refusal cannot be used to argue that such a refusal raises an inference of guilt. Historically, the rule was different in many European countries, whose “inquisitorial” model of the criminal justice system, rather than the American “adversary” model, permitted such an inference to be drawn. That doctrine has changed in many European countries today to reflect the American rule. Further, the general right against compelled self-incrimination regarding use of non-voluntary

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131 See, e.g., California v. Byers, 402 U.S. 424, 431-32 (1971) (requiring driver involved in an accident to stop at the scene and give his name and address is no more “testimonial” than requiring a person in custody to stand or walk in a police lineup, to speak prescribed words, or to give samples of handwriting, fingerprints, or blood) (Justices Black, Douglas, Brennan & Marshall in dissent); Ronald J. Allen & M. Kristin Mace, *The Self-Incrimination Clause Explained and Its Future Predicted*, 94 J. Crim. L. & Criminology 243, 248-49, 259-66 (2004), and cases cited therein.


133 Id. at 171-86, and cases cited therein.

134 See generally Ambach, supra note 125, at 769-94.

135 See, e.g., United States v. Patane, 542 U.S. 630, 639-44 (2004) (failure to give suspect *Miranda* warnings does not require suppression of “physical evidence” which were fruits of suspect's unwarned but voluntary statements) (Justices Stevens, Souter, Ginsburg & Breyer in dissent); United States v. Nichols, 438 F.3d 437 (4th Cir. 2006) (statements obtained in violation of *Miranda*, if they are otherwise voluntary, may be considered at sentencing).

confessions has roots in European law, and the European Court of Human Rights has developed a jurisprudence of self-incrimination from the European Convention on Human Rights' Article 6 right to a fair hearing. International documents, such as the United Nations International Covenant on Civil and Political Rights, also include protection against compelled self-incrimination.\textsuperscript{137}

As discussed at §§ 27.2.2 nn.109-10 & 27.2.3 nn.116-19, the historical difference between European and American models helped support the refusal to incorporate the privilege against self-incrimination into the 14\textsuperscript{th} Amendment during the formalist and Holmesian eras, given their approach to incorporation. This right was incorporated against the states and made applicable to the states in 1964 under the instrumentalist approach to incorporation, discussed at § 27.2.4 n.124.

\textbf{D. Requirement of Due Process of Law}

Relying on the Due Process Clause, the Court has held that a number of protections apply in criminal cases that are not specifically enumerated in the Constitution, as are the protections regarding grand jury indictment, double jeopardy, and the privilege against self-incrimination. For example, in 1970, the Court held in \textit{In re Winship}\textsuperscript{138} that the Due Process Clause protects the accused against conviction except on proof beyond a reasonable doubt. This protection is nowhere mentioned in the Bill of Rights, but was determined by the Court to be part of "liberty" in the Fifth and 14\textsuperscript{th} Amendments. Although, as discussed at § 27.2.5.2 n.133, this right was viewed as an "enumerated" liberty right, \textit{i.e.}, based directly on "liberty," and distinguished from "unenumerated" rights "implicit in the concept of ordered liberty," discussed at § 27.3.3, this aspect of \textit{In re Winship} is consistent with the Court's development of a range of "unenumerated" substantive due process rights involving civil liberties matters. Justice Black dissented in \textit{In re Winship}, saying that the Court "has no power to add to or subtract from the procedures set forth by the Founders." Reflecting his formalist approach, he insisted that the Court should be guided by the literal text of the Constitution, and not the Justices' own concepts of what is fair, decent, and right, because that approach would lead to shifting day-to-day standards of fairness held by individual judges.

Despite Justice Black's formalist argument, the \textit{In re Winship} approach that some additional due process rights regarding the criminal justice system are part of "the concept of ordered liberty" is the current approach of the majority of the Supreme Court. For example, the Court has created some liberty interests for prisoners while they are incarcerated in jail. For example, in 1974, in \textit{Wolff v. McDonell},\textsuperscript{139} a prisoner was viewed as having a constitutionally protected liberty interest by a state statute that bestowed mandatory sentence reduction for good behavior, subject to change for serious misconduct, because the interest conferred by the law was one of "real substance." In 1983, the


\textsuperscript{138} 397 U.S. 358 (1970); \textit{id.} at 377-78 (Black, J., dissenting).

\textsuperscript{139} 418 U.S. 539, 557 (1974).
Court held in *Hewitt v. Helms* that in determining whether prison regulations created a protected liberty interest, the courts should ask whether the state had issued merely procedural guidelines, which would not create a liberty interest, or had used language of “mandatory character,” which would create a liberty interest. As discussed at § 27.4.2.3 nn.319-24, in 1995, in *Sandin v. Conner*, a 5-4 Court drew back from the *Wolff* “real substance” approach, and the *Hewitt* “mandatory character” approach, to ask instead only whether some prison management decision imposed an “atypical and significant hardship” on the inmate. Despite this change in content, it is clear that prisoners still have some additional liberty rights not textually specific in the Due Process Clause.

In addition to these liberty interests, the Court has also stated that government actions which “shock the conscience” can give rise to a deprivation of a life, liberty, or property interest. The classic case of this kind occurred in *Rochin v. California*, in which the Court held that the forced pumping of a suspect’s stomach to obtain evidence “shocked the conscience.” A situation that was held not to “shock the conscience” occurred in *County of Sacramento v. Lewis*. That case involved a high-speed automobile chase aimed at apprehending a suspected offender that resulted in one of the suspect’s death following a crash. The Court said in *Lewis* that “only a purpose to cause harm unrelated to the legitimate object of arrest will satisfy the element of arbitrary conduct shocking to the conscience, necessary for a [substantive] due process violation.” As discussed at § 27.4.1, only intentional government action, or government action indicating “deliberate indifference” to an individual, will trigger a deprivation of due process. Mere negligent government action harming an individual does not count as a denial of due process. The Court has stated that this conscience-shocking standard is an issue of law for the judge, not a question of fact for the jury.

In general, the Court has been reluctant in the modern natural law, non-instrumentalist era to expand the list of criminal defendant’s due process rights. For example, in 1992, in *Medina v. California*, the Court held that a state could require a defendant to carry the burden of proving his incompetence by a preponderance of the evidence. More recently, in 2006, the Court held in *Dixon v. United States* that the government could require the defendant to prove duress to excuse criminal liability for knowing or willful violations of federal firearms laws. The reluctance in the modern natural law era to create new rights under the Due Process Clause in both criminal and civil matters is discussed generally at § 27.2.5.2.

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The split among Justices O’Connor, Kennedy, and Souter, noted at § 12.3.2, with Justice Souter remaining more faithful to the general reasoning of instrumentalist-era precedents, and Justices O’Connor and Kennedy more faithful to their understanding of text, purpose, structure, history, and practice, while still following the core holdings of instrumentalist-era precedents, appears in case after case involving the criminal justice system. Of course, in cases where the reasoning in instrumentalist-era precedents do not point strongly in one direction, or where an instrumentalist precedent should be overruled consistent with even a strong natural law approach to precedent, Justice Souter has been willing to join Justices O’Connor and Kennedy and reach a result consistent with the other natural law sources of interpretation: text, purpose, structure, history, and practice.

The same split occurs in death penalty cases raising issues of due process. For example, in Ramdass v. Angelone, the issue was whether to extend Justice Blackmun’s opinion in Simmons v. South Carolina, which had held that where the state puts the defendant’s future dangerousness in issue in a death penalty case, due process requires the jury to be informed if a life sentence would be without the possibility of parole. The defendant had not yet become parole ineligible because a separate court had not yet entered judgment on a jury’s verdict which would make the defendant parole ineligible. With Justices Ginsburg and Breyer, Justice Souter joined Justice Stevens’ dissent, which argued the “acute unfairness in permitting the State to rely upon a recent conviction to establish a defendant’s future dangerousness while simultaneously permitting the State to deny that there was such a conviction when the defendant attempts to argue that he is parole ineligible” and that “[e]ven the most miserly reading of the opinions in Simmons” supports the defendant’s argument in this case. In contrast, the majority, which included Justices O’Connor and Kennedy, noted that technically the defendant was not parole ineligible at the time the jury instruction was

See, e.g., Ohler v. United States, 529 U.S. 753, 759-60 (2000) (a testifying defendant who preemptively introduces evidence of a prior conviction on direct examination after an adverse in limine ruling admitting the prior convictions for impeachment purposes may not appeal that ruling after trial) (Justices Stevens, Souter, Ginsburg & Breyer in dissent); Smith v. Robbins, 528 U.S. 259 (2000) (a statement by court-appointed counsel that an appeal would have no merit, coupled with an appellate court's endorsement of that conclusion, satisfies right to counsel, even if less vigorous than previously approved approach where counsels’ brief must refer to anything in the record that might arguably support the appeal) (Justices Stevens, Souter, Ginsburg & Breyer in dissent).

See, e.g., Hopkins v. Reeves, 524 U.S. 88, 94-101 (1998) (state trial courts, in capital cases, are not constitutionally required to instruct juries on offenses that are not lesser-included offenses; instrumentalist Justice Stevens dissenting); United States v. Scheffer, 523 U.S. 303, 308-17 (1998) (rule against admission of polygraph evidence in a court martial proceeding does not violate Fifth or Sixth Amendment rights to present a defense; instrumentalist Justice Stevens dissenting).

530 U.S. 156 (2000).


530 U.S. at 177-78.

Id. at 182-83 (Stevens, J., joined by Souter, J., Ginsburg, J., & Breyer, J., dissenting).
given, and thus the Simmons precedent did not directly govern resolution of the case. Structural arguments suggested to the majority that “state trial judges and appellate courts [should] remain free, of course, to experiment,” and thus this aspect of criminal procedure should not be imposed on all 50 States as a constitutional requirement. The majority did note that Virginia had amended their procedures to permit a Simmons instruction to be given on the Ramdass facts.

This split among Justices O’Connor, Kennedy, and Souter appears in many other cases involving the death penalty. Of course, in cases where a natural law approach would differ from a formalist approach – often because the natural law approach weighs arguments of precedent and arguments from a text’s purpose more strongly than the formalist focus on literal text – Justices O’Connor, Kennedy, and Souter usually can be found on one side of the opinion, with Justices Scalia and Thomas on the other side.

§ 23.2.1.3 The Sixth Amendment: Right to a Speedy and Public Trial by an Impartial Jury, Confrontation of Witnesses, and Assistance of Counsel

The Sixth Amendment provides for three basic protections: a right to a speedy and public trial by an impartial jury; a right to confront witnesses; and a right to compulsory process for obtaining witnesses, and to assistance of counsel. Specifically, the Sixth Amendment provides: “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 where in 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 witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.”

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153 Id. at 177-78.

154 Id. at 178.

155 See, e.g., Weeks v. Angelone, 528 U.S. 225 (2000) (majority opinion holds that a jury verdict of death cannot be set aside by a slight possibility, rather than reasonable likelihood, that the jury felt compelled by the jury instructions not to consider mitigating evidence); Jones v. United States, 527 U.S. 373 (1999) (majority opinion unwilling to impose in a death penalty case a constitutional requirement that a trial judge must instruct the jury as to the legal consequence of jury deadlock); Calderon v. Thompson, 523 U.S. 538 (1998) (considering whether the Ninth Circuit abused its discretion in ordering a belated en banc vote on a death penalty case when two judges, because of administrative mistakes, did not request an en banc vote in a timely manner; majority held granting the habeas petition to ensure the votes of all judges are counted would be an abuse of discretion).

156 See, e.g., Dickerson v. United States, 530 U.S. 428, 443 (2000) (principles of stare decisis weigh heavily against overruling Miranda) (Justices Scalia and Thomas in dissent); Bousley v. United States, 523 U.S. 614, 623-24 (1998) (petitioner who can make a showing of actual innocence entitled to have his defaulted claim of an unintelligent plea considered on the merits, despite the fact that the claim was literally defaulted) (Justices Scalia and Thomas in dissent).
As with Fifth Amendment rights regarding the criminal justice system, discussed at § 23.2.1.2 n.101, for Sixth Amendment rights the Court noted in Schneckloth v. Bustamonte, \( ^{157} \) “[T]he standard of a knowing and intelligent waiver has . . . been applied to test the validity of a waiver of counsel, either at trial, or upon a guilty plea. And the Court has also applied that criteria to assess the effectiveness of a waiver of other trial rights such as the right to confrontation, to a jury trial, and to a speedy trial . . . . Guilty pleas have been carefully scrutinized to determine whether the accused knew and understood all the rights to which he would be entitled at trial, and that he had intentionally chosen to forgo them. And the Court has evaluated the knowing and intelligent nature of the waiver of trial rights in trial-type situations, such as . . . the waiver of counsel in a juvenile proceeding.”

\[A. \quad \text{Right to a Speedy and Public Trial by an Impartial Jury}\]

The Sixth Amendment guarantees to an accused a right to a speedy and public trial by an impartial jury. Regarding the right to speedy trial, the Court has held that the right attaches at the time of arrest or formal charge, whichever comes first. The remedy for violation of this right is to dismiss the indictment or vacate the sentence. To determine whether a defendant has been deprived of this right, the Court indicated in Barker v. Wingo\( ^{158} \) that courts should consider the defendant's and the prosecution's conduct by balancing four factors: (1) the length of the delay; (2) the reason for the delay; (3) whether, when, and how the defendant asserted his right to a speedy trial; and (4) whether the defendant was prejudiced by the delay. This test is a version of third-order rational review, since “the primary burden [is] on the courts and the prosecutors to assure that cases are brought to trial,” and the factors focus on governmental ends (reason for the delay) and the benefits and burdens of the delay (length of the delay, when the defendant asserted the right, and prejudice to the defendant).

For federal prosecutions, the Speedy Trial Act of 1974 established specific time limits for completing key stages of a federal criminal prosecution. Under the current version of this Act, “The information or indictment must be filed within thirty days of arrest or the service of a summons on the defendant. The trial must begin within seventy days of the filing of the information or indictment, or within seventy days of the date the defendant first appears before a judicial officer, whichever is later. Trial must begin within ninety days of the government detaining a defendant who is solely awaiting trial. If a released person awaiting trial has been designated by the government attorney as being of "high risk," the trial must similarly begin within ninety days of that designation. To provide a defendant an adequate opportunity to prepare, a trial may not begin earlier than thirty days after the defendant first appears through counsel or expressly waives counsel and elects to proceed pro se, unless the defendant consents in writing to an earlier date.”\( ^{159} \)


\( ^{158} \) 407 U.S. 514, 529-32 (1972).

The right to a speedy trial applies only to a criminal prosecution. Issues involving the right to detain illegal immigrants while a decision is made on deportation,160 sex offenders deemed dangerous to themselves or the community,161 or enemy combatants,162 raise issues only under the Due Process Clause, which are discussed at § 27.4.4.8, not the Sixth Amendment.

Regarding the right to a public trial, the Court has held that normally all procedures in criminal cases must be done in open court, unless compelling reasons, sufficient to satisfy strict scrutiny, justifying closing the proceedings. The Court noted in Globe Newspaper Co. v. Superior Court,163 the Court’s precedents have “firmly established” that “the press and general public have a constitutional right of access to criminal trials,” and closing court proceedings will be allowed only if that were “necessitated by a compelling government interest, and is narrowly tailored to serve that interest.” As this protection is viewed predominantly through the lens of the First Amendment rights of free speech, and of the press, cases involving this right are discussed at § 29.6.2.4.

This right has been viewed as only guaranteeing the right to physical access to the courtroom, not a right to televise court proceedings.164 Indeed, a number of commentators have noted that allowing televised access might affect the proceedings in a manner that would comprise the right to an impartial jury.165 Nevertheless, the prevailing doctrine is that in most circumstances proceedings may be televised if authorized by law, with all 50 states having some provision for televised access in some circumstances, although there is no obligation to do so, and televised access is limited in many cases.166 A few other countries have similar provision for televised access.167 Televising jury

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162 See generally Tung Yin, Ending the War on Terrorism One Terrorist at a Time: A Noncriminal Detention Model for Holding and Releasing Guantanamo Bay Detainees, 29 Harv. J.L. & Pub. Pol'y 149 (2005).


deliberations raises even more concern with compromising the integrity of the judicial process.\textsuperscript{168} In the federal system, the Supreme Court has never permitted its proceedings to be televised, and only in rare circumstances, such as for cases of special public interest, like the oral arguments in the 2000 election case of\textit{Bush v. Gore}, discussed at §\textsuperscript{26.5.3 nn.525-42}, has the Court permitted audio transcripts of its proceedings to be made. Only a few Circuit Courts of Appeals have rules providing for limited audio or video televising of their proceedings.\textsuperscript{169} Beginning with the 2006 Term, the Supreme Court will make same-day written transcripts available of all oral arguments.

Regarding the right to an impartial jury, it has been noted, “To establish a violation of the fair cross-section requirement of the Sixth Amendment, a defendant must show that: (1) the group alleged to be excluded is a distinctive group in the community; (2) the representation of this group is not fair and reasonable; and (3) the underrepresentation was due to a systematic exclusion of the group in the selection process.”\textsuperscript{170} A challenge can also be brought on equal protection grounds, as for racial or gender discrimination in the use of peremptory challenges, discussed at §\textsuperscript{26.2.1.6.A.}

In\textit{Apprendi v. New Jersey},\textsuperscript{171} a 5-4 Court held that any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond reasonable doubt – other than the fact of a prior conviction, which would already have been based on a prior jury decision based on a “beyond a reasonable doubt” standard. This conclusion was based on the Sixth Amendment right to a “jury” trial, and the Fifth Amendment requirement of proof in criminal cases of guilt “beyond a reasonable doubt.” The majority was composed of liberal instrumentalist Justices Stevens and Ginsburg, instrumentalist-leaning natural law Justice Souter, and formalist Justices Scalia and Thomas. Justices Scalia and Thomas joined the majority based upon a literal application of a right to jury trial and the due process requirement of proof beyond a reasonable doubt. Holmesian Chief Justice Rehnquist, occasional Holmesian-leaning Justices O’Connor and Breyer, and natural law Justice Kennedy dissented in\textit{Apprendi}. In their view, legislative and executive practice, and a reasoned elaboration of court precedents, had permitted sentencing decisions to be viewed differently than the determination of guilt, and thus the requirement of jury decisionmaking based on a beyond a reasonable doubt standard should not apply to sentencing decisions.\textsuperscript{172}


\textsuperscript{171} 530 U.S. 466, 490 (2000); \textit{id.} at 499-500 (Thomas, J., joined by Scalia, J., as to Parts I & II, concurring).

\textsuperscript{172} \textit{id.} at 523-39 (O’Connor, J., joined by Rehnquist, C.J., and Kennedy & Breyer, JJ., dissenting).
Apprendi was followed in Blakely v. Washington and United States v. Booker,\textsuperscript{173} where the Court held that state sentencing guidelines and the United States Sentencing Guidelines were unconstitutional if viewed as mandatory, since factual conclusions that trigger some of the guidelines are found by a judge in a sentencing hearing, not a jury under a beyond a reasonable doubt standard. Following Booker, the Sentencing Guidelines must be viewed as merely suggestive, not mandatory, with judges permitted to exercise their traditional discretion in sentencing.

B. Right to Confrontation of Witnesses

The Sixth Amendment provides for the right “to be confronted with witnesses against him.” The major issue raised by cases dealing with the right to confront witnesses is whether certain departures from face to face confrontation of witnesses in court can be permitted. Historically, as a matter of legislative and executive practice, and a reasoned elaboration of court precedents, the Court permitted departures from a strict, literal requirement of confrontation. This occurred in cases such as Maryland v. Craig,\textsuperscript{174} which involved a child witness in a child abuse case testifying against the defendant at trial, outside the defendant's physical presence, by a one-way closed circuit television, and in Ohio v. Roberts,\textsuperscript{175} which conditioned the admissibility of hearsay evidence on whether it falls under a "firmly rooted hearsay exception" or bears "particularized guarantees of trustworthiness."

As in Apprendi, where a combination of formalist and instrumentalist Justices have imposed since 2000 a strict requirement of jury fact-finding under a beyond a reasonable doubt standard, discussed at § 23.2.1.3.A nn.171-73, in Crawford v. Washington,\textsuperscript{176} in 2004, a combination of formalist and instrumentalist Justices overruled Roberts and adopted a strict requirement that “testimonial” statements of witnesses absent from trial can be admitted “only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine.” Reflecting an objective evidence approach, the Court stated in Davis v. Washington\textsuperscript{177} that statements are “nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency [such as statements made to a 911 dispatcher]. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.”


\textsuperscript{177} 126 S. Ct. 2266, 2273-74 (2006).
The *Crawford* decision has raised questions about its impact in cases where emotional trauma, physical safety concerns, or other factors historically have suggested some flexibility in terms of face-to-face confrontation in court. Such cases include testimony of children in sexual child abuse cases, cases involving battered spouses, cases involving physical safety of witnesses or compromising natural security secrets, such as in terrorist prosecutions, or even cases where ensuring the physical presence of witnesses would be costly, such as for foreign witness testimony. There is also a concern with the impact of the *Crawford* rule regarding dying declarations.

A second issue raised by the Confrontation Clause concerns whether prohibitions on asking certain kind of questions at trial violates the Confrontation Clause. For example, the Court held in *Delaware v. Van Arsdall* that a trial court's ruling prohibiting the defendant's inquiry into the possibility that a witness was biased because the state had dismissed his pending public drunkenness charge violated defendant's rights secured by the Confrontation Clause. Decisions have also been reached that certain rape shield laws, intended to prevent victims of rape from being cross-examined about their sexual past, violate the Confrontation Clause.

Regarding the appropriate remedy for a violation of the Confrontation Clause, the Court typically applies a “harmless error” analysis, which holds that “an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt.” While some constitutional errors in the criminal justice system are “structural,” in that they are so fundamental that they require reversal without regard to the facts or circumstances of the particular case, such as denying a defendant the assistance of counsel at trial, discussed next, at § 23.2.1.3.C nn.186-91, or the absence of an impartial judge,

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181 See, e.g., United States v. Yates, 438 F.3d 1307 (11th Cir. 2006) (Confrontation Clause prohibits presentation of foreign witness testimony via two-way video teleconferencing when such use is justified only by prosecutor’s general interest in resolving case expeditiously).


most errors in the criminal justice system are subject to “harmless error” analysis.185

C. Right to Compulsory Attendance of Witnesses and Assistance of Counsel

The Sixth Amendment right “to have compulsory process for obtaining witnesses in his favor” grants the defendant the right to offer the testimony of favorable witnesses and to compel their attendance at trial through the subpoena process. Reflecting a concern with purpose and practicality, to exercise the compulsory process right, a defendant must show that the testimony would be material, favorable to the defendant, and not merely cumulative. As with other rights, the defendant may waive the right to compulsory process. A violation of the Compulsory Process Clause is subject to the harmless error analysis and will constitute harmless error if it is established beyond a reasonable doubt that the violation did not affect the verdict. The right is not absolute and may yield to other interests.186

The Sixth Amendment also guarantees the right “to have the Assistance of Counsel” for the accused’s defense. In Johnson v. Zerbst,187 the Court held in 1938 that the Sixth Amendment requires the government to provide indigent defendants with counsel in all felony cases. Reflecting a Holmesian deference-to-government approach, the Court concluded in 1942 in Betts v. Brady188 that this right was not fundamental, and thus not incorporated into the 14th Amendment and applicable against the states. During the instrumentalist era, however, in 1963, the Court overruled


186 On all these matters, see generally Thirty-Fifth Annual Review of Criminal Procedure, III. Trial, Sixth Amendment at Trial, 35 Geo. L.J. Ann. Rev. Crim. Proc. 608, 636-41 (2006), and cases cited therein, including, inter alia, DiBenedetto v. Hall, 272 F.3d 1, 8-9 (1st Cir. 2001) (compulsory process not violated when court refused to allow defendant to present evidence of victim's ties to prior murder because evidence was unreliable, disparaged victims, and threatened to distract jury from case at hand); United States v. Moussaoui, 365 F.3d 292, 312-14 (4th Cir.) (compulsory process not violated when government refused to produce witnesses shown to be plausibly favorable to defendant because of national security interests and prosecution's offered substitutions), amended by 382 F.3d 453, 477-81 (4th Cir. 2004) (government's rightful exercise of its prerogative to protect national security interests by refusing to produce the witnesses warrants use of written summaries of the witness' statements made over the course of several months in lieu of their deposition testimony); United States v. Gonzales, 79 F.3d 413, 425 (5th Cir. 1996) (per curiam) (compulsory process not violated when court refused to issue subpoena of witness because testimony could confuse jury); United States v. Jenkins, 4 F.3d 1338, 1340-41 (6th Cir. 1993) (compulsory process not violated when court refused to disclose identity of government's confidential informant because of government's interest in protecting identity of informants).


188 316 U.S. 455, 461-65 (1942).
Betts and held in Gideon v. Wainwright that the Sixth Amendment right to counsel was fundamental. The Court made clear in Scott v. Illinois that this right to counsel applies to all felony cases and any misdemeanor cases where the accused is sentenced to any term of imprisonment. It does not apply to misdemeanor cases where only a fine is imposed. The constitutional line between misdemeanors and felonies, consistent with common-law doctrine and statutory provisions, is whether the crime has a maximum possible term of one year or less, which is a misdemeanor, or a possible sentence of more than one year, which is a felony.

In deciding right to counsel cases, the same split occurs among the modern natural law Justices, with Justice Souter remaining more faithful to the general reasoning of instrumentalist-era precedents, and Justices O'Connor and Kennedy more faithful to their understanding of text, purpose, structure, history, and practice. For example, in Texas v. Cobb, a majority, composed of Chief Justice Rehnquist, and Justices Scalia, O'Connor, Kennedy, and Thomas, held that the Sixth Amendment right to counsel attaches only to charged offenses or offenses that, even if not charged, would be considered the same offense under the Blockburger test for double jeopardy purposes, discussed at § 23.2.1.2.B nn.115-16. The dissent of Justices Stevens, Souter, Ginsburg, and Breyer followed the reasoning of instrumentalist-era precedents in the Courts of Appeals and state courts to hold that the Sixth Amendment right to counsel should also attach for criminal acts that are “closely related to” or “inextricably intertwined with” the particular crime charged.

The Sixth Amendment right to counsel will be infringed, even if the accused is provided with counsel, if that counsel is deemed “ineffective.” To prove “ineffective assistance,” the Court set forth in Strickland v. Washington a two-part test: “First, the defendant must show that counsel's performance was deficient. . . . Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” In deciding on deficiency, “the proper standard for attorney performance is that of reasonably effective assistance. . . . When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness.”

In practice, proving “ineffective assistance of counsel” has been difficult. As the Court noted in Strickland, "Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence.
A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.” The government can also create an “ineffective counsel” by interfering with the ability of counsel to make independent decisions, as might occur when communications between inmates and attorneys are monitored too closely, although this would also be difficult to prove. While the failure to provide counsel is a “structural error,” “ineffective assistance” claims are subject to “harmless error” rule, discussed at § 23.2.1.3.B n.185.  

§ 23.2.1.4 The Eighth Amendment: Protection Against Cruel and Unusual Punishment, Excessive Fines, and Excessive Bail

The Eighth Amendment provides: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” In determining the content of “cruel an unusual punishment,” formalist Justices have argued for a static interpretation fixed at the time of ratification. Among the other decisionmaking styles, which permit some notion of an evolving Constitution, there have been differences in how that evolution is to take place.

For example, as positivists who believe that all law emanates from the sovereign will, Holmesian judges have been reluctant to permit evidence of social practice determine constitutional meaning, as discussed at § 10.2.2.1 nn.35-37. Formalist judges, of course, are even more reluctant to use practice arguments, discussed at § 9.2.2.1 nn.44-45. Thus, formalist Justice Scalia, and Holmesian Chief Justice Rehnquist and Justice White, were among the four Justices in Stanford v. Kentucky who concluded that establishing traditions under 14th Amendment substantive due process analysis depended upon whether the tradition was established from consideration of legislative enactments and their application (executive practice), and not from other indicia, such as “public opinion polls, the views of interest groups, and the positions adopted by various professional associations.”

Similarly, in Atkins v. Virginia, a case striking down the death penalty for mentally retarded criminals, Chief Justice Rehnquist, joined by Justices Scalia and Thomas, noted in dissent, “[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

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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.”

Despite this view, there is an argument, discussed at § 10.2.2.1 n.36, that a true Holmesian would reject the view in Stanford v. Kentucky that evidence of practice should be limited to "laws and the application of laws" for purposes of determining our societal traditions, not social practice. This approach would follow Justice Holmes' view in Lochner v. New York that our tradition derives from both "our people and our laws." Nevertheless, perhaps because of the Holmesian posture of deference to government, as represented in constitutional adjudication by the views of Professor Thayer and others, noted at § 6.2.2.2 nn.53-54, Holmesian jurists like Chief Justice Rehnquist and Justice White adopted the Stanford limitation of looking only to the governmental acts of legislative and executive practice to determine traditions.

Natural law and instrumentalist jurists, as followers of a normative approach to law, are more willing to consider normative considerations from whatever source, including social practice, as discussed at § 6.3.3 text following n.123. In Atkins v. Virginia, the 6-3 Court majority, composed of natural law and instrumentalist Justices, discussed social practice, in addition to evidence of legislative and executive practice, raising concerns about the constitutionality of the death penalty for mentally retarded criminal. The Court stated:

Additional evidence makes it clear that this legislative judgment reflects a much broader social and professional consensus. For example, several organizations with germane expertise have adopted official positions opposing the imposition of the death penalty upon a mentally retarded offender. In addition, representatives of widely diverse religious communities in the United States, reflecting Christian, Jewish, Muslim, and Buddhist traditions, have filed an amicus curiae brief explaining that even though their views about the death penalty differ, they all “share a conviction that the execution of persons with mental retardation cannot be morally justified.” Moreover, within the world community, the imposition of the death penalty for crimes committed by the mentally retarded is overwhelmingly disapproved. Finally, polling data shows a widespread consensus among Americans, even those who support the death penalty, that executing the mentally retarded is wrong.

The Court added, “Although these factors are by no means dispositive, their consistency with the legislative evidence lends further support to our conclusion that there is a consensus among those who have addressed the issue.”

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198 Id. at 324.

199 198 U.S. 45, 75-76 (1905) (Holmes, J., dissenting).


201 Id.
It should be noted that Justice Kennedy joined the majority in *Akins*, despite his having joined with Justices Scalia and White, and Chief Justice Rehnquist, in *Stanford v. Kentucky*. As discussed at § 12.4.1, Justice Kennedy has an occasional inclination for the formalist style of interpretation. In *Akins*, however, he returned to the traditional natural law interpretive methodology. In his majority opinion in *Lawrence v. Texas*, Justice Kennedy also 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.” As noted at § 6.3.1 n.107, when considering the constitutionality of Congress creating a national bank, even James Madison, while President in 1815-16, relied in part on the social practice of “indications, in different modes, of a concurrence of the general will of the nation.”

A similar pattern of voting occurred in 2005 in *Roper v. Simmons*, a case where the Court ruled that the execution of persons under 18 was cruel and unusual punishment. *Roper* overruled the decision in *Stanford v Kentucky* to permit persons under 18 to be executed in some circumstances. As in *Akins*, the majority looked to an evolving standard of decency. The Court noted that among the 50 states, 12 bar executions altogether and 18 bar executions of all persons under 18 years of age. Thus, only 20 states permit executions of juveniles in some circumstances, and even in those states “imposition of the juvenile death penalty has become truly unusual over the last decade.” Further, since 1989, no state had changed their law to impose the death penalty on juveniles, and 5 states had banned it either by legislation or state constitutional law. The Court also noted that no other country on earth permits the death penalty to be imposed on juveniles. Even before *Stanford*, the Court had ruled in *Thompson v. Oklahoma* that it was unconstitutional for persons under 16 to be executed.

The dissent noted that among the states imposing the death penalty, 20 permit it to be applied to some juveniles, and 18 do not. Based in part on faithfulness to precedent, Justice O’Connor was unprepared to overrule *Stanford v. Kentucky*. She concluded that no national consensus had emerged against the death penalty for juveniles since *Stanford* was decided that would justify overruling that case. In her view, some 17-year-old murderers may be sufficiently mature to deserve the death penalty, and the majority’s concerns with the decisionmaking capabilities of many juveniles could be addressed not by a categorical rule preventing the execution of all persons under 18, but by “individualized sentencing in which juries are required to give appropriate mitigating weight to the defendant’s immaturity, his susceptibility to outside pressures, his cognizance of the consequences of his actions, and so forth.” Justice Scalia was even more blunt, concluding, “Words have no meaning if the view of less than 50% of death penalty States can constitute a national consensus.”

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205 543 U.S. at 599-605 (O’Connor, J., dissenting).
206 *Id.* at 607-12 (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., dissenting).
The greater respect for precedent in the natural law approach than in the formalist approach is reflected in the Court’s doctrine regarding the principle of proportionality in Eighth Amendment law. In *Harmelin v. Michigan*, without regard to whether a natural law approach would apply a principle of proportionality, as it likely would, Justices O’Connor, Kennedy, and Souter concluded that in any event principles of *stare decisis* counsel the Court to follow its precedents and apply a proportionality principle as part of determining what is “cruel and unusual punishment” under the Eighth Amendment. In contrast, Justice Scalia’s emphasis on literal text and specific intent led him to conclude that the framers and ratifiers rejected any proportionality requirement under the Eighth Amendment, and thus later Supreme Court cases adopting that requirement, like *Solem v. Helm*, should be overruled, since those precedents are not “settled law.”

Regarding the death penalty, in 1972, the end result from a range of concurring and dissenting opinions in *Furman v. Georgia* was 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. 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.”

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

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208 *Id.* at 964-65 (Scalia, J., joined by Rehnquist, C.J., announcing the judgment of the Court), discussing *Solem*, 463 U.S. 277, 284-86 (1983).

209 408 U.S. 238 (1982) (per curiam opinion) (all nine Justices wrote concurring or dissenting opinion in the case).


211 *Furman*, 408 U.S. at 257 (Brennan, J., concurring); *id.* at 314 (Marshall, J., concurring); *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting from denial of certiorari). Justice Stevens has also been a vocal critic of the death penalty, although he has not taken the position that it is unconstitutional in all circumstances. See generally James S. Liebman & Lawrence C Marshall, *Less is Better: Justice Stevens and the Narrowed Death Penalty*, 74 Fordham L. Rev. 1607 (2006).

abolition of the death penalty,\textsuperscript{213} 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, and long-standing precedents. In reaching decisions on whether certain procedures satisfy the Eighth Amendment, the same split exists as in other cases involving the criminal justice system, with conservative formalist and Holmesian Justices tending to favor the prosecution, liberal instrumentalist Justices tending to favor the accused, and natural law Justices tending to be in the middle.\textsuperscript{214}

The Excessive Fines Clause of the Eighth Amendment has provoked few cases. In \textit{United States v. Bajakajian},\textsuperscript{215} a 5-4 Court held that forfeiture of the entire $357,144 that respondent failed to declare under a federal law requiring the individual to report that he was transporting more than $10,000 in currency was grossly disproportional to the gravity of his offense. In other cases, however, courts routinely approve large fines and forfeitures will little extended discussion.\textsuperscript{216}

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\textsuperscript{214} See, e.g., Kansas v. Marsh, 126 S. Ct. 2516, 2520 (2006) (Thomas, J., joined by Roberts, C.J., & Scalia, Kennedy & Alito, JJ.) (Kansas death penalty statute that requires imposition of the death penalty once the jury has unanimously found that aggravating circumstances proved by state beyond reasonable doubt are not outweighed by mitigating circumstances is constitutional); \textit{id.} at 2541 (Souter, J., joined by Stevens, Ginsburg & Breyer, JJ., dissenting) (mandatory death penalty unconstitutional where aggravating and mitigating factors are of equal weight); Simmons v. South Carolina, 512 U.S. 154, 156 (1994) (plurality opinion of Blackmun, J., joined by Stevens, Souter & Ginsburg, JJ.) (in a capital case, where the defendant's future dangerousness is at issue, and state law prohibits the defendant's release on parole, due process requires that the sentencing jury be informed that the defendant is parole ineligible); \textit{id.} at 175-78 (O'Connor, J., joined by Rehnquist, C.J., and Kennedy, J., concurring in the judgment) (where the state puts the defendant's future dangerousness at issue, defendant should be permitted to argue to the jury that he would never be released from prison); \textit{id.} at 178-79 (Scalia, J., joined by Thomas, J., dissenting) (traditional state practices do not support the view that such a right to inform the jury is constitutionally required). \textit{See also} Pruitt v. State, 834 N.E.2d 90, 99-103 (Ind. 2005) (capital defendant seeking to invoke Eighth Amendment prohibition against execution of mentally retarded persons need only establish mental retardation by preponderance of evidence; unconstitutional to require defendant to meet clear and convincing evidence standard of proof).
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\textsuperscript{216} See, e.g., United States v. Emerson, 107 F.3d 77, 81 (1\textsuperscript{st} Cir. 1997) (penalty of $185,000 for federal aviation violation not excessive because one-half size permitted by statute and less than government recommends), \textit{cert. denied}, 522 U.S. 814 (1997); United States v. One Parcel Property, 106 F.3d 336, 339 (10\textsuperscript{th} Cir. 1997) (forfeiture of $47,700 for cocaine conviction not excessive because fine authorized by Congress allowed up to $2,000,000); United States v. 38 Whalers' Cove Dr., 954 F.2d 29, 39 (2\textsuperscript{nd} Cir. 1992) (punitive forfeiture of $145,000 condominium, even if fine, not excessive because within scope of Comprehensive Drug Abuse Prevention and Control Act of

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Because the Excessive Fines Clause only applies to criminal punishment, the issue of the excessiveness of punitive damage awards in civil litigation is handled under the Due Process Clause, discussed at § 27.1.2.4.\textsuperscript{217}

The prohibition of Excessive Bail in the Eighth Amendment has provoked even fewer cases. Bail becomes excessive when a court sets it higher than is reasonably necessary either to ensure a defendant's appearance at trial or to promote other compelling governmental interests, such as denying bail to persons "charged with serious felonies who are found after an adversary hearing to pose a threat to the safety of individuals or to the community which no condition of release can dispel."\textsuperscript{217} Only in rare cases has imposition of bail been deemed excessive.\textsuperscript{218}

\textbf{§ 23.2.2 Article I, § 9 Criminal Defendants' Rights & The Extradition Clause}

Article I, § 9 of the Constitution includes three provisions dealing with criminal defendant’s rights. They are the prohibition against bills of attainder, the prohibition against ex post facto laws, and the privilege of habeas corpus. Article IV, § 2, cl. 2 involves the Extradition Clause of the Constitution.

\textbf{§ 23.2.2.1 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


\textsuperscript{218} See, e.g., Stack v. Boyle, 342 U.S. 1, 5 (1951) ($50,000 bail excessive because defendants were charged with violation carrying maximum penalty of 5 years and $10,000 fine and government's only justification for bail was that 4 unrelated prisoners charged with same offense had previously forfeited bail); United States v. Leisure, 710 F.2d 422, 425-26 (8th Cir. 1983) (bail over $1,000,000 excessive because defendants had lived in the area for many years, had family in the area, had real property and employment in the area, and no record of prior failure to appear in court). But see United States v. Mantecon-Zayas, 949 F.2d 548, 550 (1st Cir. 1991) (bail of $400,000 not excessive, although defendant unable to pay, if amount reasonably necessary to ensure defendant's presence at trial); United States ex rel. Garcia v. O'Grady, 812 F.2d 347, 352-55 (7th Cir. 1987) (bail of $607,000 not excessive because defendant charged in drug prosecution posed risk of flight and allegedly earned $14 million annually from drug sales); United States v. Bobrow, 468 F.2d 124, 126-27 (D.C. Cir. 1972) (bail of $100,000 reasonably necessary to ensure defendant's appearance because he was foreign citizen charged with narcotics crime and had prior criminal record).
“legislative punishment of an identifiable individual.” Thus, the act must be “legislative”; it must be directed against “an identifiable individual”; it must constitute “punishment.”219 Each of these elements must be met independently of the others for the act to be unconstitutional. The first element focuses on determining whether the end of the governmental action is “legislative”; the second element focuses on whether the benefit to be achieved by the government regulation is directed against an “identifiable individual”; the third element focuses on whether the burden of the government action involves “punishment” within the constitutional proscription against Bills of Attainder.

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 branded as disloyal.”220 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.221

In United States v. Brown,222 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 “to the effect that persons possessing characteristics which make them likely to incite political strikes should not hold union office,” but rather Congress determined for itself that members in the Communist Party are more likely to incite political strikes. The Court concluded, “In a number of decisions, this Court has pointed out the fallacy of the suggestion that membership in the Communist Party, or any other political organization, can be regarded as an alternative, but equivalent, expression for a list of undesirable characteristics.” Reflecting a Holmesian predisposition to defer to government unless the unconstitutionality of the action is clear, discussed at § 10.2.1.2 nn.16-18, Holmesian Justices White, Clark, Harlan, and Stewart dissented in Brown on the grounds that there was not clear proof to establish that Congress' purpose in enacting the


220 Id. at 474.

221 Id. at 475-83.

statute was punitive rather than regulatory.\textsuperscript{223}

In \textit{Nixon v. Administrator of General Services},\textsuperscript{224} the Court was confronted with the question whether the Presidential Recordings and Materials Preservation Act of 1974, which authorized the Administrator of General Services, an official of the Executive Branch, to take custody of the Presidential papers and tape recordings of former President Richard M. Nixon, but no other President, was a Bill of Attainder. In resolving this issue, the Court noted that “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. . . . In short, appellant constituted a legitimate class of one . . . .”

In addition, the Court held that the Act was not punishment in any event. The Court noted that the Act “must be held to be an act of nonpunitive legislative policymaking. Legislation designed to guarantee the availability of evidence for use at criminal trials is a fair exercise of Congress' responsibility to the 'due process of law in the fair administration of criminal justice,' and to the functioning of our adversary legal system which depends upon the availability of relevant evidence in carrying out its commitments both to fair play and to the discovery of truth within the bounds set by law. Similarly, Congress' interest in and expansive authority to act in preservation of monuments and records of historical value to our national heritage are fully established [and not punitive]."\textsuperscript{225}

\textbf{§ 23.2.2.2 Prohibition on 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 \textit{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:

\begin{quote}
I will state what laws I consider ex post facto laws, within the words and the intent of the prohibition. 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.\textsuperscript{226}
\end{quote}

\textsuperscript{223} \textit{Id.} at 462-64, 474-76 (White, J., joined by Clark, Harlan & Stewart, JJ., dissenting).

\textsuperscript{224} 433 U.S. 425, 472 (1977).

\textsuperscript{225} \textit{Id.} at 477-78.

\textsuperscript{226} 3 U.S. 386, 390 (1798).
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 not to be given a literal reading, but to be read in light of its purpose, the maxim of construction that technical words are to be interpreted in light of their textual meaning, 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.”

In 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.

The same split between the natural law approach’s greater focus on purpose versus the formalist greater focus on literal meaning has also been evident in many cases decided under the Ex Post Facto Clause. For example, in Rogers v. Tennessee, Justice O’Connor wrote for the Court that the purpose behind the Ex Post Facto Clause and Due Process Clause to assure “fair warning” to attaching criminal penalties to what previously had been innocent conduct would not be violated by permitting the Tennessee Supreme Court to abolish 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. 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’s dissent was joined not only by Justice Thomas, but also by Justices Stevens and Breyer, in part, as their separate dissents point 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.”

227 Id. at 391-92.


229 Id. at 467 (Scalia, J., joined by Stevens, Breyer & Thomas, JJ., dissenting); id. at 467 (Stevens, J., dissenting); id. at 481 (Breyer, J, dissenting), citing Benjamin Cardozo, 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.

In *Doe v. Miller*, an Eighth Circuit Court of Appeals panel concluded that an Iowa statute, which prohibited a person convicted of certain sexual offenses against minors from establishing a residence within 2,000 feet of a school or registered child care facility existing on that date, was not an unconstitutional ex post facto law when applied to individuals whose convictions for sexual offenses took place before the law was passed. The Court concluded that the purpose of the Iowa General Assembly in passing this law was regulatory to protect the health and safety of Iowa citizens, rather than punitive. Given its operations, the court also concluded that the law was unlike banishment, which would be punitive, since it did not prevent the individual from finding living arrangements that would comply with the statute. Thus, since the law was not punitive in its intent or effect, the Ex Post Facto Clause did not apply.

§ 23.2.2.3 Right to 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, unless an emergency situation exists where Congress cannot meet and act in time. As noted at § 19.3.3 n.59, while President Lincoln did suspend the writ of habeas corpus at the beginning of the Civil War, a district court held that suspension unlawful in *Ex parte Merryman* 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.

Not surprisingly, there is a difference between instrumentalist and non-instrumentalist approaches to the writ of 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 Court has essentially overruled those expansive rulings, and

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230 529 U.S. 513 (2000) (Stevens, J., joined by Scalia, Souter, Thomas & Breyer, JJ., for the Court); id. at 553-54 (Ginsburg, J., joined by Rehnquist, C.J., and O’Connor & Kennedy, JJ., dissenting).

231 405 F.3d 700, 718-23 (8th Cir. 2005), cert. denied, 126 S. Ct. 757 (2005).
Congress has considered, though not yet enacted, further limitations on the availability of the writ. Despite these significant assaults on the habeas forum, the constitutional argument appears to have been entirely abandoned. The liberal minority on the Court has not mentioned the Suspension Clause in over a decade, and legislative as well as academic supporters of habeas have scarcely alluded to the Constitution as a bulwark against the writ's further demise.232

In recent cases, the Court has deferred to legislative judgments concerning the extent of habeas relief. For example, in *Daniels v. United States,*233 federal post-conviction relief was not available to a prisoner through a motion to vacate on the ground that the current sentence was enhanced based upon an allegedly unconstitutional prior conviction for which the petitioner was no longer in custody. In *Lackawanna Cty. District Attorney v. Coss,*234 federal post-conviction relief was similarly not available through a petition for a writ of habeas corpus. Regarding the extent of Congress’ power over the writ of habeas corpus, it has been noted:

> If, as Chief Justice Marshall stated in his famous dictum in *Ex parte Bollman,* federal habeas jurisdiction exists only to the extent that Congress so provides, the protection of the Suspension Clause would be quite minimal; absent congressional action, "the privilege itself would be lost, although no law for its suspension should be enacted."

. . . Indeed, 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.235

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,

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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.”

Where the issue involves purpose versus literalism, Justices O’Connor, Kennedy, and Souter usually can be found on one side of the case, and Justices Scalia and Thomas on the other side. For example, in *Stewart v. Martinez-Villareal*, the majority held that petitioner’s claim, raised for a second time after the first claim was dismissed as not ripe for resolution, 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 have produced a “perverse” result.

In *Hamdi v. Rumsfeld*, the Court considered the power of Congress or the President to limit habeas corpus rights. A plurality of natural law and Holmesian or Holmesian-leaning Justices concluded that, consistent with legislative and executive practice, Congress had a power to alter the writ, and that Congress can impliedly delegate that authority to the President. Justices Souter and Ginsburg required a clear statement from Congress to alter the writ, which they said did not exist in this case. Justice Scalia read the clause literally to give the Congress no independent power absent suspension of the Writ, a position joined by Justice Stevens. Justice Thomas would have given the President blanket power, reflecting the conservative predisposition to defer to the President.

§ 23.2.2.4  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 Jurisdiction of the Crime.” The states’ rights Taney Court held in 1861 in *Kentucky v. Dennison* 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* 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, such as complying with the 14th Amendment in *Brown v. Board of Education*, discussed at § 26.2.1.3. Thus, *Dennison* was overruled.

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237  523 U.S. 637, 643-44 (1998); id. at 646 (Scalia, J., joined by Thomas, J., dissenting).

238  542 U.S. 507, 519-22 (2004) (plurality opinion of O’Connor, J., joined by Rehnquist, C.J., and Kennedy & Breyer, JJ); id. at 545 (Souter, J., joined by Ginsburg, J., concurring in part and dissenting in part and concurring in the judgment); id. at 554 (Scalia, J., joined by Stevens, J., dissenting); id. at 579 (Thomas, J., dissenting).


CHAPTER 24: CONSTITUTIONAL IMPACT OF 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. As with other provisions in the Constitution, there are natural law, formalist, Holmesian, and instrumentalist ways of interpreting the Ninth Amendment.

§ 24.1 The Natural Law Approach

The first way of construing the Ninth Amendment is that it means just what it says, that the enumerated of certain rights in the Constitution should not be construed to deny or disparage others retained by the people. 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. Virtually all commentators agree that the [framers and ratifiers of the Bill of Rights believed in natural rights as a general matter.” This natural law background is also discussed at §§ 8.4.1 & 12.3.3.

Against this background, 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. Since that view was inconsistent with the intent of the framers and ratifiers that the federal government be a government of limited, delegated power, the Ninth Amendment was an attempt to craft language to prevent federal governmental power from being construed in any broader way. Based on an exhaustive look at the history and precedents of the Ninth Amendment, Professor Kurt Lash noted:

One of the original purposes of the Ninth Amendment was to prevent the Bill of Rights from being construed to suggest that congressional power extended to all matters except those expressly restricted. As Joseph Story would later write in his Commentaries on the Constitution:


2 Jeff Rosen, Was the Flag Burning Amendment Unconstitutional?, 100 Yale L.J. 1073, 1974-75 (1991) (citations omitted).
[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.3

From this perspective, the Ninth Amendment is a reminder that in interpreting the Constitution, including the first eight Amendments, a natural law theory of interpretation should be used, which supports background natural rights and, as noted at §§ 2.4 & 3.4, rejects the “positivism” of the formalist and Holmesian approaches that rights only derive from positive legal affirmations.

There are two ways to view this limitation: a libertarian perspective and a federalist perspective. The history surrounding the Ninth Amendment suggests that both perspectives were part of the concerns of the framers and ratifiers. Consistent with the Supreme Court’s focus on federalism matters in many of its earlier cases, noted at §§ 18.1.1-18.1.2, 18.2.1 & 18.4.1, the federalism concern was most prominent in the 19th century. The libertarian concern has been more prominent in the 20th century.

Reflecting the federalism concern, Professor Lash noted, “The Ninth Amendment itself seems particularly responsive to concerns that the enumeration of certain rights might undermine the theory of limited enumerated authority. Early drafts of the Ninth contain language that not only speaks of retained rights, but also of limiting the construction of federal power. Madison himself described the Ninth’s language regarding the disparagement of rights as amounting to the same thing as a rule preventing the enlargement of federal power.”4

This is the way the Ninth Amendment predominantly was used during the 19th century. For example, in Houston v. Moore,5 an issue arose over the power of the states to regulate on matters involving militias. The text of Article I, § 8, cl. 16, after granting Congress power to organize and discipline the militia, reserved to the states "the Appointment of the officers, and the Authority of training the Militia according to the discipline prescribed by Congress." Professor Lash has noted:

[Under the expressio unius maxim.] this reservation implied that all power not expressly reserved to the states was exclusively in the hands of Congress. Story rejected this argument, applying the rule of construction he believed declared by the Ninth Amendment:

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It is almost too plain for argument, that the power here given to Congress over the militia, is of a limited nature, and confined to the objects specified in these clauses; and that in all other respects, and for all other purposes, the militia are subject to the control and government of the State authorities. Nor can the reservation to the States of the appointment of the officers and authority of the training the militia according to the discipline prescribed by Congress, be justly considered as weakening this conclusion. That reservation constitutes an exception merely from the power given to Congress "to provide for organizing, arming, and disciplining the militia," and is a limitation upon the authority, which would otherwise have developed upon it as to the appointment of officers. But the exception from a given power cannot, upon any fair reasoning, be considered as an enumeration of all the powers which belong to the States over the militia.

Having announced that determining the scope of exclusive federal power must be guided by the letter and spirit of the Ninth Amendment, Story then applied the rule of construction he describes in Commentaries as mandated by the Ninth. That rule forbids construing a reservation of rights to suggest that all other rights are surrendered. In this case, the enumeration of certain rights – the state's right to appoint officers – must not be construed to deny or disparage other rights retained by the states – the right to create courts martial.

Story's opinion in Houston describes the Ninth Amendment as limiting the interpreted scope of federal power in order to preserve state regulatory autonomy. This echoes James Madison's description of the Ninth as "guarding against a latitude of interpretation" of federal power to the injury of the people's retained rights. Federal power is thus prevented from intruding into matters retained by the people who remain free to delegate that power to their state government as they see fit.

The libertarian theory of the Ninth Amendment is also supported by arguments of text, context, and history. Libertarian scholars point out that the framers and ratifiers held a conception of rights that went well beyond those few listed in the first eight amendments to the Constitution. For example, as Professor Lash noted:

Such rights, declared James Iredell in the North Carolina ratifying convention, were incapable of exhaustive enumeration:

[I]t would be not only useless, but dangerous, to enumerate a number of rights which are not intended to be given up; because it would be implying, in the strongest manner, that every right not included in the exception might be impaired by the government without usurpation; and it would be impossible to enumerate every one. Let any one make what collection or enumeration of rights he pleases, I will immediately mention twenty or thirty more rights not contained in it.

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6 Lash, supra note 3, at 619-21, citing Houston, 18 U.S. (5Wheat.) at 4 (Story, J., opinion).
Members of Congress who participated in the drafting of the Ninth Amendment also declared their belief in natural rights retained by the people. [For example,] Roger Sherman, who served with Madison on the House drafting committee, suggested an amendment declaring that "[t]he people have certain natural rights which are retained by them when they enter into Society." Both Sherman and Madison were members of the House Select Committee appointed to review Madison's drafts for the Ninth and Tenth Amendments. Reflecting language suggested by numerous state ratifying conventions, Madison's draft of the Ninth Amendment provided, "The exceptions, here or elsewhere in the constitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people, or as to enlarge the powers delegated by the constitution; but either as actual limitations of such powers, or as inserted merely for greater caution." Madison's draft of the Tenth Amendment provided, "The powers not delegated by this constitution, nor prohibited by it to the States, are reserved to the States respectively."

The final drafts of these two amendments made two significant changes. With respect to the Ninth Amendment, the new draft no longer contained Madison's reference to constructive enlargement of federal power. With respect to the Tenth Amendment, at the last minute the phrase "or to the people" was added, so it read, "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." Regarding this change in language in the Tenth Amendment, Professor Lash noted:

Why then did the Committee add the phrase "or to the people?" The answer lies in the Founders' conception of popular sovereignty. A theory of popular government developed in the period between the Revolution and the adoption of the Constitution, popular sovereignty maintained that sovereign power remains with the people, not with their government. The people delegated powers to their government, but could "alter or abolish" those powers as they saw fit. The delegation of power, however, could occur at either of two levels. For example, powers not delegated to the federal government could be delegated by the people to their own state government. As New York's suggested amendment put it:

That every Power, Jurisdiction and right, which is not by the said Constitution clearly delegated to the Congress of the United States, or the departments of the government thereof, remains to the People of the several States, or to their respective State Governments to whom they may have granted the same.

The final version of the Tenth Amendment expresses this idea that the people retain the right to delegate reserved powers to their respective state governments or not to delegate them to either level of government. Grounding the Tenth in the theory of popular sovereignty linked

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7 Lash, supra note 4, at 343-44 (citations omitted).

8 For citations to these drafts and other aspects of the history surrounding the drafting of the Ninth Amendment, see id. at 348-70.
it to the Ninth. Together, the two amendments reserve to the people all retained rights and powers.9

The reasons behind the removal of the "enlargement of power" language from the final version of the Ninth Amendment is less clear. At the same time this language, and other language, respecting the Bill of Rights was being debated, Congress was also considering the bill to create a National Bank. As discussed at §§ 7.1 & 18.1.2, there was a real debate between most Federalists, supported by Hamilton, that viewed such a bank as constitutional under normal rules of construction, and Jefferson and Madison and most anti-Federalists, who viewed that such a National Bank could only be constitutional under a constructive enlargement of federal power approach.

Against this background, Madison explained that the removal of the “enlargement of power” language was not intended to change the Ninth Amendment, but was merely removed on the grounds that the constructive enlargement of power language was redundant with language already contained in the Ninth Amendment. Since the Federalists controlled Congress, however, and were in the process of also rejecting Madison’s views regarding the constitutionality of the National Bank, a more plausible explanation is that they were concerned that had the language remained, that would have undercut their arguments in support of a National Bank, and that their focus, as that of Federalist Roger Sherman, was more on limiting government abuses through protecting rights reserved to the people, rather than a cramped view of legitimate federal government power.

The broader view of legitimate government power was the view adopted by the Supreme Court in McCulloch v. Maryland, discussed at § 18.1.2. So understood, this understanding of the drafting of the Ninth Amendment is similar to understanding the drafting of the 11th Amendment from the perspective of the Federalist Congress, discussed at § 17.2.4.3 nn.237-41.

Whether the Ninth Amendment was intended to reflect more federalism or libertarian concerns, virtually every draft proposed by the states, and well as drafts considered by Congress, focused on limitations on congressional power, or sometimes, as in the New York proposal cited above at § 24.1 n.9, departments of the federal government, meaning executive departments, but not limitations on courts. Consistent with the emerging views regarding judicial review and courts being protectors of individual liberty, discussed at § 17.1.2.1, it is likely that the framers and ratifiers expected courts to apply the Ninth and Tenth Amendment limitations on federal and state authority in terms of rights retained by the people against both governmental entities.

For example, in his famous opinion in Calder v. Bull,10 Justice Chase noted that the United States Supreme Court could protect the people against both federal and state invasion of their retained rights. He stated, “I cannot subscribe to the omnipotence of a state legislature, or that it is absolute and without control; although its authority should not be expressly restrained by the constitution,

9 Id. at 370 (citations omitted).

10 3 U.S. (3 Dall.) 386, 387-88 (1798).
or fundamental law, of the State. . . . There are acts which the federal, or state, legislature cannot do, without exceeding their authority. There are certain vital principles in our free republican governments, which will determine and overrule an apparent and flagrant abuse of legislative power; as to authorize manifest injustice by positive law; or to take away that security for personal liberty, or private property, for the protection whereof of the government was established. An act of the legislature (for I cannot call it a law), contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority.”

Similarly, in *Society for the Propagation of the Gospel v. Wheeler*, Justice Story applied natural rights retained by the people under the law of nations to determine the legal rule in a case involving state law. Referencing the Ninth Amendment, Justice Story indicated, “Where a remedy should be sought in the courts of the United States, under circumstances, in which the state laws could afford no remedy, it is a general rule of the law of nations, recognised by all civilized states, that rights and remedies respecting lands are to be regulated and governed by the law of the place, where the land is situated. Huber. tom. 2, lib. 1, tit. 3; Vatt. Law Nat. bk. 2, c. 7, § 85; Id. bk. 2, c. 8, §§ 109, 110. Independent, therefore, of the act of congress of September 24, 1789 (chapter 20, § 34), which declares, 'that the laws of the states, except where the constitution, treaties, or statutes of the United States, shall otherwise require or provide, shall be regarded as rules of decision, in trials at common law, in the courts of the United States, in cases where they apply,' the laws of the state regulating titles and remedies to real estate, must, in the absence of other regulations by the United States, be, upon general principles, the rules of decision equally between foreigners and between citizens.”

In addition, as discussed at § 25.3 nn.56-62, at the time of drafting of the 14th Amendment, the principal sponsor, Representative John Bingham, viewed the Privileges or Immunities Clause as incorporating the first eight Amendments to the Constitution, thus applying them against the states. This was necessary given the Court’s decision in *Barron v. Baltimore*, discussed at § 27.2.1 n.95, and likely correct, that the first eight Amendments did not apply to the states. There was no need to incorporate the Ninth or Tenth Amendments, however, since they applied to both the federal government and the states anyway. After all, the text of the Ninth Amendment refers to rights “in the Constitution,” not merely the Bill of Rights, and this includes Art. I, § 10 limitations on states.

In any event, without regard to the questions of whether the Ninth Amendment (1) was originally intended to reflect federalist or libertarian limitations on government, and (2) was intended only to limit the federal government, consistent Supreme Court precedents in the 20th century, based on ratification of the 14th Amendment in 1868, have supported the view that unenumerated rights exist against both federal and state governments, as discussed at § 27.3. As for what rights are part of the “rights retained by the people,” it has been noted:

[T]hree groups of rights are repeatedly called natural or unalienable in the Revolutionary declarations and state ratifying conventions: the individual right to "worship God according to the dictates of conscience"; the individual right of "defending life and liberty, acquiring,

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11 22 F. Cas. 756, 766-67 (1814).
possessing and protecting property, and pursuing and obtaining happiness and safety”; and the right of a majority of the people to "alter and abolish" their government [discussed in this book at § 24.3 n.20-21]. Three other rights are also called natural in the documentary sources: the right to emigrate or to form a new state, the rights of assembly, and the freedom of speech.

If the Founders' conception of which rights were natural is clear, their conception of which natural rights were alienable and which were unalienable is less so. The rights of religious conscience and the right of revolution are consistently called unalienable in the documentary sources and in the social compact theories on which the sources relied. The status of the rights to defend life, liberty, and property is fuzzier: social compact theory suggests that the power to control them is alienable rather than unalienable, and should be surrendered to the state which promises, in exchange, to authorize deprivations only by due process of law. George Mason, the author of the 1776 Virginia Declaration of Rights, had called the rights to defend life, liberty, and property not unalienable but "inherent" (a familiar synonym for natural). Jefferson, writing the Declaration of Independence months later, took care to remove property from his list of unalienable rights, and to call the rights of life and liberty themselves (not the right to defend them) unalienable.  

Regarding unenumerated rights, the Court noted in 1923 in *Meyer v. Nebraska*, discussed at § 27.3.2 n.141, that among the unenumerated rights are “the right of the individual to contract [and] 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.” This libertarian view is also reflected in Justice Goldberg’s concurrence in 1965 in *Griswold v. Connecticut*, discussed at § 16.3 nn.71-75. Joined by Chief Justice Warren and Justice Brennan, Justice Goldberg stated that the Ninth Amendment, while not an independent source of rights, is a reminder that in interpreting other provisions in the Constitution, such as the liberty component of the Fifth and 14th Amendment Due Process Clauses, the Court should interpret those provisions understanding that the framers believed individuals had background rights against the government, even if those rights were not stated in specific constitutional text.

Regarding the issue of which constitutional rights are “alienable,” and which are “inalienable,” most constitutional provisions regarding individual rights are “alienable” under either a “voluntary”

12 Rosen, supra note 2, at 1178-80 (citations omitted).
13 262 U.S. 390, 399 (1923).
waiver standard, such as for Fourth Amendment search and seizure rights, discussed at § 23.2.1.1 n.62, or the higher standard of a “knowing and intelligent” waiver, used for most Fifth and Sixth Amendment criminal defendant’s rights, discussed at § 23.2.1.2 nn.101-03 & 23.2.1.3 n.157. As discussed at § 23.1.3 n.28, the Seventh Amendment right to a jury trial can be waived by a “knowing and intelligent” waiver. As noted at 29.6.1.1 n.214, even the First Amendment right to freedom of speech can be waived by a “knowing and intelligent” waiver, such as in agreements by employees of the Central Intelligence Agency to waive free speech rights and submit for pre-publication review any book concerning secrets learned while working for the CIA. Almost certainly, any Second Amendment right to own guns, or Third Amendment right not to have soldiers quartered in one’s homes, could be waived, under either a “voluntary” or “knowing and intelligent” waiver standard.

On the other hand, certain rights are “inalienable.” Most constitutional rights that are “structural” protections, discussed in Chapters 17-20, are “inalienable,” since they exist to protect broader structural imperatives. For example, as indicated by INS v. Chadha, discussed at § 19.4.2.1 nn.76-86, Congress and the President cannot waive the requirements of the Bicameralism and Presentment Clauses to create a one-house veto procedure for power delegated to an administrative agency. Nor can Congress and the President alter by statute the Presidential veto power, as indicated in Clinton v. City of New York, discussed at § 19.4.2.2 nn.92-96. On the other hand, as noted at § 17.2.4.2 n.189, a state can waive its state sovereign immunity under 11th Amendment and related state sovereign immunity principles, and the federal government can waive its sovereign immunity from lawsuits, as noted at § 20.1.4.4. Among those “structural” individual rights in the criminal justice system to which the “harmless error” rule does not apply, discussed at § 23.2.1.3.B. n.185, an individual cannot waive the right to an impartial judge, but the individual can waive the right to counsel and appear pro se, as long as that waiver is “knowing and intelligent.”

Regarding other individual rights protections, the First Amendment right of free exercise of religion, and the background “right of revolution” to “alter or abolish” a tyrannical regime, are typically regarded as “inalienable,” as noted at § 24.1 n.12. In addition, the 13th Amendment provision banning slavery or involuntary servitude cannot be waived, as discussed at § 25.1. Also, the Fifth Amendment due process requirement of proof “beyond a reasonable doubt” in criminal cases and the Fifth Amendment requirement of grand jury indictment in capital cases cannot be waived, as discussed at § 23.2.1.2.n.104. Almost certainly, the Eighth Amendment bans on “excessive bail,” “excessive fines,” and “cruel and unusual punishment” cannot be waived, nor could an individual formally waive the heightened due process protections that apply in capital cases.

Despite this lack of formal waiver, in practice individuals can waive the protections of some of these rights by failing to sue. For example, in Gilmore v. Utah,15 convicted murder Gary Gilmore chose not to pursue habeas corpus relief in federal court to challenged his death penalty sentence. The Court denied third-party standing to Gilmore’s mother to sue on his behalf, and ruled that Gilmore had made a valid “knowing and intelligent” waiver of his “right to appeal” by refusing to sue. Similarly, as a practical matter, an individual could “waive” even 13th Amendment protections and

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15 429 U.S. 1012, 1013 (1976); id. at 1014-15 (Burger, C.J., joined by Powell, J., concurring).
enter into a “master/slave” relationship with a partner. Any such “contract” or “registration” of that relationship would have no legal effect, of course, and any monetary exploitation, such as the selling of individuals or their services, could result in prosecution for prostitution, which could be brought without the exploited parties’ consent. In that sense, the “waiver” would not be effective.16

§ 24.2 The Formalist Approach

In Griswold v. Connecticut,17 Justice Black elaborated in his dissent a formalist approach toward the Ninth Amendment. Consistent with a formalist emphasis on the importance of literal text, Justice Black noted that there was nothing in the text of the Ninth Amendment to determine what rights it was intended to protect. Focusing on the literal text of rights “retained by the people,” Justice Black concluded that the Ninth Amendment served as a reminder that the federal government was a government of limited powers, and that this admonition should be viewed as applying not only to the legislative and executive branches, but to the judicial branch as well. Although arguments of context and history suggest otherwise, noted at § 24.1 nn.8-12, the literal text of the Ninth Amendment draws no distinction among branches of government. Thus, for Justice Black, the Ninth Amendment was a reminder that any “extra-textual” interpretation, such as the “unenumerated” fundamental rights analysis, discussed at § 27.3, should be viewed as illegitimate.

As discussed at § 27.3, the moderate formalist majority between 1873 and 1937 did not embrace this more extreme formalist view of the illegitimacy of any unenumerated fundamental rights doctrine. During those years, the Court recognized, as in Meyer v. Nebraska, unenumerated fundamental rights to contract and engage in the common occupations of life; to acquire knowledge; and to marry, establish a home, and raise children. However, a moderate version of Justice Black’s formalist insight does caution the Court to be careful in advancing any such “unenumerated” fundamental rights analysis. As noted by the Court in 1986 in Bowers v. Hardwick:

The Court is 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 design of the Constitution. That this is so was painfully demonstrated by the face-off between the Executive and the Court in the 1930’s which resulted in the repudiation of much of the substantive gloss that the Court had placed on the Due Process Clause of the Fifth and Fourteenth Amendments. There should be, therefore, great resistance to expand the substantive reach of those Clauses, particularly if it requires redefining the category of rights deemed to be fundamental.18


18 478 U.S. 186, 194-95 (1986). For an argument embracing the view that the Ninth Amendment provides little, if any, support for unenumerated rights analysis, see Thomas B. McAffee, Inalienable Rights, Legal Enforceability, and American Constitutions: The Fourteenth Amendment and the Concept of Unenumerated Rights, 36 Wake Forest L. Rev. 747 (2001).
§ 24.3  The Holmesian Approach

Being an approach that emphasizes deference to the legislative and executive branches of government, the Holmesian approach toward the Ninth Amendment would naturally share the formalist concern, discussed at § 24.2, with expansive court interpretations of constitutional rights through any form of unenumerated fundamental rights analysis. Holmesian Justice White actually drafted the passage from Bowers at § 24.2 n.18. Similarly, in Washington v. Glucksberg, a case concerning whether there exists a fundamental right for physician-assisted suicide, Chief Justice Rehnquist said for the Court:

We “ha[ve] always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended.” 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,” . . . lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the members of this Court.  

Although Chief Justice Rehnquist was addressing his cautionary language to the meaning of “liberty” under a 14th Amendment substantive due process analysis, as discussed at § 27.3.4.3 n.280, it appears clear that an equal or greater reluctance would restrain a majority of the Court today from finding that a right was retained by the people and, thus, fell within the Ninth Amendment.

Looking to general historical sources of interpretation, as a Holmesian is more willing to do than a formalist, discussed at § 10.2.1.3, can help support this view. The Ninth Amendment states that the people "retain" rights outside those specifically enumerated. However, the manner for protecting these rights may not be in the courts, as it is for the enumerated rights provisions, such as the first eight Amendments, or the "privileges or immunities," "equal protection," and "due process" provisions of the 14th Amendment. Instead, the Ninth Amendment may best be understood as the textual reflection of the belief by the framers and ratifiers in Locke's doctrine of the people's reserved right of revolution, discussed at § 12.2.2.3 n.80.

As commentators have noted, underlying the Declaration of Independence was a belief by the framers and ratifiers on the importance of justifying the people’s right of revolution against a tyrannical government. Under this view, the Ninth Amendment is, in part, a textual commitment that the people of the United States were reserving a right of revolution if their government became as tyrannical as they perceived the government of England to be in 1776. This reserved right of

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revolution can also be connected to the Second Amendment right to keep and bear arms.\textsuperscript{21}

\section*{\textsuperscript{\textsection 24.4} \textbf{The Instrumentalist Approach}}

A final way of thinking about the Ninth Amendment would be to consider it an independent source of constitutional rights that judges can appeal to when no other provision of the Constitution seems to grant individuals such a right. Since the text of the Ninth Amendment does not provide any specific limitations on what those rights would be, such an approach would enable a judge more easily than any of the other approaches to read that judge’s policy values into the Constitution under the guise of interpreting the Ninth Amendment.

This approach has never been adopted by any Justice on the Supreme Court, not even the liberal instrumentalists of the Warren Court between 1963 and 1969. As noted at \textsuperscript{\textsection 24.1 n.14}, instrumentalists such as Chief Justice Warren, and Justices Goldberg and Brennan, have been willing to interpret the Ninth Amendment in natural law fashion, using it as a mere interpretive guidance in interpreting other constitutional provisions, particularly the unenumerated rights analysis of substantive due process doctrine, discussed at \textsuperscript{\textsection 27.3}. Similarly, concurring in \textit{Roe v. Wade},\textsuperscript{22} Justice Douglas said that the “Ninth Amendment obviously does not create federally enforceable rights.” However, he noted that a catalog of rights retained by the people “includes customary, traditional, and time-honored rights, amenities, privileges, and immunities that come with the sweep of ‘the Blessings of Liberty’ mentioned in the preamble to the Constitution. Many of them in my view come within the meaning of the term ‘liberty’ as used in the Fourteenth Amendment.”

Occasionally, however, a lower federal court has embraced the Ninth Amendment as an independent source of rights, as did the lower federal court in \textit{Roe v. Wade} and other state and lower federal courts in the years leading up to \textit{Roe v. Wade}.\textsuperscript{23} Some commentators, who are not satisfied with the list of rights the Court has developed under the unenumerated fundamental rights branch of substantive due process doctrine, discussed at \textsuperscript{\textsection\textsection 27.3.3-27.3.4}, such as Professor Randy Barnett, have also occasionally suggested the Court should embrace the Ninth Amendment as a way to give support to that commentator’s favorite additional right.\textsuperscript{24}

\begin{itemize}
  \item \textsuperscript{21} Brent J. McIntosh, \textit{The Revolutionary Second Amendment}, 51 Alabama L. Rev. 673 (2000).
  \item \textsuperscript{22} 410 U.S. 113, 210 (1973) (Douglas, J., concurring).
  \item \textsuperscript{23} See \textit{Roe v. Wade}, 314 F. Supp. 1217, 1222 (D.C. Tex. 1970) (“Freedom to choose in the matter of abortions has been accorded the status of a 'fundamental' right in every case coming to the attention of this Court where the question has been raised. Babbitz v. McCann, 312 F. Supp. 725 (E.D. Wis.1970); People v. Belous, 80 Cal. Rptr. 354, 458 P.2d 194 (Cal. 1969); State v. Munson, (South Dakota Circuit Court, Pennington County, April 6, 1970). Accord, United States v. Vuitich, 305 F. Supp. 1032 (D.D.C. 1969).”).
  \item \textsuperscript{24} See, e.g., The Rights Retained by the People, Volume I (Randy Barnett ed. 1991); The Rights Retained by the People, Volume II (Randy Barnett ed. 1993).
\end{itemize}
The modern Supreme Court is not likely to adopt any doctrine along these lines. Instead, the Court is more likely to continue to view the Ninth Amendment in natural law terms, with perhaps an acknowledgment that it does also reflect, in part, the people’s reserved right of revolution against tyrannical regimes, discussed at § 24.3 nn.20-21. As discussed at § 24.1, such a natural law view embraces both a libertarian natural rights model and a federalism model. Such a view is consistent with long-standing views of Professor Randy Barnett regarding the Ninth Amendment.25

Following the Civil War, three amendments were added to the Constitution: the 13th, 14th, and 15th Amendments. These Amendments provide a number of important protections for individuals. Those protections are discussed in Sub-Part Three of Part IV, Chapters 25-28. For ease of presentation, the Due Process Clause of the Fifth Amendment, on which the Due Process Clause of the 14th Amendment is based, is also discussed in Sub-Part Three.

The two provisions in the Civil War Amendments that have spawned the most litigation are the Equal Protection and Due Process Clauses of the 14th Amendment. For ease of presentation, the other provisions in the Civil War Amendments are discussed first in Chapter 25. Then, the Equal Protection Clause is discussed in Chapter 26. The Due Process Clause of the Fifth and 14th Amendments are discussed in Chapter 27. Chapter 28 discusses congressional power to enforce the Civil War Amendments, a power used to supplement judicial power to enforce the Amendments.

CHAPTER 25: THE CIVIL WAR AMENDMENTS GENERALLY

In addition to the Equal Protection and Due Process Clauses of the 14th Amendment, the Civil War Amendments provide four major individual rights protections. These are the 13th Amendment ban on slavery or involuntary servitude, discussed at § 25.1; the 14th Amendment Citizenship Clause, discussed at § 25.2; the 14th Amendment Privileges or Immunities Clause, discussed at § 25.3; and the 15th Amendment ban on race discrimination in the right to vote, discussed at § 25.4.

The circumstances surrounding 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. The Thirty-Eighth Congress that proposed the Thirteenth Amendment denied seats to southern delegates except to senators and representatives from West Virginia. As for the proposal of the Fourteenth Amendment, it received 33 votes in the Senate, and 120 votes in the House, but had the Southern states been fully represented in the Thirty-Ninth Congress, 48 votes in the Senate and 162 votes in the House would have been needed to meet the two-thirds requirement.

. . . 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. [Based on this Act, ratification of the 15th Amendment banning race discrimination in voting rights was a foregone conclusion.] By July 1870, all of the former confederate states had been readmitted.\footnote{Jason Mazzone, Unamendments, 90 Iowa L. Rev. 1747, 1806-07 (2005). For more extended discussion of the unusual circumstances surrounding drafting and ratification of the Civil War Amendments, see Bruce A. Ackerman, 2 We the People: Transformations 99-119 (1998).}

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 constitutional amendment process.\footnote{See John Harrison, The Lawfulness of the Reconstruction Amendments, 68 U. Chi. L. Rev. 375 (2001).} In any event, the Court has routinely viewed questions of the proper ratification of constitutional amendments as political questions, as noted at §§ 17.3.4.2 & 17.3.4.3, and the validity of the Civil War Amendments is also confirmed as a matter of “settled law.” Settled law is defined at § 4.3.2 nn.79-85.

\section{The Thirteenth Amendment}

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 “inalienable.” Any attempt to waive this right would be unenforceable.

The background to the 13th Amendment was the practice of slavery in the American South before the Civil War, and the practice in the North during the colonial period of indentured servitude. These practices were justified at the time as consistent with pre-Enlightenment classic and Christian natural law doctrine. It has been 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.”\footnote{The Bible, Christianity, and Slavery 3-4 (www.religioustolerance.org/chr_salv1.htm) (access using search engine and key phrases in quote).} During the period surrounding the United States Civil War in the 1860s, 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.” A prominent reverend at the time, Reverend R. Furman, D.D., Baptist, of South Carolina, reflecting the view of many Southerners, similarly noted, “The right of holding
slaves is clearly established in the Holy Scriptures, both by precept and example.\textsuperscript{4} 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." J.B. Thrasher of Mississippi added that blacks "are the lowest and most degraded of the descendants of Canaan." And 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.\textsuperscript{5}

Of course, as noted at § 8.4.1 nn.77-80, 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.\textsuperscript{6}

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 Constitution 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

\textsuperscript{4} \textit{What the Bible Says About Human Slavery} 1 (www.religioustolerance.org/sla_bibl.htm) (citing quotes from Jefferson Davis and Reverend Furman).


\textsuperscript{6} \textit{See U.N. Universal Declaration of Human Rights} Art. 4 (www.un.org/Overview/rights.html).
[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.” 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 both 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 . . . .

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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. Against this backdrop, in 1857 in *Dred Scott v. Sandford*, the Supreme Court attempted to resolve this issue for not only all new territories, but also suggested as a matter of constitutional law that slaves could be brought into existing Northern states and yet remain slaves and the property of the owner. In *Dred Scott*, Chief Justice Roger Taney wrote 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. As has been noted, “during debates on the Kansas-Nebraska Bill, Senator Albert G. Brown declared, ‘negroes are not men, within the meaning of the Declaration [of Independence]. If they were, Madison, and Jefferson, and Washington, all of whom lived and died slaveholders, never could have made it, for they never regarded negroes as their equals, in any respect.”

Of course, the opinions of Madison, Jefferson, and Washington were much 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. On the other hand, with regard to the view in antebellum America more 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. As noted at § 25.1 text following n.6, this Clause provided that the number of representatives to which each state was entitled in the House of Representatives was calculated by “the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, 

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11 *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).

three fifths of all other Persons [slaves].” 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 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 Southern states, John Adams would have won the electoral college vote in 1800, not Thomas Jefferson.

Based upon the slavery provisions in the Constitution, the Supreme Court reached three major conclusions in 1857 in Dred Scott v. Sandford, each wrong in terms of a faithful interpretation of the Constitution, from either a natural law or the soon-to-be-emerging formalist perspective. Each conclusion was consistent, however, with Southern pro-slavery attitudes: (1) the core holding of the case that a free state could not define citizenship to include slaves taken as property into that state, discussed at § 25.2, and thus Dred Scott could not sue in federal courts under diversity jurisdiction applicable to diverse citizens from different states; (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) as dicta in the case, 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 whether Dred Scott’s stay in the free state of Illinois and the territory of Minnesota had given him his freedom, 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 Minnesota 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, though the conditions were identical." However, [the Dred Scott 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. Indeed, the Court's apparent deviation from previous decades' jurisprudence on this issue exhibited the continual process of Southern imperialism's expanding control.13

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 Due Process Clause of the 5th Amendment was intended to give slave owners the right to move into Northern states and continue the practice of slavery there. No Court opinion prior to 1857, and consistent legislative and executive practice regarding the institution of slavery, in Acts like the Missouri Compromise of 1820, the Compromise of 1850, and

13 Hornaday, supra note 7, at 269 (citations omitted).
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 imperative.

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 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 1833 until May 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 lived at the Fort.14

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 would have been 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. The Missouri Compromise had "forever prohibited" slavery in this region. Thus, when Dr. Emerson and Dred Scott crossed the Mississippi River north of Missouri, they entered territory where slavery had been prohibited by Congress.

Dred Scott remained at Fort Snelling from May 1836 until April 1838. During this time he met and married Harriet Robinson, a slave owned by Major Lawrence Taliaferro, an Indian Agent stationed near Fort Snelling.15 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 in that capacity 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. Such an analysis would have been: only free people were entitled to a civil marriage; Dred Scott and Harriet Robinson had a civil marriage; thus, they were free.

In November 1837, Dr. Emerson received new orders. The Army sent him to Fort Jesup in Louisiana. There Dr. Emerson met and married Eliza Irene Sanford. Their legally-valid wedding ceremony took place on February 6, 1838. Emerson now sent for his slaves, and in April they joined him in Louisiana. When the Scotts arrived, they might have sued for their freedom. Louisiana courts had upheld the freedom of slaves who had lived in free jurisdictions. Even more curious is why the Scotts came to Louisiana at all. Dr. Emerson had left them in Minnesota, which was part of a free territory. They likely could have found help if they had sued for their freedom or simply tried to escape. The trip down the Mississippi River to Louisiana took them by Iowa and Illinois,

14 This summary of Dred Scott’s life is substantially based upon, with minor stylistic edits, an account given in Paul Finkelman, *The Dred Scott Case, Slavery and the Politics of Law*, 20 Hamline L. Rev. 1, 11-21 (1996).

15 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, *Mrs. Dred Scott*, 106 Yale L.J. 1033 (1997).
where they might have escaped. Instead, they traveled over a thousand miles to reach Dr. Emerson, unaccompanied by him, or apparently any other person with authority over them. 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. After all, Emerson had let them marry, had kept them together as a couple, and treated them well enough so they did not seek their freedom. Dr. Emerson may also have told them that eventually he would free them, and the Scotts may have not only believed him, but thought that gaining such a clear legal freedom was worth the wait.

In December 1843, Emerson died suddenly at the age of 40. His widow, Irene, inherited his estate, and 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 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.

It is unclear why in 1846 Dred Scott tried to purchase his freedom, and when refused, decided to sue for his freedom, when he had failed to sue while living in free jurisdictions and had failed to try to escape when Emerson had left him at Fort Snelling. Perhaps Dr. Emerson had promised Scott his freedom – or at least the right to purchase his freedom – and when he died suddenly, Scott felt it was time to seek another route to freedom. It is also possible that it was only in 1846 that Scott discovered he had a legal claim to freedom. He may have learned this from local whites, including the sons of his former master, Peter Blow. Sometime after returning to St. Louis, Scott had renewed contact with the Blows, who began to provide financial aid for his litigation. It is also possible that Harriet Scott became aware of the family's claim to liberty. While in St. Louis, she had joined Reverend John R. Anderson's Second African Baptist Church. Reverend Anderson had been born a slave, but later purchased his freedom and became a typesetter for Elijah P. Lovejoy, an anti-slavery editor in Illinois. Reverend Anderson, or someone else in the church, may have informed Mrs. Scott that she and her family were legally entitled to their freedom. When Dred and Harriet Scott understood that they should be entitled to their freedom, they found attorneys to take their case.

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 Court's decision 11 years later in 1857. By that time, Irene Emerson had remarried, to an anti-slavery Republican from Massachusetts, but her 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.

As should have been expected, 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 earlier 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. 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. This Act rejected that aspect of Dred Scott which had stated that Congress was powerless to regulate slavery in the territories.

In his decision leading up to declaration of 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 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 the abolition of 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 factional 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.

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With the end of the Civil War, the more radical form of complete abolitionism, rejecting in its entirety the "White Supremacy" premise lying behind the *Dred Scott* decision, came to dominate Congress. Regarding the background to the 13th Amendment, 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."\(^{18}\)

This more radical form of complete abolitionism was also reflected in § 4 of the 14th Amendment, ratified in 1868, 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.” 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.”\(^{19}\)

Ratified in 1865, the 13th Amendment was first interpreted by the Supreme Court in the *Slaughter-House Cases*,\(^ {20}\) decided in 1873. The Court said the purpose of the 13th Amendment was to forbid "all shades and conditions of African slavery."\(^ {21}\) Ten years later, a more extensive interpretation was given in *The Civil Rights Cases*.\(^ {22}\) 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."\(^ {23}\) 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, and give evidence; and to inherit, purchase, lease, sell, and convey property. However, the Court held that Congress' power did not

\(^{18}\) See Tsesis, *supra* note 10, at 324.

\(^{19}\) 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).

\(^{20}\) 83 U.S. (16 Wall.) 36 (1873).

\(^{21}\) Id. at 69.

\(^{22}\) 109 U.S. 3 (1883).

\(^{23}\) Id. at 20.
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.24

The "social rights" limit on congressional power was reinforced in 1896 by Plessy v. Ferguson.25 The Court agreed in Plessy that the 14th Amendment was not intended to enforce "social" equality, as distinguished from "political" equality.26 Further, even in cases of “political” equality, in determining what race classifications were reasonable, the Court would take into account the established usages, customs, and traditions of the people.27 As discussed at § 26.2.1.1.B, in Plessy this meant that “separate, but equal” railway cars for whites and blacks were constitutional, based on customs of racial segregation, which included at that time separate school systems for white and black students even in many Northern States and the District of Columbia.28 As a result, protection from public as well as private race discrimination largely disappeared for many decades.

During the remaining years of the formalist era, the Court fleshed out the meaning of "slavery" and "involuntary servitude" by holding that the 13th Amendment did not bar federal or state governments from requiring individuals to perform duties owed the government, such as service in the army, or state militia, or a jury.29 However, the Court held that neither the federal government nor state governments could compel one person to work for another in payment of a debt.30

Formalist precedents remained largely untouched during the Holmesian era. The Court continued to protect debtors from forced labor,31 but it excluded other events from coverage by finding them not to be involuntary servitude, such as an injunction in a labor dispute preventing interference with a business.32 Also, the Court continued to weaken the early civil rights statutes by holding, as in

24 Id. at 22-25.

25 163 U.S. 537 (1896).

26 Id. at 543-44.

27 Id. at 549-50.

28 Id. at 550-51.


Collins v. Hardyman,\(^3^3\) that 42 U.S.C. § 1985(3), which creates a damage action for private conspiracies to deprive a person or a class of persons of equal protection, applies only to conspiracies under color of state law, \textit{i.e.}, there must be state action.

Despite this deference-to-government approach, the Holmesian Court did weaken slightly the "separate, but equal" theory of \textit{Plessy}. As discussed at § 26.2.1.1.C, based on a functional analysis of whether separate facilities were in fact equal, rather than the formalist-era analysis, which focused predominantly on whether facilities literally existed for both races, Holmesian-era courts struck down some separate programs of race discrimination in graduate school education.\(^3^4\) However, here, as in so many areas of constitutional law, substantial changes in the scope of both the 13\(^{th}\) and 14\(^{th}\) Amendments did not occur until the instrumentalist era.

As discussed at § 26.2.1.1.D, instrumentally inspired changes began in 1954 with \textit{Brown v. Board of Education},\(^3^5\) where a unanimous Court held that race discrimination in public education was inherently unequal, overruling \textit{Plessy} on this point. In 1964, Congress joined the drive against race discrimination by passing the Civil Rights Act of 1964, upheld as a valid exercise of congressional power under the Commerce Clause in \textit{Heart of Atlanta Motel v. United States} and \textit{Katzenbach v. McClung},\(^3^6\) discussed at § 18.2.4 nn.93-99.

In 1968, the Court considered in \textit{Jones v. Alfred H. Mayer Co.}\(^3^7\) the meaning and validity of 42 U.S.C. § 1982, which had been enacted in 1866 but remained largely dormant after the \textit{Civil Rights Cases}. Section 1982 provides, “All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.” In \textit{Jones}, the Court held that § 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 13\(^{th}\) Amendment. As discussed at § 28.2 nn.20-22, abandoning its apparently exclusive claim in the \textit{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 test of \textit{McCulloch v. Maryland}\(^3^8\) that “the end be legitimate, \ldots 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," and to translate its understanding into effective legislation.

\footnotesize
\begin{itemize}
\item \(^3^3\) 341 U.S. 651, 659-62 (1951).
\item \(^3^5\) 347 U.S. 483 (1954).
\item \(^3^6\) \textit{Katzenbach}, 379 U.S. 294 (1964); \textit{Heart of Atlanta Motel}, 379 U.S. 241 (1964).
\item \(^3^7\) 392 U.S. 409, 420-36 (1968).
\item \(^3^8\) 17 U.S. (4 Wheat.) 316, 421 (1819).
\end{itemize}
The Court also noted that in the Civil Rights Cases it had said that the burdens and disabilities of slavery included restraints on fundamental rights, such as the same right to purchase property as is enjoyed by white citizens. Dissenting in Jones, Justice Harlan, joined by Justice White, both Holmesians, said that the statute's words suggested a right to equal status under law and, thus, created a right only against state-sanctioned discrimination.\textsuperscript{39} This result – requiring state action under § 1982 – is consistent with the Holmesian-era case of Collins v. Hardyman, discussed at § 25.1 n.33, requiring state action under § 1985(3).

In 1971, the Court overruled Collins v. Hardyman in Griffin v. Breckenridge\textsuperscript{40} and held that §1985(3), an exercise of power under § 2 of the 13\textsuperscript{th} Amendment, extended to private conspiratorial violence based on "racial, or perhaps otherwise class-based, invidious discriminatory animus." In 1976, in Runyon v. McCrory,\textsuperscript{41} the Court extended Jones to § 1981 and the right protected by that section to make contracts. For these statutes to apply, however, proof of intent to discriminate is required, not mere discriminatory effects.\textsuperscript{42}

The Court has not yet decided whether exemptions in the Civil Rights Act of 1964 relating to private clubs or other private establishments should be read as an implied repeal of the unqualified provisions of §§ 1981 & 1982. Also open are questions of whether these sections should be read as not applicable to certain private relationships, such as relationships which may be protected by the First Amendment freedom of association, discussed at § 31.2.2. Concurring in Runyon, Justice Powell said that private choices that are not part of a commercial relationship offered generally or widely, and which reflect the selectivity exercised by individuals entering into a personal relationship, were not intended to be restricted by the 19th century Civil Rights Acts.\textsuperscript{43}

Based on the natural law great respect for precedent, the modern post-instrumentalist Court has not reversed or limited the instrumentalist precedents. But it has not used them to expand federal remedies for discrimination. For example, it has confined §§ 1981 & 1982 to "racial" discrimination and has not extended them to discrimination for national origin or religion.\textsuperscript{44} The Court has also not decided whether § 1985(3) is limited to cases involving racial animus, but there is no evidence that the present Court will exceed that limit. These cases are discussed at § 28.2 nn.23-30.

\textsuperscript{39} 392 U.S. at 450-76 (Harlan, J., joined by White, J., dissenting).

\textsuperscript{40} 403 U.S. 88, 102 (1971).


\textsuperscript{43} 427 U.S. at 186-89 (Powell, J., concurring).

The Citizenship Clause of § 1 of the 14th Amendment 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.” The central purpose of this clause was to overrule that part of the 1857 holding in *Dred Scott v. Sandford*\(^{45}\) that blacks were not and could not be citizens. Having citizenship is an important right because, among other things, a citizen may not be deported or excluded from the United States.\(^{46}\) Nor may Congress take away an American’s citizenship without his assent.\(^{47}\) Further, a citizen may chose to reside in any state and thus become a citizen of the state, with the same right as every other citizen in that state.\(^{48}\)

Article III, § 2 of the Constitution grants federal courts jurisdiction over "Controversies . . . . between Citizens of different States." In *Dred Scott v. Sandford*,\(^ {49}\) the Supreme Court declared that even free blacks could never be "Citizens" within the meaning of this provision. Speaking for the Court, Chief Justice Taney purported to base this decision on the original understanding of the Constitution. However, rather that determine the meaning of the diversity provision by examining the words or deeds of the framers and ratifiers concerning it, Taney relied upon his perception of the general racial views of white Americans from early colonial times until 1857. Taney stated:

> [I]t cannot be believed that the large slaveholding States regarded them [African-Americans] as included in the word citizens, or would have consented to a Constitution which might compel them to receive them in that character from another State. For if they were so received, and entitled to the privileges and immunities of citizens, it would exempt them from the operation of the special laws and from the police regulations which they considered to be necessary for their own safety. It would give to persons of the negro race, who were recognized as citizens in any one State of the Union, the right to enter every other State whenever they pleased, singly or in companies, without pass or passport, and without obstruction, to sojourn there as long as they pleased, to go where they pleased at every hour of the day or night without molestation, unless they committed some violation of law for which a white man would be punished . . . .\(^{50}\)

However, cases from the late 18th century refute this understanding of the framers and ratifiers’ intent. In a pair of interracial diversity cases captioned *Elkay v. Moss & Ives*, federal courts did permit free blacks to sue as citizens, and the cases were widely reported and did not cause any

\(^{45}\) 60 U.S. (19 How.) 393, 405, 426 (1857).


\(^{49}\) 60 U.S. (19 How.) 393, 405, 426 (1857).

\(^{50}\) Id. at 417.
consternation in either the North or South at the time.51 These cases demonstrate that free blacks could count for the purposes of federal diversity jurisdiction under the original Constitution.

In any event, without regard to whether Dred Scott was rightly or wrongly decided on this point in 1857, the 14th Amendment Citizenship Clause extended citizens to all persons born or naturalized in the United States, including former slaves as well as free blacks. An interesting question arose in 1870 whether a free black, Hiram Revels, clearly granted citizenship in 1868 by ratification of the 14th Amendment, could serve in the Senate, since under Article I, § 3, cl. 3, as noted at § 20.1.2.2, a person must be a citizen for at least 9 years to be a Senator. The Senate decided to seat Mr. Revels, rejecting the holding of Dred Scott, which would have meant Mr. Revels had only been a citizen for 2 years in 1870. The Senate instead viewed the 14th Amendment Citizenship Clause as merely restating the proper view that the person should have been considered a citizen all along.52

Under 8 U.S.C. § 1401, Congress has added three additional situations in which citizenship exists from birth: (1) persons born in the United States to members of Indian, Eskimo, Aleutian, or other sovereign aboriginal tribes, (2) persons born outside the United States to parents who are both citizens, where one of them has had a residence in the United States prior to the birth, and (3) persons born outside the United States where only one parent is a citizen and that person resides in the United States for a prescribed period of time. In Rogers v. Bellei,53 the Court upheld this third category against a challenge that the provisions in the 14th Amendment granted that person citizenship as a constitutional matter. For the Court, Justice Blackmun stated that 14th Amendment citizenship extends only to persons “born or naturalized in the United States,” and thus does not include an individual naturalized according to congressional statutes, but born outside the United States. For such an individual, Congress has the power to determine conditions on citizenship under the standard minimum rational review test that the condition is not an unreasonable, arbitrary, or unlawful application of Congress’ power over immigration and naturalization, as discussed at § 18.3.4.

Under 8 U.S.C. § 1401, Congress has provided that citizens have a right to renounce their United States citizenship. However, in Vance v. Terrazas,54 an instrumentalist-era precedent did not allow Congress legislatively to presume an intent to renounce citizenship upon the doing of certain acts, such as swearing allegiance to a foreign country. Even in that situation the government must prove that the act was done with the intent to relinquish citizenship. That intent can be proved, however, by only a preponderance of the evidence.


This area of law has remained stable in recent years as the post-instrumentalist Court has not decided any case that has significantly affected the attainment of citizenship. However, a number of recent cases have affected the rights of citizens versus aliens, discussed at § 26.2.2.

§ 25.3 The Fourteenth Amendment’s Privileges or Immunities Clause

The Privileges or Immunities Clause of § 1 of the 14th Amendment provides: “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.” The initial debate over this clause involved how to read the clause in concert with the Privileges and Immunities Clause of Article IV, § 2, against the backdrop of the 14th Amendment’s provisions regarding United States and state citizenship.

The first sentence in the 14th Amendment, the Citizenship Clause, clearly rejected Justice Taney’s analysis in Dred Scott that United States citizenship depended upon a person being a citizen of a state first, a status controlled by states, not the federal government. Instead, the Citizenship Clause said that “any person born or naturalized in the United States” is by that fact a “citizen of the United States and of the State wherein they reside.” Citizenship thus now depends upon federal protection in the 14th Amendment, and is not a state-created right.

Based upon this observation, one way to read the 14th Amendment Privileges or Immunities Clause would be to say that all the “fundamental” privileges and immunities which had been based upon state citizenship in the Article IV, § 2 Privileges and Immunities Clause, discussed at § 20.3.3, were now transferred to all United States citizens as defined by the 14th Amendment’s Citizenship Clause. This would include those rights recognized in Corfield v. Coryell as “fundamental,” e.g., rights to pass through, reside in, own property in, make contracts in, and engage in common occupations in a state on equal terms with citizens of that state. A second way to read the 14th Amendment Privileges or Immunities Clause would be to say that these “fundamental” rights are still protected only under Article IV, § 2, and thus determined by state practice, and that the 14th Amendment clause only protects rights uniquely a product of United States citizenship, not state citizenship.

General historical evidence surrounding the passage of the 14th Amendment suggests that the framers of 14th Amendment intended to adopt the first approach. For example, as has been noted, “[T]he 1866 campaign was a referendum on the congressional plan for Reconstruction, the centerpiece of which was the Fourteenth Amendment. Republicans reminded voters of Southern denials of free speech and other basic liberties and insisted that the Fourteenth Amendment would protect the


fundamental rights of American citizens.”

The 14th Amendment was also drafted against the backdrop of Northern attitudes toward Southern nullification of federal laws that had existed from 1830-1860. As has been noted:

The South Carolina Ordinance of Nullification barred compliance with the Federal Tariff Acts of 1828 and 1832, prohibited appeals to the United States Supreme Court, and declared that federal coercion would provoke secession. When the South Carolina Governor called for raising an army of 12,000, President Jackson countered by threatening to hang the leading nullifiers as traitors, and reinforced the military stationed in and around Charleston as evidence of his resolve. Congress defused the crisis by engineering a compromise that gave South Carolina much of the tariff reform it had sought. Although the congressional compromise resolved the immediate crisis, it merely postponed the Civil War, while fueling resentments leading up to that conflict.

In yet another challenge to federal authority, South Carolina officials seized and imprisoned black seamen who entered Charleston harbor. On behalf of the seamen, Judge Samuel Hoar traveled as an emissary from Massachusetts to Charleston to argue that the Privileges and Immunities Clause of Article IV protected all Massachusetts citizens, regardless of race. Shortly after his arrival, state officials informed Hoar that his life could not be protected, and the South Carolina legislature ordered his expulsion. In response to this affair, other southern states, including Georgia and Louisiana, rose to defend South Carolina’s efforts to protect "the exercise of their sovereign rights."

The confrontation in Charleston fueled congressional debates. Congressman Hudson added that he was angered not only by the fact that South Carolina had imprisoned a Massachusetts citizen, but also because the State of South Carolina had blocked appeal of that decision to the United States Supreme Court. From the beginning, references to the Hoar affair implicated not only the substantive rights of a black seaman and the Massachusetts judge who traveled to defend him, but also the underlying issue of national government authority to protect those rights.

Members of Congress who supported the Fourteenth Amendment began their political careers immersed in the series of state sovereignty claims that had provoked constitutional crises in the years leading up to the Civil War.

In contrast to viewing the 14th Amendment through the lens of this history of federal concern over state actions denying civil rights, the Supreme Court held in the Slaughter-House Cases that the Privileges or Immunities Clause protects only a short list of rights relating primarily to relationships between citizens and the federal government. This decision reflects more a formalist emphasis on

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57 Curtis, supra note 56, at 1134.


the literal text in the 14th Amendment Citizenship Clause distinguishing “citizens of the United States” and citizenship “of the State wherein they reside,” and the fact the Privileges or Immunities Clause applies to citizens of the United States, not citizens of a state, rather than the natural law greater focus on general historical evidence like the 1866 congressional campaign.

In determining what are the privileges and immunities of United States citizenship, the Court mentioned in the *Slaughter-House Cases* the rights: (1) to come to the seat of government and there do business with it, (2) to have free access to seaports through which all operations of foreign commerce are conducted, and to the subtreasuries, land offices, and courts of justice in the several States, (3) to demand protection from the federal government while on the high seas or within the jurisdiction of a foreign government, (4) peacefully to assemble and petition government for redress of grievances, (5) to have the privilege of the writ of habeas corpus, (6) to use the navigable waters of the United States, (7) to become a citizen of any State of the Union by *bona fide* residence therein, with the same rights as other citizens of that State, and (8) to be protected by the 13th, 14th, and 15th Amendments. The Court concluded the list by saying that “a citizen of the United States can, of his own volition, become a citizen of any State of the Union by a *bona fide* residence therein, with the same rights as other citizens of that state.” The individual would then also have the privileges and immunities belonging to state citizenship in that state.

As some authors have noted, if the First Amendment right peaceably to assemble and petition for redress of grievances is included as a federal privilege or immunity, it is not clear why other rights protected by the First Amendment or, indeed, the entire Bill of Rights, are not also considered privileges and immunities of citizens of the United States. Thus, the Court’s decision in the *Slaughter-House Cases* did not have to be read as narrowly as the Court did in the years following the case. An interpretation of the *Slaughter-House Cases* more faithful to the natural law base of the 14th Amendment is possible. The majority ruled in the case that the Privileges or Immunities Clause protects four kinds of rights, those that “owe their existence to the Federal government, its National character, its Constitution, or its laws.” Professor William Rich has noted in an article that although the majority opinion only gave a few examples of these rights:

With this language, and though these illustrations, [Justice] Miller had covered all the important bases. Privileges or immunities could be based upon (1) text that specifically limited states, (2) implied rights, such as the right to travel, (3) rights found in the first eight amendments to the Constitution, or (4) rights established through exercise of the power of Congress to pass laws or the power of the executive to make treatises. . . . Both Miller and [Congressman] Bingham [one of the principle architects of the 14th Amendment] argued that the Privileges or Immunities Clause did not create new substance, but rather reinforced laws and principles already encompassed by the Constitution. Both men articulated views consistent with incorporating the Bill of Rights and applying them to the states. And both men appeared to understand the

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61 83 U.S. at 79.
importance of reinforcing federal supremacy to assure that no states would again rely on claims of state sovereignty to evade responsibilities imposed by federal law.\textsuperscript{62}

This view of the \textit{Slaughter-House Cases} creates an opinion of greater impact, particularly when combined with Chief Justice Marshall’s more expansive view of congressional power under the Commerce Clause. That view, which is consistent with a natural law approach to the Commerce Clause, as discussed at § 12.3.2 nn.91-95, was used during the 1960s to make constitutional civil rights legislation regarding service at places of public accommodation in cases like \textit{Katzenbach v. McClung}.\textsuperscript{63} As discussed at §17.2.4.3 nn.248-57, this view would also mean that Congress can trump any 11\textsuperscript{th} Amendment argument of state sovereignty through a 14\textsuperscript{th} Amendment Privileges or Immunities Clause analysis granting each citizen a right against the state to have any constitutionally valid federal law enforced.

The Court’s treatment of the \textit{Slaughter-House Cases} as a precedent, however, has not lived up to this analysis. Instead, after 1873, the Court limited the \textit{Slaughter-House Cases} Privileges or Immunities Clause analysis during the formalist era to the literal examples given by Justice Miller of federal privileges and immunities. As discussed at § 18.2.2, the Court limited the Commerce Clause analysis to regulations literally involving commerce, not civil rights statutes that had a substantial affect on commerce. The Court did not return to the list for many decades, and the Privileges or Immunities Clause of the 14\textsuperscript{th} Amendment came to be regarded as pretty much a dead letter. As an example of one of the few cases to discuss the matter, the Court held in 1940 in \textit{Madden v. Kentucky}\textsuperscript{64} that the right to carry out an incident to a trade, business or calling, such as the deposit of money in banks, is not a privilege of national citizenship. Thus, a state could require residents to pay a higher tax on deposits in banks outside the state than in local banks.

As a practical matter, the Court reinstated the historical intent of the framers of the 14\textsuperscript{th} Amendment by creating the doctrine of substantive due process. As discussed at § 27.2, virtually all of the Bill of Rights are now applicable against the states by being viewed as incorporated into the 14\textsuperscript{th} Amendment Due Process Clause. As discussed at § 27.3, additional fundamental rights are protected under the unenumerated fundamental rights analysis of those rights “implicit in the concept of ordered liberty” under the 14\textsuperscript{th} Amendment Due Process Clause. As discussed at § 28.2 nn.20-25, that aspect of \textit{Corfield v. Coryell} dealing with equal rights to make contracts and own property are protected under 42 U.S.C. §§ 1981-1982, which have been held to be constitutionally valid as part of Congress’ enforcement power under the 13\textsuperscript{th} Amendment. One consequence of this is that by protecting these rights under the 13\textsuperscript{th} Amendment or the 14\textsuperscript{th} Amendment Due Process Clause, rather than the Privileges or Immunities Clause, all persons, not merely citizens, are granted these fundamental rights, an expansion of the protections given to aliens.

Given the result in the \textit{Slaughter-House Cases} and its progeny, however, the Privileges or Immunities Clause of the 14\textsuperscript{th} Amendment lay relatively dormant for 150 years. However, in \textit{Saenz

\textsuperscript{62} Rich, \textit{supra} note 58, at 182-84.  

\textsuperscript{63} 379 U.S. 294, 299-305 (1964).  

\textsuperscript{64} 309 U.S. 83, 90-93 (1940).
v. Roe, the Court held that the right to travel and move from one state to another, is protected not only by the first sentence of Article IV, § 2, but also by the Privileges or Immunities Clause of the 14th Amendment. Further, that protection includes the right of a newly arrived citizen to the same privileges and immunities enjoyed by other citizens of the same state. Writing for a 6-3 Court, Justice Stevens noted in Saenz that the "right to travel" embraces at least three different components. It protects: (1) the right of a citizen of one state to enter and to leave another state; (2) the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second state; and (3) for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State.

Regarding the first of these rights, Justice Stevens noted that while the Court’s precedents have clearly identified such a right, the Court has never identified:

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.”

Under this right, the ability of Congress to make criminal one person taking another person across state lines for purposes of lawful activity in that second state, such as passing a bill to outlaw adults taking minors across state lines to evade the parental notification provisions regarding abortions in one state by transporting them to another state that does not have such parental notification requirements, would be of questionable constitutionality as infringing on individuals’ right to travel.

A second component of the right to travel is protected by constitutional text. Justice Stevens noted:

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, 19 L. Ed. 357 (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").

The 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 that state is protected by the 14th Amendment’s Privileges or Immunities Clause. Justice Stevens stated:

66  Id. at 501 (citations omitted).
67  Id. at 501-02.
The Framers of the Fourteenth Amendment modeled this Clause upon the "Privileges and Immunities" Clause found in Article IV. Cong. Globe, 39th Cong., 1st Sess., 1033-1034 (1866) (statement of Rep. Bingham). In Dred Scott v. Sandford, 19 How. 393, 15 L.Ed. 691 [1857], this Court had limited the protection of Article IV to rights under state law and concluded that free blacks could not claim citizenship. The Fourteenth Amendment overruled this decision. The Amendment's Privileges or Immunities Clause and Citizenship Clause guaranteed the rights of newly freed black citizens by ensuring that they could claim the state citizenship of any State in which they resided and by precluding that State from abridging their rights of national citizenship.

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, it has always been common ground that this Clause protects the third component of the right to travel.68

Justice Stevens quoted from the Slaughter-House Cases that such a new citizen has “the same rights as other citizens of that state.”69 Stevens continued that discriminations against new citizens are to be tested strictly, which presumably means the state must show a compelling purpose and means necessary to advance that purpose. Regarding justifications for discrimination between newly arrived and already established residents, a purpose to deter welfare applicants from migrating is impermissible,70 as is an interest in saving money by discriminating among equally eligible citizens.71 Thus, Saenz v. Roe invalidated a California statute which for one year limited welfare grants to new residents to the amount payable by the state of the family’s previous residence.

The extent to which this case will apply as a precedent to any other form of discrimination against new residents remains to be seen. However, the language in Saenz is quite broad and, unlike the rights protected by Article IV, § 2, discussed at § 20.3.3.2 n.298-300, does not appear to be limited to interests sufficiently basic to the livelihood of the nation. Further, Justice Stevens appeared to extend to Article IV, § 2 the non-discrimination principle of the 14th Amendment Privileges or Immunities Clause, when, he said:

There may be a substantial reason for requiring the nonresident to pay more than the resident for a hunting license, see Baldwin v. Fish and Game Comm’s of Mont., 436 U.S. 371 (1978) or to enroll in the state university, see Vlandis v. Kline, 412 U.S. 441, 445 (1963), but our cases have not identified any acceptable reason for qualifying the protection afforded by the Clause for “the citizen of State A who ventures into State B” to settle there and establish a home.’ Zobel, 457 U.S., at 74 (O’Connor, J., concurring in judgment). Permissible justifications for discrimination between residents and nonresidents are simply inapplicable to a nonresident's

68 Id. at 502-03 & n.15.
69 Id. at 503.
70 Id. at 506.
71 Id. at 506-07.
exercise of the right to move into another State and become a resident of that State.\textsuperscript{72}

This language is sufficiently broad that it seems unlikely for \textit{Saenz v. Roe} to be confined as a precedent to situations where the state of new residence denies a benefit vital to either the new resident or the nation. Additional aspects of the right to travel under the Equal Protection Clause are discussed at § 26.5.1.

Chief Justice Rehnquist, in dissent with Justice Thomas, pointed out that the text of Article IV, § 2 limits its protection to nonresidents. He also objected that the majority’s approach in \textit{Saenz} unreasonably restricted the power of a state to assure that only persons who establish a bona fide residence receive the benefits provided to current residents of the state. Justice Rehnquist said that the California law did not impose any obstacle to entry into California and so there was no infringement on any right to travel.\textsuperscript{73}

Absent any fundamental right being involved, Justice Rehnquist indicated that only minimum rational review should be applied, as discussed at §§ 26.4.1 & 27.1.2.1. Under such a standard of review, California's use of a durational residence requirement, as in \textit{Sosna v. Iowa}\textsuperscript{74} and \textit{Vlandis v. Kline},\textsuperscript{75} discussed under the fundamental right to travel at § 26.5.1 nn.493-95, was a reasonable means for testing the bona fides of an individual's claim to residence. Justice Thomas, dissenting in \textit{Saenz}, also noted that repeated references to the \textit{Corfield} decision by members of the 39\textsuperscript{th} Congress supports the inference that they understood the “privileges or immunities of citizens” to be fundamental rights, rather than every public benefit established by positive law.\textsuperscript{76}

\section{25.4 The Fifteenth Amendment’s Ban on Race Discrimination in Voting}

The 15\textsuperscript{th} Amendment provides: “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.”

The 15\textsuperscript{th} Amendment was an improvement over the provisions in the 14\textsuperscript{th} Amendment on voting. The provisions in § 2 of the 14\textsuperscript{th} Amendment merely provided that the denial of the right to vote to any male citizen otherwise qualified to vote (21 years of age and a citizen), except on grounds of “participation in rebellion, or other crime,” would result in reduction of the state’s number of representatives to Congress “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.” This provision was

\textsuperscript{72} \textit{Id.} at 502.

\textsuperscript{73} \textit{Id.} at 516 (Rehnquist, C.J., joined by Thomas, J., dissenting).

\textsuperscript{74} 419 U.S. 393 (1975).

\textsuperscript{75} 412 U.S. 441 (1973).

\textsuperscript{76} \textit{Saenz}, 526 U.S. at 527 (Thomas, J., joined by Rehnquist, C.J., dissenting).
primarily intended to deal with the fact that under § 1 of the 14th Amendment, which made all persons born in the United States citizens, including former slaves, the representation of the South in Congress would increase as former slaves would now be counted as full persons, not 3/5 of person, as under the original Constitution in Article I, § 2, cl. 3, discussed at § 25.1 text following n.6. If counted as full persons, even though the South had lost the Civil War, “the elite white South would return to the Congress with even more political power in the House of Representatives and the electoral college. African Americans would have no more right to vote after slavery than before slavery; but the white elite that had caused such a costly war would increase its political power by the addition of two fifths of the African American population in the apportionment process.” Under § 2 of the 14th Amendment, “If all African Americans were excluded from voting, Section 2 could actually reduce the voting power of a southern state that limited votes to white males. In theory, this would force the states to choose between increased representation with black voters or reduced representations and the ability to exclude black voters.”

In practice, the reconstituted Southern state governments established during Andrew Johnson’s presidency immediately after the Civil War limited suffrage to white males. Indeed, as has been noted, “As late as 1867, blacks were enfranchised in only five New England states and, subject to a discriminatory property requirement, in New York. State after state rejected black suffrage proposals in popular referenda between 1865 and 1867: Minnesota, Wisconsin, Connecticut, Kansas, Ohio, and New York.” Ratified in 1870, the 15th Amendment changed all of those practices as a constitutional imperative.

As with the 13th and 14th Amendments, the protections of the 15th Amendment can be enforced directly by the courts, through a civil action brought under 42 U.S.C. § 1983. During the early part of the formalist era, the Court made clear that laws intentionally discriminating on the basis of race were invalid. Using ancestry as a proxy for race in determining voting qualifications has also been declared unconstitutional.

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77 Aynes, supra note 19, at 314.


79 Guinn v. United States, 238 U.S. 347, 363 (1915) (the court struck down a grandfather clause which exempted from a literacy test for voting all lineal descendants of persons entitled to vote or residing in some foreign nation on January 1, 1866).

80 Neal v. Delaware, 103 U.S. 370, 390-97 (1881) (adoption of the 15th Amendment rendered inoperative a provision in the then-existing Constitution of Delaware, whereby the right of suffrage was limited to the white race; a statute confining the selection of jurors to persons possessing the qualifications of electors is enlarged in its operation so as to embrace all those who, by the Constitution of the State, as modified by the 15th Amendment, are entitled to vote).

During the early and mid-1900s, many states disenfranchised African-Americans from voting by the use of grandfather clauses, procedural hurdles, primary elections open only to whites, improper voting challenges, racial gerrymandering, and discriminatory application of voting tests. These efforts were gradually struck down in a long series of cases decided during formalist and Holmesian eras. Some of these cases used the 15th Amendment, and some of them found a lack of equal protection under the 14th Amendment. A few such cases continued to come before the Court during the instrumentalist era.

Throughout all of this time there were on the books a number of statutes enacted by Congress that were intended to prevent racial discrimination in voting practices. For example, the Enforcement Act of 1870 made it illegal for public officials or private persons to obstruct the right to vote. In 1871, Congress created some federal supervision of elections by requiring the certification of election returns. And, during the first part of the instrumentalist era, there were renewed efforts designed to enhance judicial enforcement of the Constitution. For example, the Civil Rights Act of 1957 empowered the Attorney General to sue to enjoin public and private racial interference with the right to vote. Later statutes gave the Attorney General the right to see local records and authorized courts to register voters in areas of systematic voting discrimination. All of these efforts were approved by the Court as “appropriate” legislation.

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82 Nixon v. Herndon, 273 U.S. 536 (1927) (blacks denied the vote in a primary election; 14th Amendment violated); Lane v. Wilson, 307 U.S. 268 (1939) (15th Amendment violated by statute granting voters not qualifying under a grandfather clause only 12 days in which to register to vote); Nixon v. Condon, 286 U.S. 73 (1932) (exclusion of voters on racial grounds by a party executive committee authorized to do so under state law violates the 14th Amendment); Smith v. Allwright, 321 U.S. 649 (1944) (15th Amendment must be complied with during primary elections); Terry v. Adams, 345 U.S. 461 (1953) (15th Amendment is violated by a state which allows the operation of an all-white primary that in practice determines the outcome of Democratic primary elections).

83 Gomillion v. Lightfoot, 364 U.S. 339 (1960) (drawing city boundaries to exclude almost all black voters violates the 15th Amendment); Louisiana v. United States, 380 U.S. 145 (1965) (15th Amendment violated by granting registrars unreviewable discretion in deciding who understands a state or federal constitutional provision and thus who may vote, where that discretion had been used to deny blacks the right to vote).

84 16 Stat. 170.

85 16 Stat. 433.

86 71 Stat. 634.

87 74 Stat. 86.

Unfortunately, all these judicial remedies and congressional statutes dealt with confined situations and were circumvented on a large scale in some states. As a practical matter, most African-Americans were denied meaningful voting rights in the South from the 1880s through the mid-1960s, as discussed at § 14.1 n.1.

The turning point came when Congress, to provide more effective enforcement of the 15th Amendment, enacted the Voting Rights Act of 1965.89 The Act created a coverage formula and provided many remedies if a political subdivision was covered. Coverage applied to any state, county, parish, or similar political subdivision that on November 1, 1964 was determined by the Attorney General to maintain a “test or device” to qualify voting rights where less than 50% of its voting age residents were registered on November 1, 1964 or voted in that year’s presidential election. The term “test or device” was defined as a requirement that the registrant be able to read or interpret any matter, demonstrate any educational achievement or knowledge of any particular subject, or possess good moral character, or prove his voting qualification by the voucher of registered voters or others.90

If these criteria were met, the Attorney General could suspend voting tests and send federal voting examiners into the state. Under the Voting Rights Act, a state could block enforcement by proving in court that it had not engaged in racial discrimination in voting.91 A covered state or political subdivision could not change its election qualifications or procedures without approval of the Attorney General.92 Although phrased in race-neutral terms, the states or political subdivisions covered by the Act were predominantly those where the less than 50% registration of voting age residents had been caused by denial of voting rights to minorities, particularly African-Americans in the South.

In South Carolina v. Katzenbach,93 the Court upheld the Voting Rights Act as “appropriate” legislation. The majority opinion by Chief Justice Warren established several principles that were thereafter applied by the Court during the instrumentalist era:

1. “Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting.”
2. The determination of what means are rational is to be made by applying the standard announced in McCulloch v. Maryland regarding the express powers of Congress as related to the reserved powers of the States,”
3. Congressional power is not limited to forbidding violations of the 15th Amendment; Congress may create specific remedies, and the remedies provided by the Voting Rights

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90 Id. § 1973b(b).
91 Id. § 1973b(a), (d).
92 Id. § 1973(b).
Act are rational in both theory and practice as a means of combating the evils revealed by congressional investigations.\textsuperscript{94}

Congress later abolished literacy tests on a nationwide basis, and the Court held this constitutional in 1970.\textsuperscript{95} However, the string of court victories for civil rights groups in cases on race discrimination in voting came to a halt when the court ruled in 1980, in \textit{Mobile v. Bolden},\textsuperscript{96} that Congress intended that laws which “deny or abridge” the right to vote be identified by proof of discriminatory purpose, not merely discriminatory effects. This holding set off a heated debate in Congress, which was legislating to extend the Act. Civil rights groups said that the purpose test imposed an unduly burdensome hurdle in litigation. Supporters of \textit{Mobile v. Bolden} said that a results standard would lead to the eventual use of quotas and racially proportional representation. A compromise was finally agreed upon, signed by President Reagan in 1982, and codified at 42 U.S.C. § 1973, which provides:

2(a) “[n]o voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied [in] a manner which results in a denial or abridgement of the right [to] vote on account of race or color, or in contravention of the guarantees [provided in subsection (b)];

2(b) [A violation is established] “if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election [are] not equally open to participation by members of a [protected] class of citizens [in] that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office [is] one circumstance which may be considered: \textit{Provided}, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion of the population.”

The above compromise qualifies the results orientation announced in § 2(a) with violations limited in § 2(b) to situations in which political processes are not equally open to members of a protected class, and the rejection in § 2(b) of any right to proportional representation.

As the Court has moved into the post-instrumentalist era, its opinions have expressed an increasing concern that congressional remedies not be primarily an effort to enhance elected minority representation, rather than an effort to remedy past race discrimination in voting and to prevent such discrimination in the future. The series of cases includes a transformation of what is considered “appropriate” under the 14\textsuperscript{th} as well as the 15\textsuperscript{th} Amendment, it being assumed that the word has the same meaning for both Amendments. The cases trace back to \textit{South Carolina v. Katzenbach} and \textit{Katzenbach v. Morgan}. They are discussed at §§ 28.3-28.4, along with other cases dealing with the issue of congressional enforcement of the Civil War Amendments.

\textsuperscript{94} \textit{Id.} at 324-26, \textit{citing McCulloch}, 17 U.S. 316, 421 (1819).


\textsuperscript{96} 446 U.S. 55, 62-65 (1980).
The second line of post-instrumentalist cases relating to the 15th Amendment ban on race discrimination in voting have dealt with the inappropriate use of race as a predominant guide in redistricting. Although the cases relate ultimately to that right, the Court has dealt with the matter under the Equal Protection Clause of the 14th Amendment. These cases are discussed at § 26.2.1.5.
CHAPTER 26: THE EQUAL PROTECTION CLAUSE


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, discussed at § 26.2.3.1.B n.178, 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 a later case, Weinberger v. Wiesenfeld, the Court noted 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 Hampton v. Mow Sun Wong, 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, "[E]qual protection obligations imposed by the Fifth and Fourteenth Amendments [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, discussed at § 26.2.2.2 nn.346-47] 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 discussed under the state action doctrine at § 21.1. 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.

The Court’s decision in Bolling was unanimous, and no Justice since Bolling has expressed disagreement with the proposition that equal protection principles apply to the federal government through the Fifth Amendment Due Process Clause. Admittedly, arguments can be made that prior

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3  426 U.S. 88, 100 (1976).
to the 14th Amendment the federal government was not bound, and Congress did not consider itself bound, by equal protection principles. Further, it can be argued that nothing in the history or drafting of the 14th Amendment, or congressional practice soon thereafter, was intended to change that result. Indeed, the text that became the Equal Protection Clause “expressly bound both the states and the national government when originally presented to the Joint Committee on Reconstruction by Thaddeus Stevens on April 21, 1866,” but after “a week of consideration, the Joint Committee removed the provision's express application to the federal government when on April 28 – after Republican party caucusing – it replaced Stevens's original proposal with John Bingham's substitute formulation [which became the current version with its state-centered text] just before finalizing its workproduct.”6 Nevertheless, given the unanimous view of the Justices since Bolling to the contrary, application of equal protection principles to the federal government is, practically speaking, a matter of “settled law.” “Settled law” is defined at § 4.3.2 nn.79-85.

Binding all levels of government to principles of equal protection is consistent not only with a literal commitment to equal citizenship of a society at the formalist Stage 4 level of moral reasoning, discussed at § 15.4.1 nn.60-65, but also is consistent with the commitment of a society at Stage 6 to giving each individual equal concern and respect, discussed at § 15.4.1 nn.77-79, including those individuals traditionally or customarily discrimination against at Stage 4. In America, this included minorities, women, the mentally or physically disabled, and illegitimate children, among others. It is also consistent with full elaboration of the meaning of the Declaration of Independence and its promise that all individuals are endowed with equal inalienable rights to life, liberty, and the pursuit of happiness, discussed at § 15.4.1 n.80. For this reason, if the Court ever changed this aspect of equal protection doctrine, political pressures based upon broad-based belief today in rights to equal treatment would likely cause Congress to propose, and 3/4 of the states to ratify, a constitutional amendment binding the federal government to equal protection principles anyway.

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6 Siegel, supra note 5, at 571-72. On the history and drafting of the 14th Amendment regarding applicability to the federal government, see generally id. at 547-90; David E. Bernstein, Bolling, Equal Protection, Due Process and Lochnerphobia, 93 Geo. L.J. 1253, 1257-61 (2005) (summarizing scholarly critiques of Bolling from the perspective of original intent, including noting that while John Hart Ely in his book, Democracy and Distrust 32 (1980), called the Bolling decision "gibberish both syntactically and historically," writing twenty years or so later he argued that "it was the office of the Equal Protection Clause unequivocally to apply to the states a command of equality of the sort that the original framers, and [the Supreme] Court among others, had already acknowledged in various contexts to be constitutionally applicable to the federal government." John Hart Ely, John Hart Ely (concurring in the judgment except as to the remedy), in What Brown v. Board of Education Should Have Said 135, 139 (Jack M. Balkin ed., 2001)).
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, as discussed at § 26.2.2. Corporations, as well as partnerships or individual proprietorships, have also been held to be “persons” entitled to equal protection of the laws.7 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,8 “[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.”9

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.9 However, as stated in one early case in 1897, Gulf, Colorado & Santa Fe Railroad Co. v. Ellis,10 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 Railway Express Agency, Inc. v. New York,11 “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:

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7 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).

8 528 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).

9 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).

10 165 U.S. 150, 155 (1897).

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.12

The elements of this “rational” basis review are discussed at § 26.1.1.1. The elements of “heightened review” are discussed at § 26.1.1.2. The factors used by the Court to determine if a fundamental right or an inherently suspect characteristic is involved are discussed at § 26.1.2. Additional elements of the structure of Equal Protection Clause review related to the “presumption” of constitutionality mentioned in Nordlinger are discussed at §§ 26.1.3 & 26.1.4.

§ 26.1.1 Equal Protection Standards of Review

§ 26.1.1.1 The Rational Basis Test

As the Court noted in Nordlinger v. Hahn, cited at § 26.1 n.12, “[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.” 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 involve the health, safety, or general welfare of the people. In practice, 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.13

The specific 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

12 505 U.S. 1, 10 (1992).
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 punishment for crimes committed against them.\textsuperscript{14}

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 14\textsuperscript{th} Amendment was to make it clear that the Civil Rights Act of 1866 was constitutional.\textsuperscript{15} Given this history, the Court has always held that a bare desire to discriminate on racial grounds constitutes an illegitimate governmental interest.\textsuperscript{16} The Court has also held that "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."\textsuperscript{17} 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;\textsuperscript{18} prejudice against persons who enter into an interracial marriage;\textsuperscript{19} prejudice against the mentally impaired;\textsuperscript{20} and animus against individuals

\textsuperscript{14} See generally Robert J. Kaczorowski, Congress’s Power to Enforce the Fourteenth Amendment Rights: Lessons from Federal Remedies the Framers Enacted, 42 Harv. J. Legis. 187, 241-46 (2005), and sources cited therein; Peter Wallenstein, Blue Laws and Black Codes: Conflicts, Courts, and Change in Twentieth-Century Virginia 4-5 (2004) (discussing such codes in the state of Virginia); Eric Foner, Nothing But Freedom: Emancipation and its Legacy 49 (1983). More information about the Black Codes, including copies of various states’ Codes, is available through Internet search engines using the term “Black Codes” and then clicking on appropriate sites.

\textsuperscript{15} See Michael C. Dorf, Equal Protection Incorporation, 88 Va. L. Rev. 951, 958 n.22 (2002), citing, inter alia, Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 67-71 (1872); Akhil Reed Amar, The Supreme Court, 1999 Term — Foreward: The Document and the Doctrine, 114 Harv. L. Rev. 26, 64 (2000); Michael W. McConnell, The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin's "Moral Reading" of the Constitution, 65 Fordham L. Rev. 1269, 1281 (1997) ("The clearest and most indisputable purpose of the Fourteenth Amendment was to provide constitutional authority for the Civil Rights Act of 1866, which outlawed the Black Codes.").

\textsuperscript{16} See, e.g., Yick Wo v. Hopkins, 118 U.S. 356, 373-74 (1886).

\textsuperscript{17} United States Dep’t of Agriculture v. Moreno, 413 U.S. 528, 534 (1973).

\textsuperscript{18} 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”).


\textsuperscript{20} 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).
based upon their sexual orientation.\textsuperscript{21}

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.\textsuperscript{22}

In addition, in 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.”\textsuperscript{23} Thus, it has been noted, “The traditional deference both to legislative purpose \textit{i.e., legislative interests or ends] and to legislative selections among means continues, on the whole, to make the rationality requirement largely equivalent to a strong presumption of constitutionality.”\textsuperscript{24} For this reason, this standard of review is often called minimum rational review, because the government action only need be minimally rational to be upheld.

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 some 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 those 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. 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 has stated, “[e]qual protection doesn't require that all evils of the same genus be eliminated or none at all.”\textsuperscript{25} The legislature can adopt a step-by-step approach, as long as each step is rational in terms of which part of the problem is regulated first.

\textsuperscript{21} Romer v. Evans, 517 U.S. 620 (1996) (“animus” against a politically unpopular group, in this case animus based upon sexual orientation, an illegitimate governmental interest).

\textsuperscript{22} \textit{See, e.g.,} Heller v. Doe, 509 U.S. 312, 320 (1993).

\textsuperscript{23} \textit{Id.} at 319, \textit{citing} New Orleans v. Dukes, 427 U.S. 297, 303 (1976) (\textit{per curiam}).

\textsuperscript{24} Laurence H. Tribe, \textit{American Constitutional Law} § 16.3, at 1442-43 (2d ed. 1988). \textit{See also} Erwin Chemerinsky, \textit{Constitutional Law: Principles and Policies} 652 (2d ed. 2002) (“The Supreme Court generally has been extremely deferential to the government when applying the rational basis test. . . . [I]t is very rare for the Supreme Court to find that a law fails the rational basis test.”).

A classic example of the Court’s “underinclusiveness” analysis occurred in Railway Express Agency, Inc. v. New York. In this case, involving a ban on advertising on vehicles, the Court upheld an exemption for vehicles engaged in the usual business of the owner and not used mainly for advertising. The legislature’s legitimate interest in the case was a concern that advertisements on the sides of trucks would be a distraction to other drivers and pedestrians, and that distraction would cause a traffic safety problem. Such distraction would be caused both by ads for other businesses on the side of a truck, which was prohibited under the statute, and by ads for the truck owner’s own business, which was permitted. Despite this underinclusiveness in the statute, 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 the way in which the Court’s typical deference to the legislature influenced the outcome of this case. 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. Nor did the government have the burdening of introducing evidence into the case record on this point. 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 that such a conclusion was not shown by the challenger to be “irrational.”

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.’” On the other hand, a statute that burdens innocent persons for no rational reason will be held to be irrationally overinclusive. As the Court has noted, “The question is whether Congress achieved its purpose in a patently arbitrary or irrational way.”

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27 Id. at 110.


29 Fritz, 449 U.S. at 177.
The case of *New York City Transit Authority v. Beazer*\(^{30}\) provides a good example of the Court’s overinclusiveness analysis. *Beazer* involved a New York City Transit Authority policy not to employ persons who use methadone. At the time, methadone was used in New York as a treatment program to help individuals cure their addiction to heroin. Because of traffic safety concerns, the Transit Authority did not want persons on heroin working for the Transit Authority, and there was evidence that some individuals in the methadone treatment program, perhaps as many as 20-30%, would relapse and start taking heroin again.

Although the complete ban on employment was overinclusive, in that perhaps 70% of the methadone users would have no on-going drug problem with heroin, the Court held that the ban was not “irrationally” overinclusive. Absent proof that the “offending 30% could be excluded as cheaply and effectively in the absence of the rule,” the Court held that “the degree of rationality” was sufficient to make the ban constitutional. The Court acknowledged that the Transit Authority’s rule was likely “broadly than necessary to exclude those methadone users who are not actually qualified to work” and that it may be “unwise for a large employer like [the Transit Authority] to rely on a general rule instead of individualized consideration of every job applicant,” but that “represents a policy choice . . . made by that branch of Government vested with the power to make such choices.”\(^{31}\)

### § 26.1.1.2 Heightened Scrutiny Tests

As indicated in *Nordlinger v. Hahn*, cited at § 26.1 n.12, “[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 factors used by the Court to determine if a fundamental right or a suspect characteristic is involved are discussed at § 26.1.2. The remainder of this section will discuss the elements of heightened Equal Protection Clause review.

The creation of these heightened levels of review came about gradually. As discussed at § 26.1.2.2 nn.68-72, the possibility that the Court might apply a higher standard of review than rational basis when considering constitutional clauses that protect civil rights was first suggested explicitly in 1938 in footnote 4 of *United States v. Carolene Products Co.*\(^{32}\) 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*.\(^{33}\) A similar phrase, "most rigid scrutiny," was mentioned


\(^{31}\) Id. at 592 (citations omitted).

\(^{32}\) 304 U.S. 144, 152 n.4 (1938).

\(^{33}\) 316 U.S. 535, 541 (1942).
by the Court in 1944 in one of the Japanese internment cases, *Korematsu v. United States*.34 In *Griswold v. Connecticut*,35 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*,36 where miscegenation 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.’" The Court in *Graham v. Richardson*,37 in 1971, spoke of "strict 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 the 1973 opinion of Justice Brennan in *Frontiero v. Richardson*,38 an opinion which announced the judgment of the Court, but which was joined by only a plurality composed of Justices Douglas, 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*.39 In 1967, the Court referred in *Loving v. Virginia*40 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*,41 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*,42 at intermediate

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34 323 U.S. 214, 216 (1944).
36 388 U.S. 1, 11 (1967).
39 354 U.S. 234, 265 (1957) (Frankfurter, J., joined by Harlan, J., concurring in the judgment).
40 388 U.S. 1, 11 (1967).
42 429 U.S. 190, 197 (1976).
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.43 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, discussed at § 26.3.1.2.

As applied, these two versions of heightened scrutiny – strict scrutiny (for suspect characteristics)
and intermediate review (for quasi-suspect characteristics) – 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 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.44 On the other hand, certain interests, like diversity in broadcast programming, may be
important, but are not compelling.45 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.46 Examples
of other interests that have been assumed to be compelling by judges while deciding cases are
national security and military defense,47 compliance with the Voting Rights Act,48 improving the
delivery of health-care services to communities currently underserved,49 operation of a research-

43 See, e.g., Michael M. v. Superior Court, 450 U.S. 464, 497 n.4 (1981) (Stevens, J.,
dissenting) (contrasting “mid-level review” from “strict scrutiny”).

money, and effort . . . do not suffice to justify a gender-based discrimination in the distribution of
employment-related benefits.”).

45 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.”).

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.”).

47 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).


oriented elementary school dedicated to improving the quality of education in urban public
schools, and the reduction of racial isolation in a situation that appeared to be de facto
segregation.

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. At intermediate
scrutiny, the statute must be “substantially related” to advancing its ends, not merely “rationally
related,” as under rational basis review. Under strict scrutiny, the statute must be “necessary” to
further the statute’s ends, which means, in part, that the statute must be the “least restrictive” or
“least burdensome” way of effectively advancing the governmental ends. 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. A statute which is so poorly drafted that it
does not regulate such a “substantial” number of problem individuals will be too underinclusive to
satisfy intermediate review. For example, the ad ban in *Railway Express*, discussed at § 26.1.1.1
nn.26-27, while rational, probably was not “substantially related” to achieving its ends because its
exception of ads for the truck owners’ own business probably left too many individuals unregulated
by the act to satisfy the substantial relationship test.

This analysis underscores an important fact about the underinclusiveness inquiry. 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. Since 1976, however, such a regulation of advertisements would raise a First
Amendment problem under the Court’s current commercial speech doctrine, discussed at § 30.3.2.

With regard to overinclusiveness, the statute at intermediate review must not burden “substantially
more individuals than necessary” to achieve its ends. The *Beazer* case, discussed at § 26.1.1.1
nn.30-31, provides a good example of this. While the complete ban on hiring methadone users was
held rational by the Court in *Beazer*, had the Court applied intermediate review, the fact that

50 Hunter ex rel. Brand v. Regents of the Univ. of Cal., 190 F.3d 1061, 1063-64 (9th Cir. 1999).
51 Brewer v. The West Irondequoit Central Sch. Dist., 212 F.3d 738, 752 (2d Cir. 2000).
52 *See* Chemerinsky, *supra* note 24, at 645 (“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.”).
53 *See id.* (“Under strict scrutiny a law is upheld if it is proved necessary to achieve a
compelling government interest. The government . . . must show that it cannot achieve its objective
through any less discriminatory alternative.”).
according to the Court’s opinion probably 70% 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 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 typically not an important or substantial governmental interest that can be used to justify governmental action at intermediate review.

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. 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 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 ends. This means that any unnecessary underinclusiveness will render the statute unconstitutional at strict scrutiny. 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 some problem with the regulation, will satisfy the strict scrutiny underinclusiveness test.

The Court typically phrases this requirement in the negative, that is, by stating that at strict scrutiny the statute must be “necessary” to advance the government’s compelling interest. 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 further clear that this requirement of a direct relationship does exist at strict scrutiny. As discussed at § 30.3.2.1 nn.217-30, 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 explicitly 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, discussed at § 30.3.2.1 nn.228-30. Thus, since a “direct relationship” is required in commercial speech cases, a fortiori such a requirement must be required at strict scrutiny.

54 440 U.S. at 589.

55 See supra note 44.

56 See supra note 53.
Finally, it is important to note that 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 underinclusiveness analysis is to note that at rational basis review the statute must be rationally related to achieving its ends; at intermediate scrutiny the statute must be rationally and substantially related to achieving its ends; at strict scrutiny, the statute must be rationally, substantially, and directly related to achieving its ends.

One example of the difference that the “direct relationship” test makes in deciding Equal Protection Clause cases comes from the race-based affirmative action cases. Under the strict scrutiny approach toward race-based affirmative action programs adopted in Richmond v. J.A. Croson Co., discussed at § 26.2.1.4.C n.234-36, if the state’s compelling government interest is to remedy its own prior racial discrimination, only remedial steps “directly related” to remedying that discrimination will be constitutional. As indicated in Wygant v. Jackson Board of Education, discussed at § 26.2.1.4.C n.226, “indirect” means, such as hiring to create role models to help overcome racial discrimination at some future time, do not satisfy strict scrutiny. In contrast, under intermediate review, as existed for federal race-based affirmative action between 1990 and 1995 under Metro Broadcasting v. FCC, discussed at § 26.2.1.4.D nn.239-41, encouraging broadcast diversity through the “indirect” means of a preference for minority ownership, rather than “direct” regulation of content diversity, was used to satisfy the “substantial relationship” requirement of intermediate review.

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 establishing that the particular statute which the legislature did adopt meets strict scrutiny. In each case, the government must show that the statute adopted was, in fact, directly related to advancing the government’s compelling interest in a manner that employed the least burdensome effective alternative. Specifically, 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.

A Table summarizing each of the elements of minimum rational review, intermediate review, and strict scrutiny, discussed here at § 26.1.1, appears in Table 7.2, at § 7.2.1 text following n.42.

§ 26.1.2 Determining Whether Heightened Scrutiny Should Apply

§ 26.1.2.1 The Basic Guidelines for Heightened Scrutiny Today

As noted at § 26.1 n.12, under Equal Protection Clause doctrine the Court first must determine what standard of review to adopt in each case – rational review, intermediate scrutiny, or strict scrutiny. The Court does this in each case by considering a myriad of factors that counsel the Court either to defer to legislative judgment, in which case rational review is employed, or counsel the Court to be suspicious of the legislative action, in which case some form of heightened scrutiny is applied. Over time, the Court has clarified the standard of review to be applied in most cases under the Equal Protection Clause, so that lower courts today are supplied with reasonably clear and predictable guidance on what standard of review to apply in most cases. These specific standards of review for
different kinds of Equal Protection Clause cases are discussed at §§ 26.2-26.5. The discussion here will indicate how the Court determines what standard to apply in each case.

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, equally 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. As the Court has noted, “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.”\(^{57}\) 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."\(^{58}\) Thus, cases involving race, ethnicity, or national origin traditionally trigger the highest kind of Equal Protection Clause review – strict scrutiny in today’s terminology.

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, under a proper theory of constitutional interpretation, 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\(^{59}\); 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 unpredictability in the law.\(^{60}\) The issue of how to determine what constitutes a proper theory of constitutional interpretation to decide if some right is a fundamental right existing in the Constitution is discussed at § 27.1.1.

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


\(^{58}\) Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886).

\(^{59}\) See 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.”).

\(^{60}\) 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.”).
about repeal of undesirable legislation"61; 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.62 Where such a concern exists with the political process, even Holmesian judges are not prepared to exercise rational review deference. Cases involving higher than minimum rational review based on concern with the political process also include cases where the legislature may be operating in a self-interested capacity, as occurs for state protectionist legislation that raises dormant commerce clause problems, discussed at § 20.3.2.1.C nn.181-84, or the state impairing the obligation of its own contracts under Contracts Clause review, discussed at § 22.1.4 nn.29-33.

Two other factors appear more prominently in natural law opinions. These reflect the basic natural law principle 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 gender63; and (7) whether the classification 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.64

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 part of an historical pattern of such discrimination65; and (9) to what extent the judges are competent to make the substantive decisions required at heightened scrutiny which involve second-guessing 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.66 Not surprisingly, instrumentalist judges, with their greater willingness

61 Carolene Products, 304 U.S. at 152 n.4.

62 Id.

63 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.”)

64 See, e.g., Plyler v. Doe, 457 U.S. 202, 220 (1982), citing Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175 (1972) (“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.”)

65 Frontiero, 411 U.S. at 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.”)

66 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
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.\(^67\)

In terms of the two categories under *Nordlinger v. Hahn* that trigger heightened scrutiny – fundamental rights and suspect, or quasi-suspect, characteristics – factor (2) focuses directly on the question of whether a fundamental right exists. Factors (4) - (8) focus on whether a suspect, or quasi-suspect, characteristic 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 second-guess legislative judgment, apply in both cases of fundamental rights and suspect, or quasi-suspect, characteristics.

\section*{§ 26.1.2.2 The Carolene Products Decision and Historical Notes on What Level of Scrutiny to Apply}

In the foundational case regarding what level of scrutiny to apply, *United States v. Carolene Products Co.*,\(^68\) the Court held in 1938 that in determining whether legislation violates the Due Process Clause the Court will presume the existence of facts supporting the legislative judgment and will ask only whether facts made known or generally assumed "preclude the assumption that the legislation rests upon some rational basis within the knowledge and experience of the legislators." At this point, however, in footnote 4, the Court said that: (1) “there may be a narrower scope for 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 Fourteenth." The Court also said that it was not necessary to consider at that time whether a more exacting or searching judicial scrutiny should be brought to bear: (2) "when legislation restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation"; or (3) when "statutes [are] directed against particular religious, or national, or racial minorities: 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."

This footnote was penned by Justice Stone while Louis Lusky served as his law clerk.\(^69\) As Professor Lusky has noted, paragraph one of footnote 4 was added at the suggestion of Chief Justice

\(^{67}\) *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 second-guess legislative judgment in the case).

\(^{68}\) 304 U.S. 144, 152-53 & n.4 (1938).

\(^{69}\) See Louis Lusky, By What Right 30 (1993).
Hughes, and rests on different premises than paragraphs two and three. Paragraphs two and three of footnote 4 affirm "self-government" principles: paragraph two affirms a commitment to government "by the people," and paragraph three focuses on government "by the whole people," including discrete and insular minorities. Paragraph one's commitment to specific protections in the Constitution, particularly the first ten Amendments that focus mostly on protecting individuals from the government, is based more on "individual autonomy" concerns, not "self-government." Placed in this context, Professor Lusky has stated that his belief is that footnote 4 was intended to start a dialogue on the Court on what circumstances deserve heightened scrutiny review.

As between concerns with "autonomy" versus "self-government," Holmesian Justices or jurists are likely to place greater weight on self-government, willing to defer to the legislative and executive branches as long as those branches are operating efficiently. Such an approach would agree with Professor Lusky that the "great objective" of government is to "enable people to live together peaceably," and the "single most essential means to that end is the achievement of a sense of universal kinship. . . . Law's primary means of expanding the circle of kinship is to define limits of permissible behavior." As Lusky made clear, he is willing to tolerate significant limits on permissible behavior, and thus significant limits on individual autonomy, in order to create the conditions he thinks are needed for the development of kinship, community, and democratic self-government. Professor Lusky stated, "The initial proposition is simple. . . . It declares that meaningful freedom is maximized . . . in a society where individual actions are subjected to wise controls. Thomas Hobbes so declared in Leviathan (1651)." From this perspective, it is paragraphs two and three of Carolene Products that deserve the greatest weight. This perspective is also evidenced in Professor John Hart Ely’s support for a “representation-reinforcing” model of Equal Protection Clause review.

As Professor Lusky noted, paragraph one's underlying notion of certain fundamental rights deserving heightened scrutiny is based upon "an implicit assumption . . . that this recognition of their special significance by the revered Framers will legitimize extraordinarily intrusive judicial review as implementing the intent of the Framers themselves. The dynamics of government play no part in

70 Id. at 123-25, 177-90.
71 Id. at 123.
72 See generally id. at 124-30.
73 Id. at 4-5.
74 See, e.g., id. at 63-73 (freedom of speech cases discussed), 87-96 (discussing the Court's "overreaction against" historic societal taboos), 142-51 & 167-75 (discussing the importance of the Court serving to advance "the operation of the melting pot" in a society "not blessed with a high degree of homogeneity").
75 Id. at 172.
this calculus.”

Nonetheless, the increased scrutiny for certain specified rights does represent a departure from the usual posture of Holmesian deference to government. Thus, the extra amount of scrutiny called for by footnote one of Carolene Products might be too much for some Holmesian judges. For example, Holmesian Justice Felix Frankfurter never tired of pointing out that the Constitution itself makes no differentiation between so-called fundamental rights and other constitutionally protected rights.

Natural law and instrumentalist judges also embrace the concept of fundamental rights. As discussed at § 27.1.1 nn.21-31, such judges have been more willing than formalist and Holmesian judges to branch out and identify through natural law principles or instrumentalist social policy calculations fundamental rights beyond those listed in the first ten Amendments – the so-called unenumerated fundamental rights analysis. As a Holmesian, Professor Lusky naturally lamented this extension. However, even if it is true, as Professor Lusky believed, that some excessive expansion of constitutional rights has been aided by the addition of paragraph one to Carolene Products footnote 4, that does not mean that the concerns of paragraph one should be given short shrift. It may mean instead that a principled way must be found to apply paragraph one in a judicially appropriate and restrained manner, in the same way that Professor Lusky believed that paragraphs two and three can be so applied.

A similar difference among the four decisionmaking styles is reflected in the suspect and quasi-suspect characteristic part of the analysis. Formalists tend to prefer to keep suspect classes closely tied to the framers and ratifiers’ predominant specific historical intent – race, ethnicity, and national origin – and have a great worry concerning a Pandora’s Box effect and judicial second-guessing of legislative judgments. While substantially agreeing with this view, Holmesians are more willing to add those groups who cannot protect themselves adequately in the political process, such as religious minorities, in addition to racial and ethnic minorities, as indicated in Carolene Products footnote 4.

The natural law concern with whether the classification burdens an immutable characteristic, like race or gender, and whether the classification burdens an individual for something not the product

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77 Lusky, supra note 69, at 124-25.

78 198 U.S. 45, 75-76 (1905) (Holmes, J., dissenting).

of that individual’s choice, like status as an illegitimate child or being the child of parents who are illegally in the United States, supports intermediate scrutiny for discrimination based upon gender, illegitimacy, or being the child of an illegal immigrant, under quasi-suspect characteristic analysis. As discussed at § 26.2.2.1.B nn.337-42 (children of illegal immigrants), § 26.3.1.2 nn.361-69 (gender discrimination), and § 26.3.2 n.413-16 (illegitimate children), adoption of intermediate scrutiny in each of these three cases was opposed initially by formalist and Holmesian judges.

The instrumentalist greater focus on groups historically victimized by discrimination, and greater willingness to second-guess legislative decisionmaking, has meant that instrumentalist judges have been more willing to apply strict scrutiny in certain cases, like gender discrimination, to which natural law judges only apply intermediate review, as noted at § 26.3.1.2.1 n.362. Further, it has meant a willingness to suggest heightened scrutiny for cases involving the poor, discussed at § 26.4.2 nn.447-49, or the mentally or physically impaired, discussed at § 26.4.5 nn.459-62, with respect to which the other decisionmaking styles have decided to apply only rational review.

§ 26.1.3 The Burden of Proof and What Governmental Interests Can be Considered Under Different Standards of Review

The plaintiff has the burden of proof in cases under rational review. Thus, the Court presumes that the statute or other governmental action is constitutional, and the challenger must prove either that no legitimate interests are advanced by the statute, or that the statute is irrationally underinclusive or overinclusive. In contrast, at intermediate review or strict scrutiny, the government has the burden of justifying its statute or other action. In these cases, the government must show that the statute is substantially related to advancing substantial or important government interests, for intermediate review, or is necessary to advance compelling government interests, for strict scrutiny.

In determining whether a legitimate, important, or compelling interest exists under the first prong of the equal protection tests, the Court has adopted different approaches to what interests can be considered under rational review, intermediate review, and strict scrutiny. Under rational review, the Court has stated that “any conceivable basis” can be used to satisfy the legitimate interest part of the rational review test. The Court has noted, “It is, of course, constitutionally irrelevant whether the reasoning in fact underlay the legislative decision.”

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In contrast, at strict scrutiny, the Court looks only to actual purposes to determine if a compelling
government interest exists.\textsuperscript{85} Some formalists have indicated a concern with only using actual
purposes given the uncertainty and difficulty in establishing any particular legislative purpose.\textsuperscript{86} Although rejected by a majority of the Court, this concern with determining legislative purpose is
discussed at §§ 6.2.1.1 nn.2-5 & 6.2.1.2 mn.28-29.

Despite this being the doctrine today, occasionally members of the Court seeking more vigorous
protection of individual rights have suggested that something more than “any conceivable interest”
should be required at rational basis scrutiny. Dissenting in \textit{United States Railroad Retirement Board
v. Fritz},\textsuperscript{87} Justice Brennan, joined by Justice Marshall, said the legislative intent must reflect “actual”
purposes even under rational basis review. Dissenting in \textit{Schweiker v. Wilson},\textsuperscript{88} Justice Powell,
joined by Justices Brennan, Marshall, and Stevens, said that if no legitimate actual legislative
purpose appears in legislative history or the statutory scheme, the Court should require a “fair and
substantial relation” to an asserted purpose. Concurring in \textit{Logan v. Zimmerman Brush Co.},\textsuperscript{89} Justice
Blackmun, with Justices Brennan, Marshall, and O’Connor, said that a classificatory scheme must
"rationally advance a reasonable and identifiable governmental objective."

None of these alternative views have gained a majority vote. Echoing Justice Douglas in 1955 in
Beach Communications, Inc.},\textsuperscript{91} "In areas of social and economic policy, a statutory classification that
neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld
against equal protection challenge if there is any reasonably conceivable state of facts that could
provide a rational basis for classification." Explaining this deferential approach, Justice Thomas
said, "The Constitution presumes that, absent some reason to infer antipathy, even improvident
decisions will eventually be rectified by the democratic process and that judicial intervention is
generally unwarranted no matter how unwisely we may think a political branch has acted."

\textsuperscript{85} See generally Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S.


\textsuperscript{88} 450 U.S. 221, 244-45 (1981) (Powell, J., joined by Brennan, Marshall & Blackmun, JJ.,
dissenting).

\textsuperscript{89} 455 U.S. 422, 439 (1982) (Blackmun, J., joined by Brennan, Marshall & O’Connor, JJ.,
dissenting).

\textsuperscript{90} 348 U.S. 483, 488 (1955) (“The day is gone when this Court uses the [14\textsuperscript{th} Amendment Due
Process Clause] to strike down state laws, regulatory of business or industrial conditions, because
they may be unwise, improvident, or out of harmony with a particular school of thought.”).

\textsuperscript{91} 508 U.S. 307, 313-14 (1993).
Cases under intermediate scrutiny have posed a greater problem for the Court. Three different formulations have appeared in Court opinions. At one extreme, in *Edenfield v. Fane*, the Court stated that at intermediate review the Court would consider any governmental interest “put forward by the State” during the litigation to determine whether an important or substantial interest exists. This differs from the “any conceivable basis” test that permits a court on its own to invent conceivable interests to support the statute. This test, though, does permit the government to invent interests during the course of litigation that may have no real relationship to actual legislative purposes. At the other extreme, per Justice Ginsburg in *United States v. Virginia*, the Court used the strict scrutiny “actual purpose” test in a case involving intermediate review.

The more typical requirement at intermediate scrutiny, however, is a third requirement that the interest be one which “could have plausibly motivated an impartial legislature.” This approach recognizes that “inquiries into congressional motives or purposes are a hazardous matter,” while also recognizing that the Court should not permit “post hoc rationalizations” to justify a statute at intermediate scrutiny. The two cases cited by Justice Ginsburg in *United States v. Virginia* to support using an actual purpose analysis do not clearly support that position. In the first case, *Weinberger v. Wiesenfeld*, 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, *Califano v. Goldfarb*, Justice Ginsburg cited the four-Justice 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.”

Justice Stevens’ phrasing of this test in *Goldfarb* combined the requirement that the government “put forward the interest during litigation” with the requirement that the interest be “plausible to assume” the legislature had in mind. That approach is problematic, as it would prevent the Court from considering “plausible” or even “actual” governmental interests merely because government attorneys failed to mention them. Perhaps the best accommodation of these cases would be to

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95 *Michael M.*, 450 U.S. at 469.

96 *Virginia*, 518 U.S. at 535-36.


98 430 U.S. 199, 212-13 (1977); id. at 223 & n.9 (Stevens J., concurring).
conclude that only “actual” governmental purposes can be used at strict scrutiny; “actual” or “plausible” governmental interests can be used at intermediate scrutiny; and implausible, but conceivable post hoc justifications for a statute can be used only under rational review. A 2001 case of intermediate scrutiny, *Nguyen v. INS*, discussed at § 26.3.2 n.417-22, seemed to follow this approach. The dissent criticized the majority for not requiring “actual purposes” as in *United States v. Virginia*. The majority summarily listed two purposes for the statute, without addressing whether they were actual or only plausible.

§ 26.1.4 Which Inquiries are Questions of Law versus Questions of Fact

Although Court opinions rarely discuss this subject, the first question under Equal Protection Clause doctrine of whether or not the government has a sufficient interest should be viewed as a question of law with no deference given to the district court on appeal. Whether a particular governmental interest is illegitimate, legitimate, important, or compelling typically does not turn upon the facts of any particular case, but on the nature of the interest. Thus, as noted § 26.1.1.1 nn.16-21, certain interests, like prejudice against the mentally impaired, are not legitimate. As noted at § 26.1.1.2 nn. 44-51, certain interests, like administrative cost considerations, while legitimate, are not important; certain interests, like diversity in broadcast programming, are important, but not compelling; and certain interests, like remedying one’s own prior racial discrimination, are compelling.

Even in the rare case where the amount of the administrative cost savings could possibly turn an otherwise legitimate interest into an important or compelling governmental interest, as in *Frontiero v. Richardson*, the Justices appeared to conduct a de novo review of the evidence, thus implicitly treating that determination as a question of law. The plurality also concluded in *Frontiero* that administrative cost savings alone could never be a compelling governmental interest, but would always have to be joined with some other interest that, in combination, might give the government a compelling governmental interest to regulate. The Court did treat cost savings as a valid interest in *Mathews v. Lucas*, discussed at § 26.3.2 n.412, a case that would be intermediate scrutiny today. However, at the time, it was only “second-order, not toothless” rational review. Thus, cost savings were used as a legitimate government interest in *Lucas*, not an important government interest.

In contrast, how much the government’s actions advance government ends or burden individuals in their operation are properly viewed as fact questions subject to the “clearly erroneous” standard of deference on appeal, discussed at § 4.2.4 n.63. As opposed to the nature of the interest, the underinclusiveness or overinclusiveness of any statute or government program are fact questions which depend on the particular statute or program before the court for their proper resolution.

On the other hand, the ultimate conclusions about whether the means are rationally related, substantially related, or directly related to the ends, or whether some burden is irrational, substantially more burdensome than necessary, or the least burdensome alternative, are best

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100 411 U.S. 677, 689-91 (1973) (Brennan, J., plurality opinion).
conceived as mixed questions of law and fact for *de novo* review by courts on appeal. Under usual practice, appellate courts review *de novo* legal questions and mixed questions of law and fact insofar as those issues impact on constitutional matters. In explaining the rationale for *de novo* review on mixed questions of law and fact, the Supreme Court stated in 1996 in *Ornelas v. United States* that "[a] policy of sweeping deference" could allow constitutional issues to be decided "[i]n the absence of any significant difference in the facts, [depending] on whether different trial judges draw general conclusions that the facts are sufficient or insufficient" to decide the constitutional issue. The Court concluded that "[i]ndependent review [of ultimate constitutional facts] is therefore necessary if appellate courts are to maintain control of, and to clarify, the legal principles." Similarly, in 1985 in *Miller v. Fenton*, the Court indicated that where the "relevant legal principle can be given meaning only through its application to the particular circumstances of a case, the Court has been reluctant to give the trier of fact's conclusions presumptive force and, in so doing, strip a federal appellate court of its primary function as an expositor of law." Under this approach, the finder of fact should determine the amount of any underinclusiveness or overinclusiveness. The court should then determine as a matter of law the ultimate conclusion whether that amount renders the statute unconstitutional.

§ 26.2 Classifications Involving Strict Scrutiny

§ 26.2.1 Racial, Ethnic, or National Origin Discrimination

Under current doctrine, statutes that on their face involve racial, ethnic, or national origin classifications automatically trigger a strict scrutiny approach. Such classifications are discussed at § 26.2.1.1. In addition, statutes that are neutral on their face, but which nonetheless were passed based upon an intent to discriminate on racial, ethnic, or national origin grounds, trigger strict scrutiny. Such statutes are discussed at § 26.2.1.2. Four substantive areas where the Court has considered a number of cases are then discussed as examples of strict scrutiny review. These cases involve school desegregation, discussed at § 26.2.1.3; race-based affirmative action, discussed at § 26.2.1.4; race-based redistricting of voting districts, discussed at § 26.2.1.5; and race discrimination in the context of the criminal justice system, discussed at § 26.2.1.6.

§ 26.2.1.1 Facial Discrimination Cases

A. The Original Natural Law Era

Since the 14th Amendment was not ratified until 1868, and did not receive its first Supreme Court interpretation until 1873, its judicial history began in the formalist era. However, the Amendment

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was drafted and passed during the original natural law era. Thus, informed consideration of the purpose and scope of the 14th Amendment, and the context and history surrounding ratification, should take this natural law background into account. This would suggest that an interpretation most faithful to the original intent of the framers and ratifiers of the 14th Amendment would be an interpretation from a natural law perspective. As discussed at § 12.2.2, such a perspective embraces the concept of an “evolving” Constitution in light of later legislative, executive, and social practice, a reasoned elaboration of judicial precedents, and prudential considerations of background moral principles, in addition to text, purpose, context, and history kinds of evidence. This perspective is increasingly reflected in Court cases decided since 1986 in the modern natural law era, particularly in areas such as race-based affirmative action, discussed at § 26.2.1.4; racial redistricting cases, discussed at § 26.2.1.5; race discrimination in the criminal justice system, discussed at § 26.2.1.6; alienage classifications, discussed at § 26.2.2; gender discrimination, discussed at § 26.3.1; discrimination based upon illegitimacy, discussed at § 26.3.2; cases involving physical or mental disability, discussed at § 26.4.5; and sexual orientation, discussed at § 26.4.6.

B. The Formalist Era

In the Slaughter-House Cases, when the Court first interpreted the Equal Protection Clause in 1873, the Court said that it doubted very much "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." That conclusion, which apparently was a reflection of the Court's understanding of legislative history, rather than a reaction to the text of the clause, was repeated in 1880 in Strauder v. West Virginia. There the Court said, "What is this but declaring that the law in the States shall be the same for the black as for the white."

Despite those initial statements, the formalist Court, with its focus on literal text, as well as history, soon reverberated to the text of the Equal Protection Clause, which contained no such limitation. In Barbier v. Connolly, decided in 1885, the Court indicated that the clause applied to a law regulating the hours during which laundries could be operated, saying that the clause guaranteed, among other things, that "all persons should be equally entitled to pursue their happiness and acquire and enjoy property." Similarly, in 1886 in Yick Wo v. Hopkins, the Court struck down a ban on wooden laundries that was applied only to business owned by aliens of Chinese ancestry. The Court said the provisions of equal protection "are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, or color, or of nationality."

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104 83 U.S. (16 Wall.) 36, 81 (1873).

105 100 U.S. 303, 307 (1880).

106 113 U.S. 27, 31(1885).

107 118 U.S. 356, 369 (1886).
Although the Court gave careful review to classifications that discriminated against individuals on grounds of race, ethnicity, or national origin, as in *Yick Wo v. Hopkins*, the formalist-era Court removed most protection to racial groups from state-based racial classifications that literally treated whites and non-whites equally. In 1896, the Court held in *Plessy v. Ferguson*\(^{108}\) that a state could require separate railway carriages for “colored” and “white” passengers. The Court concluded in *Plessy* that the state’s requirement did not involve racial discrimination, since the separate railway carriage requirement applied equally to both “coloreds” and “whites.”

Based upon this literal, or formal, equal application of the law, the formalist Court concluded in *Plessy* that “separate, but equal” facilities posed no problem requiring heightened scrutiny. Applying the rational review “reasonableness” test, the Court decided that the separate carriage requirement was reasonable because reasonableness should be considered in light of customs and traditions, and in 1896 segregation of the races was reasonable from that perspective. Specifically, the Court stated in *Plessy*:

> In determining the question of reasonableness, it [the state] 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, the constitutionality of which does not seem to have been questioned, or the corresponding acts of state legislatures.\(^{109}\)

With respect to whether the law was based on notions of “White Supremacy,” and thus denied African-Americans equal protection of the law, the Court had two responses. First, the Court noted:

> 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.\(^{110}\)

The Court’s second counterargument focused on the proper role for law in terms of molding public morality. The Court stated:

\(^{108}\) 163 U.S. 537, 546-52 (1896).

\(^{109}\) *Id.* at 550-51.

\(^{110}\) *Id.* at 551.
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: “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.111

To implement the statute in Plessy, the state of Louisiana had to define who was “white” and who was “colored” for purposes of the statute. The particular plaintiff in the 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.112 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 standards), to 1/16 or 1/8 (in a number of Northern and Southern states), to, in a Northern state like Michigan, 1/4, or in Ohio, a preponderance of blood test.113

Dissenting in Plessy, Holmesian Justice Harlan focused on the evident purpose behind the statute, not its literal requirement of equal treatment. He noted, “Everyone 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. . . . 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.”114 In terms of official doctrine, Justice

111 Id. at 552.


114 163 U.S. at 557 (Harlan, J., dissenting).
Harlan concluded that the Louisiana statute was inconsistent with “the personal liberty of citizens” to decide with whom they wish to sit. He also noted, “The arbitrary separation of citizens, on the basis of race, while they are on a public highway, is a badge of servitude wholly inconsistent with the civil freedom and the equality before the law established by the constitution.” His official core holding of the case, however, seemed to be that treating citizens differently was inconsistent with “the guaranty given by the constitution to each state of a republican form of government” under the Guaranty Clause.115 By limiting his decision to protecting the rights of “citizens,” and not “persons” under an Equal Protection Clause or Due Process Clause liberty analysis, Justice Harlan could observe, “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.”116

The formalist Court did depart from this “separate, but equal” doctrine when considering cases involving rights of property, based upon the specific history surrounding the Civil Rights Act of 1866 dealing with rights to purchase, own, and sell property without regard to race, which was repassed after ratification of the 14th Amendment. Because this history suggested the 14th Amendment incorporated the principle of the Civil Rights Act of 1866 regarding equal rights to own property, in Buchanan v. Warley117 the Court struck down as unconstitutional a state statute limiting the rights of both whites and blacks to sell their property to members of the other race.

Because it was never clear before 1954 that the Equal Protection Clause applied to the federal government, as noted at § 26.1 nn.1-6, the formalist Court did not apply even the limited “separate, but equal” doctrine to exercises of congressional power. For example, in the 1870 Naturalization Act, an attempt was made by Senator Charles Sumner to add language providing that “all acts of Congress relating to naturalization be, and the same are hereby, amended by striking out the word 'white' wherever it occurs, so that in naturalization there shall be no distinction of race or color." Faced with concerns from Western states about the amendment's effect on their growing Chinese population, the Senate rejected Sumner's language, with one Senator noting that "there is but little opposition to extending the naturalization laws to alien Africans within this country." For these Senators, 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."

Based on the 1870 Naturalization Act, for many decades American law extended a right of naturalization to "aliens being free white persons, and to aliens of African nativity and to persons of African descent." The 1870 Naturalization Act strongly supports the inference that Congress felt sure of its constitutional power, despite the Equal Protection Clause, to enact invidious race-conscious laws regulating aliens. Such laws were never ruled unconstitutional by the Supreme Court of the formalist era. The naturalization law's racial bias remained largely intact until 1952.118

115 Id. at 557, 562, 564.
116 Id. at 561.
117 245 U.S. 60, 78-82 (1917).
118 This account of the 1870 Naturalization Act appears in Siegel, supra note 5, at 554-56.
C. The Holmesian Era

As noted at § 3.2, as a functional approach to law, the Holmesian approach to decisionmaking is characterized by a substantially greater willingness than formalist judges to look past formal, or literal, application of the law, and to examine legislative purpose and practical effect. Holmesian judges also have a predisposition to defer to legislative and executive practice. These aspects of Holmesian jurisprudence pulled Holmesian judges in opposite directions during the Holmesian era.

On the one hand, the Holmesian Court moderated the impact of Plessy’s “separate, but equal” doctrine by requiring separate facilities actually to exist in practice, or by holding facilities that were provided were not functionally equal, and thus constituted unconstitutional discrimination. This occurred in cases like Missouri ex rel. Gaines v. Canada,119 which held in 1938 that if a state offers legal education to whites, it must also do so for African-Americans; Sipuel v. Board of Regents,120 where the Court held in 1946 that qualified African-Americans had to be admitted to the state’s only law school where denial of admission was solely on the basis of race; Sweatt v. Painter,121 where the Court held in 1950 that a ban on African-American admission to a state law school was unconstitutional where the state’s alternative law school for African-Americans offered inferior opportunity; and McLaurin v. Oklahoma State Regents,122 where the Court held in 1950 that differential treatment of African-American students to designated non-white rows in assignment of seats in a classroom, library, and cafeteria constituted a denial of equal protection. The Court also held in Shelley v. Kraemer,123 decided in 1948, that a racially restrictive covenant in a private land deed constituted a violation of equal protection when enforced by a court even though it applied equally to white and black buyers and sellers. The Court rejected the “separate, but equal” doctrine in this context based upon precedents like Buchanan v. Warley, discussed at § 26.2.1.1.B n.117, and because functionally the clause operated to deny blacks an equal opportunity to purchase a house.

On the other hand, most use of racial classifications by the federal government or state governments during the Holmesian era were upheld by the Court. For example, in 1944 in Korematsu v. United States,124 the Supreme Court upheld President Roosevelt's curfew and exclusion orders requiring persons of Japanese ancestry to be removed from certain districts and forced to enter "relocation centers." Because this regulation discriminated against persons based upon their national origin, the Court applied the strict scrutiny approach that was suggested in the 1938 case of Carolene Products, discussed at § 26.1.2.2 n.68. Reflecting the Holmesian deference to government posture, however, the Court concluded that the government had a compelling governmental interest to prevent sabotage.

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123 334 U.S. 1, 11-12 (1948).
during war time to which the relocation centers were a necessary response. The Court said, “[A]ll 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.”125 An instrumentalist-inspired dissent in *Korematsu* noted that the restrictions were not the least burdensome effective alternative, and thus should not have survived strict scrutiny. Justice Murphy stated, “No adequate reason is given for the failure to treat 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.”126

D. The Instrumentalist Era

In *Brown v. Board of Education*,127 decided in 1954, the Court held that racially separate educational facilities are inherently unequal and that segregation in public education deprived the plaintiffs of equal protection of the law. Any language in *Plessy* to the contrary of the Court's holding in *Brown* was overruled. A similar holding was reached under the Fifth Amendment with respect to segregated schools provided for in the District of Columbia by Congress in *Bolling v. Sharpe*.128 The Court said that segregation in public education is not reasonably related to any proper governmental objective and thus was an arbitrary deprivation of liberty in violation of the Equal Protection branch of the Due Process Clause, discussed at § 26.1 nn.1-6.

*Brown* quickly led into a series of cases holding that racial segregation in other public facilities was a denial of equal protection.129 Thus, by 1963, the Court could state in *Johnson v. Virginia*,130 “[I]t is no longer open to question that a State may not constitutionally require segregation of public facilities.” Also, the Court made clear that the protection was not solely a matter of black and white, but extended to all examples of discrimination against minority groups, whether based on race, ethnicity, or national origin. Thus, as early as 1954, the Court rejected the argument in *Hernandez v. Texas*131 that persons of Mexican descent could be excluded from a jury because the Equal

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125 *Id.* at 216.

126 *Id.* at 241 (Murphy, J., dissenting).


Protection Clause contemplated only two classes – “white” and “Negro.” The Court noted that community prejudices with respect to race and color are not static and the 14th Amendment is not directed solely against discrimination based on a two-class theory.

The Brown case did not explicitly state that a heightened degree of scrutiny was being applied by the Court. However, that requirement was emphasized in Loving v. Virginia, when in 1967 the Court struck down statutes in 16 predominantly Southern states that prevented marriages between persons on the basis of race. Drawing on the Japanese internment cases and citing Korematsu v. United States, Chief Justice Warren said the Equal Protection Clause demands that racial classifications be subjected to the "most rigid scrutiny." He continued that if racial classifications are ever to be upheld, they must be "necessary" to the accomplishment of some permissible objective independent of racial discrimination. With regard to the particular issue of anti-miscegenation laws, the Court noted, “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. 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, 198 P.2d 17 (1948).”

By 1984, the meaning of strict scrutiny had become the formula recited by the Court today. In Palmore v. Sidoti, for example, the Court wrote that racial classifications must be justified by a compelling governmental interest and must be necessary to the accomplishment of this compelling interest. In Palmore, in a multi-racial child custody case, the Court refused to allow a trial court to consider private racial biases and the possible injury they might inflict on the child to affect the custody decision of a mother who, after a divorce, had subsequently remarried a man of another race. Not only was pandering to private racial biases not a compelling interest, it was not even a legitimate interest that could be used at rational review. The Court noted, "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."

This principle, that unlike Plessy, customs and traditions of people are not a basis for legitimate action if they represent irrational biases or prejudices from the perspective of truth, as determined by formal operational thought and its scientific method and “hypothetico-deductive” technique, discussed at § 15.3 nn.44-46, distinguishes these post-1954 cases as examples of instrumentalist Stage 5 and modern natural law Stage 6 moral reasoning, instead of the concrete customs and traditions level of moral reasoning of the formalist era Stage 4. Other examples of the post-1954 Court rejecting customs and traditions alone as a legitimate basis for moral action in equal protection cases are noted at § 26.1.1 nn. 17-21, and at §§ 16.3 nn.76-83 & 16.4 nn.92-106, discussing moral and legal reasoning from the perspective of Stage 6 rational dialogue.

132 388 U.S. 1, 5 n.4, 9-11 (1967) (citations omitted).

Despite these developments, many instrumentalist Justices have argued for a departure from strict scrutiny in cases of race-based affirmative action, and adoption of only intermediate review, as discussed at § 26.2.1.4.A nn.212, 219 and § 26.2.1.4.C nn.227, 238-39, 246-48. As noted there, the theory behind this argument is that such affirmative action is intended to remedy a legacy of discrimination against the minority group, and this “benign” use of race should not be subjected to rigorous strict scrutiny review. In the modern natural law era, this instrumentalist view has been rejected by a majority of the Court, composed of formalist, Holmesian, and natural law Justices, as discussed at § 26.2.1.1.E nn.134-35, § 26.2.1.4.C nn.234-37, and § 26.2.1.4.D nn.241-45.

E. The Modern Natural Law Era

Today's Supreme Court, with its influential group of natural law Justices who give great weight to precedent, has followed most of the instrumentalist precedents with respect to race discrimination. Where necessary, it has extended application of the doctrine in order to ensure effective remedies, such as in cases involving peremptory jury challenges based upon race, discussed at § 26.2.1.6.A. In the area of affirmative action, discussed at §§ 26.2.1.4.C-26.2.1.4.D, the Court has resolved what was an uncertainty during the instrumentalist era by requiring strict scrutiny of all racial preferences. The Court’s current majority believes that the Equal Protection Clause supports complete racial neutrality – treating all citizens as individuals, and not as components of racial, ethnic, or national classes. Under this approach, there can be no “benign” kind of racial discrimination. In 1995, in Adarand Constructors, Inc. v. Pena,134 the Court observed that “any individual suffers an injury when he or she is disadvantaged by the government because of his or her race, whatever that race may be.” In Miller v. Johnson,135 also in 1995, the Court noted, “[The] Equal Protection Clause[’s] . . . central mandate is racial neutrality in governmental decisionmaking,” citing Loving v. Virginia and Brown.

When applying strict scrutiny to any racial classification, the modern extreme formalist position, adopted by Justice Scalia, is that any use of race as a classifying principle violates the literal meaning of equality, and thus government can never have a "compelling interest" in discriminating on the basis of race in order to "make up" for past racial discrimination in the opposite direction.136 Other modern formalists, such as Justice Thomas, acknowledge, as did Holmesian Chief Justice Rehnquist, that remedying prior racial discrimination through a race-conscious remedy could possibly, although not likely, be justified under a strict scrutiny approach.137 Only a few formalists today, who place greater weight on specific history than literal text, might still support the view that Plessy’s principle of “separate but equal” is correctly applied, as did Professor Raoul Berger in discussing segregation in the public schools, discussed at § 9.3.4 n.79. An area where the use of race


137 Id. at 204 (Chief Justice Rehnquist joining Justice O’Connor’s majority opinion in Adarand); id. at 240 (Thomas, J., concurring in part and concurring in the judgment).
may pose difficult problems for the Court in the near future concerns the possible use of racial profiling in security activities associated with antiterrorist efforts. To date, security efforts have been, at least on their face, race-neutral.  

§ 26.2.1.2 Non-Facial Race Discrimination: The Intent Requirement

During the formalist era, in the few cases where the Court struck down laws for discrimination on the basis of race where the statute did not use a discriminatory racial classification on its face, the discrimination was clearly intentional and was often labeled, as in *Yick Wo v. Hopkins*,\(^\text{139}\) 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 administration of justice, such as service on a jury, the Court spoke of "intentional discrimination."\(^\text{140}\) In the instrumentalist era, when the Court began to address discrimination in public education and other public facilities, it spoke of tracing laws to a racially discriminatory purpose.\(^\text{141}\) However, not until 1976 did the Court squarely face the question of whether the 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*.\(^\text{142}\) In *Davis*, Justice White wrote for the Court that finding race discrimination under the Fifth or 14th Amendment depended upon tracing government action to a racially discriminatory purpose or intent. If such an “invidious” intent is found by the Court, strict scrutiny will be invoked. Without such intent, a differential impact is given only rational basis scrutiny.\(^\text{143}\) Intent to discriminate is also needed to invoke a higher level of scrutiny for discrimination against any suspect or quasi-suspect class, like gender.\(^\text{144}\)

Although precedents are not clear, the doctrine from *Palmer v. Thompson*\(^\text{145}\) 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.” Thus, statutes passed with a discriminatory intent, but no actual discriminatory effects, likely trigger only rational review.


\(^\text{139}\) 118 U.S. 356, 373-74 (1886).

\(^\text{140}\) Akins v. Texas, 325 U.S. 398, 403 (1945).

\(^\text{141}\) Keyes v. School District No. 1, 413 U.S. 189, 198-200 (1973)

\(^\text{142}\) 426 U.S. 229 (1976).

\(^\text{143}\) *Id.* at 239-41. See also Rogers v. Lodge, 458 U.S. 613, 616-17 & n.5 (1982).


\(^\text{145}\) 403 U.S. 217, 224 (1971).
Indeed, if no discriminatory effects exist, there may be a problem with showing an injury-in-fact sufficient to prove standing. For example, in *Palmer*, the city’s decision to close a public pool to all citizens, rather than integrating the pool, technically affected all citizens equally, and any stigmatic injury from closing the pool based on racial motives would be a generalized grievance for which no standing would exist, as noted at § 17.3.1.4.A n.447.

Factors relevant for finding discriminatory intent were detailed in 1977 in *Village of Arlington Heights v. Metropolitan Housing Development Corp.* There the Court held that a *prima facie* case of discrimination can be made by showing race was a motivating factor in the decision considering:

1. the impact or effect of the official action;
2. the historical background of the decision, particularly if it reveals a series of official actions taken for invidious purposes;
3. legislative or administrative history, including the specific sequence of events leading up to the challenged decision; any departures from normal procedural practices; and any substantive departures, particularly if factors usually considered important by the decision-maker strongly favor a decision contrary to the one reached; and
4. any other evidence of discriminatory motive.

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 an identifiable group. Thus, the ability to foresee disparate impact as a consequence of a law does not, without more, trigger a finding of discriminatory intent. For example, a law granting veterans a preference in civil service hiring was upheld even though all knew it would advantage more men than women. Nothing in the record showed that the preference was devised or re-enacted because it would keep women out of the civil service. 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.

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146 See id. at 226-27.
Discriminatory intent was not proved in the following landmark cases:

1. A verbal skills and reading comprehension exam for police officers that African-Americans failed in disproportionate numbers was not shown to be intentionally discriminatory and was rationally related to the skills needed to be a police officer.153

2. A *prima facie* case was not established where a city denied a petition to re-zone for low cost housing which probably would have been used by a number of minority families. The Court pointed to a history of zoning for single-family dwellings and allowing apartments only as a buffer to industry and other non-conforming uses. The area was zoned since 1959, and statements by board members focused almost exclusively on zoning rather than race.154

3. Statistical evidence that the death penalty was being applied with racially discriminatory effects, 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” 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 discriminatory on grounds of race.155

Discriminatory intent was found to have motivated the creation or maintenance of a law in the following landmark cases:

1. Statistical evidence of racial disproportion on jury panels established a *prima facie* case of discrimination against Mexican-Americans. Rebuttal could only be by evidence of the way jury commissioners operated and their reasons for doing so. It was not enough that 3 of the 5 commissioners were Mexican-Americans. Justice Marshall explained that the question is not how Mexican-Americans treat each other but how the particular commissioners acted.156

2. An at-large district was unconstitutional because it was maintained with a discriminatory intent. Relevant evidence included past discrimination that impaired minority ability to participate in the political process, whether elected officials were responsive to minority needs, and whether the district's size tended to impair minority political access.157


3. Section 182 of the Alabama Constitution, 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, and the law was not saved by its additional purpose of discriminating against poor whites.158

On balance, these cases are representative, in that it has seemingly been more difficult to prove racial discrimination in cases involving jobs, housing, or the death penalty, while it has been easier, although still difficult, to prove racial discrimination in cases involving voting rights, other aspects of the criminal justice system, or, as discussed at § 26.2.1.3.A nn.173-74, de facto segregation in the public schools.

When interpreting civil rights statutes, the Court has often had to decide whether Congress intended to require proof of intent as an element necessary to show a violation of the statute. The results have varied. There is no liability under 42 U.S.C. § 1981 or § 1982 without proof of discriminatory intent, based predominantly on the legislative history of the Civil Rights Act of 1866, passed by the same Congress that proposed the 14th Amendment, where discriminatory intent is required under Davis.159 On the other hand, proof of intent is not needed under the Voting Rights Act.160 Under the 15th Amendment, a 4-Justice plurality of the Court has said that it bars only purposeful discrimination with the right to vote.161 Two other Justices decided the case “assuming” that intent need be shown.162 It remains an open question whether proof of intent is needed under the 13th Amendment's ban on slavery or involuntary servitude. The more likely answer is no, based upon City of Memphis v. Greene,163 where the Court stated, “To decide the narrow constitutional question presented by this record we need not speculate about the sort of impact on a racial group that might be prohibited by the Amendment itself.” The Court did note in Greene, however, that “ racially discriminatory motives” were relevant in determining whether the impact was a “badge or incident” of slavery.

Additional cases involving intent have arisen in the context of state referendums. For example, California voters in 1966 approved Proposition 14, which repealed certain anti-discrimination laws. The Supreme Court of California held that the purpose and intent of Proposition 14 was to authorize and encourage private race discrimination. In Reitman v. Mulkey,164 a majority of the United States

162 Id. at 80 (Blackmun, J., concurring in the result); id. at 101-02 (White, J., dissenting).
Supreme Court agreed 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. Private racial discrimination in the rental of an apartment in California was barred by pre-existing California legislation that made such discrimination illegal. Analytically, the issue in the case was whether Proposition 14 constituted a “purpose” to discriminate on grounds of race, triggering strict scrutiny under an Equal Protection Clause discriminatory intent analysis.

During the instrumentalist period there were several other such cases. In 1969, a city charter provision that prevented the city council from implementing any ordinance dealing with discrimination in housing based on race, religion, or ancestry, without approval of a majority of city voters, was held unconstitutional as discriminatory on its face. In 1982, the Court invalidated a law that barred local school boards from requiring students to attend schools other than those nearest the students’ homes, unless ordered by a court of 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. Justice Powell dissented, with Chief Justice Burger and Justices Rehnquist and O’Connor. Powell said that racial minorities were not uniquely burdened by this law and that the Constitution does not dictate at what level school decisions must be taken.

In a non-racial context, the Court has permitted some laws that increased the difficulty of obtaining legislative reform. For example, the California Constitution required a referendum for publicly supported low-rent housing projects. This was held valid because persons in poverty are not a suspect class and California had a long history of using referendums to give citizens a voice on questions of public policy. Eleven years later a California initiative was approved that amended the California Constitution to forbid California courts from ordering busing unless required by the United States Constitution. The Court said that the law contained no racial classification on its face and no discriminatory purpose had been shown.

§ 26.2.1.3 Constitutional Law on Desegregation of the Public Schools

A. An Overview

In several ways, the Court’s decisions regarding desegregation of the public schools in the United States following Brown v. Board of Education in 1954 is the most remarkable series of cases in the history of the Supreme Court. First, the Court had its longest set of unanimous opinions. From

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Brown in 1954, until Keyes in 1973, there was no dissent in any school desegregation case. The Court may have held itself together with unanimous opinions because of the widespread resistance to Brown evidenced by a variety of techniques engaged in by many local communities and states to avoid desegregation, and the Court’s desire to present a united front in the face of such resistance.

Second, 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 of such cases, while large, is less than in the school desegregation context. 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 educational effect on minority students when treated as inferior by the community, and in part because of the concept expressed by Justice Marshall, dissenting in Milliken v. Bradley (Milliken I), who said that "unless our children begin to learn together, there is little hope that our people will ever learn to live together." On the other hand, the Court is still struggling to find ways for maintaining a strong commitment to desegregation and yet to extricate the federal judicial system from what has threatened to become a perpetual trusteeship over a number of the Nation's public school systems.

The kinds of problems faced by the Court have changed over the decades. In the 1950s, the challenge was to begin obtaining compliance in Southern states that had laws requiring segregation, i.e., de jure discrimination. In the 1960s, the Court had to develop detailed principles guiding the formulation of desegregation decrees. In the 1970s, when the Court began to deal with Northern states that never had statutes requiring segregation as a matter of law, the Court devised doctrines that made it easier to reach a finding of de facto discriminatory intent. This occurred through doctrines such as the rule of Keyes v. School District No. 1, 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. This presumption put the burden on the school board to rebut a prima facie case. At the same time proof was made easier, the Court began to impose limits on the discretion of district courts. In Keyes, Justice Powell expressed concern about excessive busing, saying that the goal is the best possible education for all children.

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174 Id. at 240-50 (Powell, J., concurring in part and dissenting in part).
In the 1980s, the Court focused on other matters than school desegregation, predominantly leaving lower courts to continue supervising desegregation decrees. In the 1990s, however, the Court began to deal with long-standing desegregation lawsuits where the parties, lawyers, and judges were wondering whether the lawsuits would outlive them. The issues have centered about the breadth of remedial decrees, when a district court can dismiss a desegregation action, and when a desegregation decree can be dissolved. It is not easy to end one of these lawsuits because the court must find that the system is being operated in compliance with the Equal Protection Clause and it is unlikely that the board will return to its former ways of segregating students by race. In answering this question the court must determine whether the school board has complied in good faith and whether all vestiges of past discrimination have been eliminated to the extent practicable, not an easy thing to find when, as is usually the case, the system today may be almost as racially separated as it was in the beginning.

In retrospect, from today's perspective, it appears that the Court has won its struggle to have local school boards engage in good faith compliance with the underlying constitutional principles. But residential decisions by some local citizens to move from urban school districts to the suburbs, and educational decisions by other local citizens who chose to remain in urban districts to 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.

To some extent, that result was made possible by the Court's 5-4 decision in *Milliken I*,\(^{175}\) which held that an interdistrict remedy – one that reaches beyond the confines of a single school district – can be ordered only if there is an interdistrict violation. Since in many cases the new suburban school districts never engaged in any intentional racial discrimination, their new school districts could not be part of a desegregation degree. The *Milliken I* case was thus a real hurdle in the path of being able to devise desegregation decrees which promise realistically to work if the district court could not find that the district lines were themselves drawn with an intent to segregate minority students in one school system. Absent such an intent, “white flight” to the suburbs would work, as the suburban districts would merely reflect the predominant white make-up of individuals in the suburban community, leaving the urban district with a predominantly minority population.

Some district courts have sought to find imaginative ways around *Milliken I*. For example, 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. In reviewing this decision in *Missouri v. Jenkins*,\(^{176}\) the Supreme Court held that since there was no evidence of an interdistrict violation, the District Court's pursuit of "desegregative attractiveness" across district lines was beyond the scope of its authority. Chief Justice Rehnquist said, “A district court seeking to remedy an *intra*district violation that has not 'directly caused' significant interdistrict effects, exceeds its remedial authority if it orders a remedy with an interdistrict purpose.”

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\(^{176}\) 515 U.S. 70, 97 (1995).
B. Cases From the Instrumentalist Era

Cases from the instrumentalist era, 1954-1986, can be divided into four chronological periods: (1) school segregation was declared unconstitutional; (2) principles were developed to guide lower courts in finding violations and developing remedies; (3) limits were placed on remedial orders; and (4) initial consideration was given to when desegregation litigation may be concluded.

1. Step One: School Segregation Declared Unconstitutional

The watershed case, which inaugurated the instrumentalist era on the Supreme Court, was *Brown v. Board of Education*. There, the Supreme Court unanimously held that segregation in public education was unconstitutional as a violation of the Equal Protection Clause, with respect to the states. At the same time, the Court held in *Bolling v. Sharpe* that school segregation was a violation of the Due Process Clause of the Fifth Amendment, if conducted by the federal government, as it was at that time in the District of Columbia. Chief Justice Warren noted in *Bolling*, “In view of our decision [in *Brown*] that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government.”

In a short opinion, designed to be widely distributed to, read by, and understood by the American people, Chief Justice Warren considered a wide variety of arguments against the result, and countered each one. Using the six basic sources of constitutional law as an organizing principle, Justice Warren’s reasoning, contrasted with what was said in *Plessy*, can be outlined as follows:

**Text**: *Plessy*: Literally equal treatment is afforded when the races are provided equal facilities, even though they are separate. *Brown*: Separate educational facilities, because they are separate and thus not literally the same, are inherently unequal.

**Context**: *Plessy*: Taken as a whole, the clauses of the 14th Amendment require civil equality, and the 15th Amendment requires political equality, but this is not a question of civil or political equality, it is more akin to social equality, which is dependent on societal customs and traditions. The 14th Amendment was not intended to reach such social matters. *Brown*: The context of public education today is that it is of vital importance to every child and our society; if a state undertakes to provide public education, it confers a right which must be made available to all on equal terms.

**History**: *Plessy*: When the 14th Amendment was ratified, the states and Congress had systems of separate education and it was not thought the Amendment changed this, as evidenced by continuation of these systems. *Brown*: The Amendment’s history is inconclusive, with avid proponents wanting to remove all legal distinctions among persons born or naturalized in the Nation and avid opponents wanting a limited effect. What others thought is uncertain.


Deference to Legislative and Executive Practice: *Plessy:* Public education is a function within a state's police power and the question is whether the state law is reasonable, granting the legislature large discretion to act with reference to established customs and traditions of the people. When the 14th Amendment was passed, Congress and many states authorized separate schools that continued in many states and the District of Columbia. *Brown:* Public education did not exist or was not much advanced in 1868, particularly in the South where education of white children was largely in the hands of private groups and education of African-Americans was almost nonexistent. We must consider public education in the light of its full development and its present place in American life and throughout our Nation.

Judicial Precedent: *Plessy:* The establishment of separate schools for white and colored children has been held valid many times. *Brown:* Before *Plessy,* the Court said the 14th Amendment barred all state-imposed discrimination against African-Americans. *Plessy* was a transportation case. In the Supreme Court, two formalist-era cases involving public education did not challenge the doctrine of separate but equal,179 and in the four Holmesian-era cases [discussed at § 26.1.1.1.C nn.119-22] inequalities in specific benefits were found. The decision on the broader question of whether to overrule *Plessy* was reserved.

Prudential Social Policy Concerns: *Plessy:* Laws permitting or requiring race separation do not imply inferiority of either race, and if such is found it is solely because the colored race chooses to put that construction on it. *Brown:* To separate African-American children 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. Any language in *Plessy* to the contrary is overruled.

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, asking the parties to submit additional briefs, including focus on the specific question, "What evidence is there that the Congress which submitted and the State legislatures and conventions which ratified the Fourteenth Amendment contemplated or did not contemplate, understood or did not understand, that it would abolish segregation in public schools?"180 One author has noted, “According to one account, four

179 Cumming v. Richmond County Bd. of Educ., 175 U.S. 528 (1899) (African-American taxpayers denied an injunction requiring the defendant school board to discontinue the operation of a high school for white children until the board resumed operation of a high school for African-American children); Gong Lum v. Rice, 275 U.S. 78 (1927) (plaintiff, a child of Chinese descent, contended only that state authorities had misapplied the doctrine by classifying him with “colored” children and requiring him to attend a “colored” school).

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.181 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.

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.182 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.183

2. Step Two: Principles Developed to Guide Lower Courts in Finding Violations and Developing Remedies

Initially it was easy to find constitutional violations because many states had explicit policies calling for segregation. When challenges were made to school systems where no such policies ever existed, but where there were many one-race schools, 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, as discussed at § 26.2.1.2 n.147, 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.184 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

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in schools, there is a *prima facie* case that the current segregation was caused, at least in part, by the prior acts.\textsuperscript{185} 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{186}

With respect to remedies, the Court first said in 1955 in *Brown v. Board of Education (Brown II)*\textsuperscript{187} that the district courts should enter such decrees as were necessary to admit students to public schools on a racially nondiscriminatory basis "with all deliberate speed." Thirteen years later, in 1968, after experiencing great difficulty in getting states and school systems to comply with federally ordered remedies,\textsuperscript{188} the Court abandoned this relatively relaxed approach in *Green v. County School Board*\textsuperscript{189} and said that the “burden on a school board today is to come forward with a plan that promises realistically to work . . . now . . . until it is clear that state-imposed segregation has been completely removed.”

Three years later, in 1971, the Court slightly expanded the remedial goal in *Swann v. Charlotte-Mecklenburg Board of Education*,\textsuperscript{190} and provided relatively specific guidelines that have been used by the 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.\textsuperscript{191} Six years later, in 1977, the Court noted in *Milliken v. Bradley (Milliken II)*\textsuperscript{192} 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

\begin{thebibliography}{9}

\bibitem{187} 349 U.S. 294, 301 (1955).
\bibitem{189} 391 U.S. 430, 439 (1968).
\bibitem{190} 402 U.S. 1, 15 (1971).
\bibitem{191} Id. at 15-31.
\bibitem{192} 433 U.S. 267, 283-91 (1977).

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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.

3. Step Three: Limits Placed on Remedial Orders

District courts began to discover in many cities that population shifts, 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 Supreme Court largely ended this practice with its decision in 1974 in *Milliken v. Bradley (Milliken I).*193 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, *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.194

Another restrictive rule was created in *Dayton Board of Education v. Brinkman (Dayton I).*195 The Court held in *Dayton I* in 1977 that if there are only a few isolated discriminatory practices, the district court should limit the scope of any remedy by determining the incremental segregative effect of intentional discrimination. This result was “clarified” by *Dayton Board of Education v. Brinkman (Dayton II)*196 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. If plaintiff proves purposeful discrimination in the past not remedied by board action, and there presently is system-wide racial disproportion in the schools, there is a *prima facie* case that current segregation was caused at least in part by prior acts.

4. Step Four: Initial Consideration of Concluding Desegregation Litigation

The Court initially indicated that it might not be too difficult for a district court to terminate a desegregation action. In 1976, the Court said in *Pasadena City Board of Education v. Spangler*197 that if a plan achieves racially neutral attendance, the court has “fully performed its function of providing the appropriate remedy for previous racially discriminatory attendance patterns.” As noted at § 26.2.1.3.C nn.201-07, in practice terminating a desegregation action proved more difficult, and only in the mid-to-late 1990s did terminating such programs meet with much success.

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194 *Id.* at 744-46; *id.* at 762 (White, J., joined by Douglas, Brennan & Marshall, JJ., dissenting).
C. The Modern Natural Law Era

During the modern natural law era, since 1986, the Supreme Court has been working primarily in the last two areas: fine tuning remedial rules and creating standards for terminating litigation that would be consistent with the Court's commitment to remove all vestiges of past discrimination from public school systems and assure that school boards do not return to former discriminatory policies.

In the remedial area, the Court decided in *Spallone v. United States*[^198] 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, composed of liberal Holmesian Justice White, and the four liberal instrumentalists, Justices Brennan, Marshall, Blackmun, and Stevens, held in *Missouri v. Jenkins (Jenkins II)*[^199] that the court may direct the local agency to levy taxes and may enjoin state laws that limit such levies. On the other hand, the Court reaffirmed in *Missouri v. Jenkins (Jenkins III)*[^200] 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. This holding is consistent with the background natural law principle, noted at § 12.2.2.3 text following n.81, that remedies should be proportionate to the violation.

With respect to the termination of desegregation litigation, the Court has been laboring to formulate appropriate principles. First, in *Board of Education of Oklahoma City Public Schools v. Dowell,*[^201] the Court held that a desegregation decree can be done 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.

[^199]: 495 U.S. 33, 55-58 (1990). Justice Kennedy, joined by Chief Justice Rehnquist, and Justices O'Connor and Scalia, dissented from this part of the Court’s ruling. *Id.* at 58-59.
[^201]: 498 U.S. 237, 246 (1991); *id.* at 251-52 (Marshall, J., joined by Blackmun & Stevens, JJ., dissenting).
A creative half-way solution was found when the Court held in *Freeman v. Pitts* in 1992 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 and nothing requires intrusive measures to achieve racial balance in student assignments in the late phases of carrying out a desegregation decree when the imbalance is not attributable to either the prior de jure system or to a later violation by the school district. The Court 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.

In 1992, a new kind of school desegregation problem came before the Court in *United States v. Fordice*. This involved the desegregation of a state university. The specific question was whether Mississippi had dismantled its formerly segregated university system by establishing racially neutral admission policies. The problem arose from the fact that the state's university system was still divided into a group of historically white schools and historically black schools. The Court ordered the district court to reexamine the policies governing the system, particularly with respect to admission standards, program duplication, institutional mission assignments, and continued operation of all eight public universities. The reexamination was to use the following test: “If the State perpetuates policies and practices traceable to its prior system that continue to have segregative effects – whether by influencing student enrollment decisions or by fostering segregation in other facets of the university system – and such policies are without sound educational justification and can be practicably eliminated, the State has not satisfied its burden of proving that it has dismantled its prior system.”

Discussing the possible application of this test, the Court questioned why the state was assigning students to the comprehensive universities on the basis of achieving a minimum composite score of 15 on the ACT test, when the average score for white students was known to be higher than that of black students. The Court wondered why many undergraduate programs at historically black universities are duplicated by historically white universities. It noted that the universities designated “comprehensive,” which get the most resources, were historically white universities. And it wondered whether the state was attempting to fund more institutions of higher learning than were justified by the resources available to the state.

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205 *Id.* at 732-43.
Justice Thomas, concurring, said that he did not understand the opinion as saying that a state is forbidden from maintaining historically black institutions.206 Dissenting in part, Justice Scalia said that only one aspect of an historically segregated university system need be eliminated: discriminatory admissions standards. He predicted that the test articulated by the majority left virtually standardless discretion in the district court judges, which would lead to litigation-driven confusion in the formerly de jure states, litigation that would benefit no one.207

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.208 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.209 The Brown Court’s rejection of permitting customs and traditions regarding segregation to determine the outcome of the Equal Protection analysis also foreshadowed the view, discussed at § 26.1.1.1 nn.16-21, that a bare desire to harm a politically unpopular group is an illegitimate interest under modern Equal Protection Clause analysis.

§ 26.2.1.4 The Constitutionality of Affirmative Action Programs Based on Race

A. Initial Approaches to Affirmative Action

Unless one reads “equal protection” as a literal barrier to all racial classifications, as do some extreme formalists today, as noted at § 26.2.1.1.E n.136, the text of the Constitution neither explicitly mandates nor explicitly prohibits government-based affirmative action programs. As an historical matter, the Reconstruction-era Congresses that passed the 13th, 14th & 15th Amendments engaged in a number of forms of affirmative action, particularly through institutions such as the Freedman’s Bureau, but also race-conscious welfare programs for “colored women and children”; welfare legislation directed toward all “blacks,” not merely newly-freed slaves; and legislation to ensure compensation for African-American servicemen who served during the Civil War.210

206 Id. at 745-49 (Thomas, J., concurring).


210 See Jeb Rubenfeld, Affirmative Action, 107 Yale L.J. 427, 429-32 (1997) (race-conscious welfare programs for “colored women and children”); Eric Schnapper, Affirmative Action and the Legislative History of the Fourteenth Amendment, 71 Va. L. Rev. 753, 754-83 (1985) (Freedman’s bureau legislation, some of which was applicable to all “blacks,” not merely newly freed former slaves; welfare legislation directed toward African-Americans; and special legislation to ensure
The question of what standard of review should be used for such programs remained unasked during the formalist and Holmesian eras. Indeed, it was only many years after Brown v. Board of Education in 1954 that voluntary government affirmative action programs began to appear in the modern era. In the meantime, the Supreme Court and lower federal courts had ordered various kind of affirmative action as a means for remediying illegal race discrimination in schools. For example, in opposition to such action, the Mobile school board had argued in Swann v. Charlotte-Mecklenburg Board of Education\(^{211}\) that the Constitution requires teacher assignments to be on a “color blind” basis. The Court rejected that contention, however, where district courts were using equity power in ordering the assignment of teachers to achieve a particular degree of faculty desegregation as part of a remedial plan to bring about a completely unitary, non-discriminatory school system.

Not until late in the instrumentalist era was there a Supreme Court case testing the constitutionality of a state’s voluntary affirmative action program. The case was Regents of the University of California v. Bakke\(^{212}\) in 1978. In Bakke, the University of California-Davis medical school had set aside 16 places for minorities in its first-year class. As discussed below, at § 26.2.1.4.A n.219, Justices Brennan, White, Marshall, and Blackmun tested the program by intermediate scrutiny, concluding that it was constitutional because the school’s purpose of remediying 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.\(^{213}\)

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. He then concluded that the trial court erred when it enjoined the university from according any consideration to race in its admissions process.

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.\(^{214}\) Applying strict scrutiny, Justice Powell noted that there were four governmental interests that the affirmative action program purported to serve. Justice Powell then analyzed each of those interests to determine if any could survive a strict scrutiny analysis.

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\(^{211}\) 402 U.S. 1, 19 (1971).

\(^{212}\) 438 U.S. 265, 269-72 (1978) (Powell, J., opinion, announcing the judgment of the Court).

\(^{213}\) 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).

\(^{214}\) Id. at 289-91 (Powell, J., opinion, announcing the judgment of the Court).

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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.”215

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 left no doubt that such an interest was not for him a compelling governmental interest that could be used at strict scrutiny. As he remarked, “That is a step we have never approved.”216

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. In contrast, in this case, as Justice Powell observed, the government “has not shown that its preferential classification is likely to have any significant effect on the problem.”217

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

215 Id. at 306.

216 Id. at 306-10.

217 Id. at 310-11.
scrutiny review, Justice Powell concluded that the Davis program’s set-aside of 16 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, and thus the Davis affirmative action set-aside program was unconstitutional under a strict scrutiny approach.\(^{218}\)

Justice Brennan, dissenting with Justices Marshall, Blackmun and White, said that racial classifications designed to serve “benign” remedial purposes should be given only intermediate scrutiny. He concluded that Davis’ articulated purpose of remediaying the effects of past societal discrimination was an important interest, at least where “there is a sound basis for concluding that 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, \textit{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.”\(^ {219}\)

Because of the vote pattern in Bakke, that case did not definitely settle whether strict scrutiny should be applied to state race-based affirmative action programs. And, it left open the question of whether strict scrutiny should be applied to affirmative action programs created by the federal government, as opposed to those created by states.

\textbf{B. Post-Bakke Developments During the Instrumentalist Era}

During later years of the instrumentalist era, the issue of a standard of review for federal affirmative action programs was addressed, but left clouded, in \textit{Fullilove v. Klutzick}.\(^ {220}\) \textit{Fullilove} involved a federal program that created a 10% minority-owned firm set-aside in construction grants to the states. The Supreme Court upheld 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, remediaying the present effects of past discrimination in a way that does not stigmatize, since

\(^{218}\) \textit{Id.} at 311-20.

\(^{219}\) \textit{Id.} at 359-62, 373-79 (Brennan, J., joined by White, Marshall & Blackmun, JJ., concurring in the judgment in part and dissenting in part).

\(^{220}\) 448 U.S. 448 (1980).
a contract could be awarded to a minority enterprise only if it was qualified to do the work. 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 articulated in the several Bakke opinions. Regarding objectives, Chief Justice Burger said that Congress’ spending power was at least as broad as its regulatory powers. Congress could remedy the present effects of past discrimination pertaining to private persons through the Commerce Clause and could remedy present effects pertaining to state and local agencies through the Equal Protection guarantees of the 14th Amendment. 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. Chief Justice Burger indicated that Congress was responding not only to the federal government’s own prior racial discrimination, but also to general societal discrimination in the form of “barriers to competitive access which had their roots in racial and ethnic discrimination, and which continue today, even absent any intentional discrimination or other unlawful conduct,” and “this pattern of disadvantage and discrimination existed with respect to state and local construction contracting” as well as federal contracting.

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, and its total contemporary record in dealing with the problems of racial discrimination against minority business enterprises established the conclusion that purposeful discrimination 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.

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 and presumptively invalid. Applying strict scrutiny, Stewart could find no compelling governmental interest, since in his view there was no evidence that Congress had engaged in the past in racial discrimination.

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221 Id. at 519-20 (Marshall, J., joined by Brennan & Blackmun, JJ., concurring).

222 Id. at 477-78, 490-92 (Burger, C.J., joined by White & Powell, JJ., announcing the judgment of the Court).

223 Id. at 510-15 (Powell, J., concurring).
discrimination in its disbursement of federal funds. 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.

C. The Modern Natural Law Era

At the beginning of the modern natural law era, 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*. 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 *Bakke*, was not a compelling government interest, as discussed at § 26.2.1.4.A n.216; (2) providing minority role models was not directly related to responding to any compelling government interest in remedying any racial discrimination in employment which had previously occurred; and (3) the loss of an existing job 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, concurred 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.

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224 *Id.* at 522-23 (Stewart, J., joined by Rehnquist, J., dissenting).

225 *Id.* at 535-36 (Stevens, J., dissenting).

226 476 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).

227 *Id.* at 295 (Marshall, J., joined by Brennan & Blackmun, JJ., dissenting); *id.* at 313 (Stevens, J., dissenting).
The Court noted in 1986 in *Local No. 93, International Association of Firefighters v. Cleveland* 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 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 as to constitutional issues that the relief passed even the most rigorous scrutiny test. Justice Brennan's opinion for the Court, joined by Marshall, Blackmun, Powell, Stevens, and O'Connor, considered several factors in holding the tailoring proper:

1. **Need and Alternatives**: The efficacy of alternative remedies (the lower court had decided, in light of the union's long record of resistance to ending discrimination, that strong measures were required);
2. **Duration**: The planned duration of the remedy (it had a limited duration);
3. **Flexibility, Including Waivability**: The availability of waiver provisions or some other form of flexibility if the hiring plan could not be met (meeting the goal here had been twice delayed);
4. **Relationship of Numerical Goals to the Relevant Labor Market**: The relationship between the percentage of minority workers to be employed and the percent of minority group members in the relevant population or work force (this goal was directly related to the work force); and
5. **Impact on Innocent Third Parties**: The effect of the remedy on innocent third parties (the order did not disadvantage existing union members and thus was different than *Wygant*).

The same five factors were applied 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. In addition, there was a compelling interest in dealing with promotions since discrimination at the entry level precluded blacks from competing for promotions. Finally, there was a compelling interest in compliance with trial court judgments calling for the department to establish procedures that did not discriminate.

Applying the above five factors, the Court found that the order was properly tailored, as follows:

1. **Need and Alternatives**: The government alternatives did not take account of the more than 10-year delay in implementing a non-discriminatory system of promotion and the injury done to black officers who had lost promotion opportunities by the delays. Fines probably would not help, and an attorneys’ fee order had not prevented foot-dragging.

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2. **Duration**: The order ended when a plan not having a discriminatory impact was in place.

3. **Flexibility, Including Waivability**: The Judge hoped that use of the order would be a one-time thing, and on submission of appropriate procedures the Judge had suspended its application.

4. **Relationship of Numerical Goals to the Relevant Labor Market**: 25% was the percentage of blacks in the relevant labor market. The 50% figure was not the goal; it merely stood for the speed at which the goal would be achieved, a reasonable provision in view of the defendant's prior delays.

5. **Impact on Innocent Third Parties**: It was used only once at the rank of corporal. It did not impose an absolute bar on white promotions, nor require layoffs of white officers.  

Justice Brennan observed that the Court had not in all situations required court-ordered remedial plans to be the least restrictive means of implementation. District courts retain some discretion even though the remedy must be narrowly tailored. Justice Stevens concurred. 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 broader and more definitive holding was reached in *Richmond v. J.A. Croson Co.* Six Justices there agreed to strike down a city’s program that required prime contractors on city projects to subcontract at least 30% of the dollar amount of the contract to one or more Minority Business Enterprises. Chief Justice Rehnquist and Justices White and Kennedy joined in an opinion by Justice O'Connor that applied strict scrutiny. Justice O'Connor explained that classifications based on race carry a danger of stigmatic harm and unless strictly reserved for remedial settings may promote notions of racial inferiority and lead to a politics of racial hostility. Applying strict scrutiny, she wrote that the city’s failure to prove racial discrimination in the local construction industry by a “strong basis in evidence” showed that the city had failed to demonstrate a compelling interest. The fact that minority businesses received 1% of the public construction jobs, while 50% of the population in Richmond were minorities, did not, by itself, prove prior racial discrimination because, in part, “Blacks may be disproportionately attracted to industries other than construction.”

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230 *Id.* at 171-83.

231 *Id.* at 184-85.

232 *Id.* at 194-95 & n.4 (Stevens, J., concurring).

233 *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).

Even if discrimination against African-American construction workers had been found, the city’s affirmative program was not directly related to remedying that discrimination. Justice O’Connor noted, “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 random inclusion of racial groups that, as a practical matter, may never have suffered from discrimination in the construction industry in Richmond”\(^{235}\) underscores that the affirmative action program in \textit{Croson} was not directly related to advancing a compelling governmental interest.

Further, even if the program were limited to African-Americans, the city would have to show under strict scrutiny that its 30% set-aside program was the least burdensome effective alternative. This would include consideration of whether race-neutral means could be an effective remedy for prior discriminatory treatment. Yet, as Justice O’Connor noted, “[T]here does not appear to have been any consideration of the use of race-neutral means to increase minority business participation in city contracting. 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.”\(^{236}\)

Justice Scalia, concurring, said that in only one situation should a state be able to use affirmative action to undo past discrimination: where it is needed to eliminate a state’s maintenance of a system of unlawful race discrimination. Justice Stevens, concurring in the judgment, specifically disagreed with the view that a government decision that rests on a racial classification is never permissible except as a remedy for its own past wrong. Here, however, the city made no claim that the public interest in efficient performance of its construction contracts would be served by the racial preference and there was no attempt by the city to identify the characteristics of the advantaged and disadvantaged classes that may justify their disparate treatment. Instead, the city had merely engaged in a stereotypical analysis that is the hallmark of violations of equal protection as there was no attempt to limit the class of persons benefitted by the ordinance to victims of past discrimination.\(^{237}\)

\[^{235}\textit{Id.} at 506. \textit{Cf.} Jana-Rock Construction, Inc. v. New York State Dep’t of Economic Develop., 438 F.3d 195, 207-09, 211-14 (2nd Cir. 2006), and cases cited therein (exclusion of persons of Portuguese and Spanish descent in affirmative action program for Hispanics, defined as Latin American Hispanics, constitutional based upon different history of discrimination, although the court applied rational review, rather than the second prong of strict scrutiny asking whether the exclusion was “necessary” to make the program “directly related” to remedying prior discrimination against Latin American Hispanics, and, if not, the program would be “unnecessarily underinclusive”; the court’s cite to \textit{Katzenbach v. Morgan}, 384 U.S. 641, 656-58 (1966) to justify rational basis scrutiny was inapposite, since that aspect of \textit{Katzenbach} involved discrimination between “American-flag schools” and “non-American-flag schools,” a social regulation not involving on its face racial, ethnic, or national origin discrimination, and no showing of discriminatory intent was made based on race, ethnicity, or national origin; in \textit{Jana-Rock} the exclusion was based on national origin).\]

\[^{236}\textit{488 U.S.} at 507 (citations omitted).\]

\[^{237}\textit{Id.} at 520-28 (Scalia, J., concurring); \textit{id} at 511-16 (Stevens, J., concurring).\]
Justice Marshall dissented, with Justices Brennan and Blackmun. Marshall again insisted that intermediate scrutiny was adequate for voluntary governmental affirmative action programs. Applying intermediate scrutiny, Marshall said that Richmond’s initiative was clearly constitutional, when viewed against the backdrop of systematic nationwide racial discrimination that Congress has identified. Richmond had a substantial purpose in eradicating the effects of past racial discrimination and in preventing the city’s own spending decisions from reinforcing and perpetuating the exclusionary effects of past discrimination which had more clearly been identified than by relying on generalized societal discrimination. The means were substantially related to the goal because Richmond’s 30% figure falls roughly halfway between the present percentage of Richmond-based minority contractors (1%) and the percent of minorities in Richmond (50%).

Criticizing the majority’s use of strict scrutiny, Justice Marshall said there is a profound difference between governmental actions that are racist, and governmental actions that seek to remedy the effects of prior racism or prevent neutral governmental activity from perpetuating the effects of such racism.238

Early in the 1990s there was one instrumentalist victory in support of intermediate scrutiny, a victory destined to be short-lived. In *Metro Broadcasting Inc. v. FCC*,239 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 public school faculty, or in the student body of a professional school.240 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 discussed at § 10.3.3. 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 in this case.

Justice O’Connor dissented, with Chief Justice Rehnquist and Justices Scalia and Kennedy.241 Justice O’Connor insisted that strict scrutiny should apply to federal as well as to state affirmative

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238 *Id.* at 528-61 (Marshall, J., joined by Brennan & Blackmun, JJ., dissenting).


240 *Id.* at 601-02 (Stevens, J., concurring).

241 *Id.* at 602-31 (O’Connor, J., joined by Rehnquist, C.J., and Scalia & Kennedy, JJ., dissenting).
action programs, a position she was able to transform into law six years later in *Adarand Constructors, Inc. v. Pena*, once Justice Marshall had been replaced by Justice Thomas. In her dissent, Justice O’Connor said that six members of the Court in *Fullilove* had rejected intermediate scrutiny of federal actions in favor or some more stringent form of review. In *Croson*, the Court had determined that strict scrutiny should apply to preferences that favor members of minority groups. Here, 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, *Metro Broadcasting* 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 5 Justices, 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.” Justice O’Connor added that to the extent *Metro Broadcasting* was inconsistent with this principle, it was overruled. She explained that *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. 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.” Indeed, it is unclear whether Justice Scalia now believes there are any compelling government interests to support racial discrimination.

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

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243 *Id.* at 227. Applying strict scrutiny, narrowly drawn federal affirmative action programs in government contracting have continued to be upheld as constitutional. 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).

244 515 U.S. at 227-31.

245 *Id.* at 239 (Scalia, J., concurring in part and concurring in the judgment).
to foster equality. 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 in the future, she underscored that Justice O’Connor’s opinion said that strict scrutiny is not always fatal in fact. Justice Ginsburg saw the Court’s decision as one which would allow precedents to evolve, and be informed by and responsive to changing conditions. 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. Souter said that § 5 of the 14th Amendment should remain, after this case, as the source of an interest of the national government sufficiently important to satisfy the requirements of the strict scrutiny test. Further, he did not see that Justice O’Connor’s opinion would effect what he called the long accepted view that constitutional authority to remedy past discrimination is not limited to the power to forbid its continuation, but extends to eliminating those effects that would otherwise persist.

In a related development, the Court has in recent years applied strict scrutiny to the redrawing of congressional districts covered by the Voting Rights Act for the remedial purpose of achieving a majority in each such district of racial groups that otherwise were a minority, discussed at § 26.2.1.5. As in Bakke, race may be considered, but it must not be the predominant consideration.

D. Affirmative Action in the Context of School Admissions Policies

Several questions remained open after this series of cases regarding the use of affirmative action in the context of school admissions policies. One question was whether Bakke stood as a precedent supporting the notion that race may be used in the admissions process of a state university. 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 broadcast diversity in Metro Broadcasting, or diversity in hiring faculty for role model purposes in Wygant, show that the diversity interest will not satisfy strict scrutiny. In a statement accompanying the Court’s denial of certiorari, Justice Ginsburg 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. Thus, by the time the Hopwood case reached the Supreme Court, it was technically moot.

246 Id. at 242-64 (Stevens, J, joined by Ginsburg, J., dissenting).

247 Id. at 271-76 (Ginsburg, J., joined by Breyer, J, dissenting).

248 Id. at 264-71 (Souter, J., joined by Ginsburg & Breyer, JJ, dissenting).

249 78 F.3d 932 (5th Cir. 1996), cert. denied, 518 U.S. 1033 (1996).
The Court resolved this issue in 2003 in a set of companion cases, *Grutter v. Bollinger* and *Gratz v. Bollinger*. In *Grutter*, the Court adopted Justice Powell’s approach in *Bakke* as the majority approach. Deferring to academic judgment, the Court then decided that having a racially diverse student body is directly and substantially related to the compelling governmental interest in effective and efficient education. Under strict scrutiny, of course, any race-based affirmative action program must be the least restrictive alternative to achieving these educational benefits. In *Grutter v. Bollinger*, the Court concluded that the University of Michigan’s law school system of individualized consideration of applicants, taking race into account as a factor, satisfied this test, consistent with Justice Powell’s opinion in *Bakke*. On the other hand, 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 that could be used to assure that the undergraduate program received the educational benefits flowing from a racially diverse student body.

A second question is whether even if race may be used in admissions programs, what factual proof will be sufficient to show for a particular education program that diversity is directly related to advancing a compelling interest in efficient and effective education? After *Grutter* this should be easier to show, but it is clear that a present majority of the Court will test each individual program on its own merits, and the government must supply the proof.

A third question is whether, apart from judicially-imposed remedies or diversity in higher education, the Court will consider any interest to be compelling beyond an authorized government institution attempting to create a remedy for its own prior illegal discrimination or such discrimination by private individuals within the scope of the agency’s legislative jurisdiction. Regarding this question, many court opinions have held, or strongly implied, that such additional compelling governmental interests exist, as noted at § 26.1.1.2 nn.47-51.

A fourth question involves the manner in which the issues raised in the educational affirmative action cases have been framed. As indicated, courts typically ask whether having a diverse student body is a compelling government interest. Then, following Justice Powell’s concurrence in

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251 539 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).

most lower courts concluded there is a compelling government interest, but some courts did not. This way of phrasing the issue, however, is wrong.

The real question of government ends in these cases is whether there is a compelling government interest in effective and efficient education. That is the end that governments seek regarding education. Diversity in the student body is one means to obtain this end. As Justice Powell noted in Bakke, discussed at § 26.2.1.4.A n.215, merely having diversity for diversity’s sake is not only not a compelling interest, it is not even a legitimate interest. Properly understood, the strict scrutiny analysis that should take place in race-based affirmative action cases involving education involves: (1) is there a compelling governmental interest in education; (2) is having a diverse student body directly related to advancing this interest, and (3) is the affirmative action program adopted the least burdensome alternative that would effectively advance the government’s interest in education.

Of course, a similar tracking of standard strict scrutiny analysis should be applied in other affirmative action cases. For example, in Wittmer v. Peters, the Seventh Circuit Court of Appeals had to decide whether a prison could adopt a racial preference in hiring officers for a “boot camp” for young, non-violent criminal offenders. The court analyzed the case as involving whether the government had a compelling government interest in having a diverse group of officers for the boot camp. The proper analysis should be: (1) is having an effective, rehabilitative “boot camp” program a compelling government interest; (2) is having a diverse group of officers directly related to a successful “boot camp” program; and (3) is the extent of the affirmative action program adopted to achieve that diverse group the least burdensome alternative that will effectively advance the government’s rehabilitative end.

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254 See Bhagwat, supra note 252, at 266-68 (discussing Hunter and other cases).

255 Id. at 264, 268 n.48 (discussing Hopwood and other cases).

256 See, e.g., Texas Const. Art. VII, § 1 (“It shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools.”), discussed in Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391 (Tex. 1989).

257 Bakke, 438 U.S. at 307 (“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.”).

258 87 F.3d 916, 919-20 (7th Cir. 1996).
Courts are currently split on the question of whether analyzing the governmental ends part of this analysis is a fact question or question of law. That may be because the courts have been conflating the means and ends inquiries by asking whether having a diverse student body is a compelling government interest. Once it is understood that this way of viewing the question is wrong, it should become clear that the proper question of governmental ends, such as whether efficient education is a compelling governmental interest, is a question of law, as indicated at § 26.1.4 n.100. Based upon court precedents, it should be uncontroversial that education is a compelling government interest, particularly for state governments where most educational affirmative action takes place.259

In contrast to governmental ends, the two means questions of underinclusiveness and overinclusiveness are fact questions which depend on the particular program before the court for their proper resolution. Thus, after hearing all the evidence, and remembering that the government bears the burden in these heightened scrutiny cases, discussed at § 26.1.3 n.82, a district court should decide as a factual matter how the particular program operates in practice. It would then be a mixed question of law and fact, discussed at § 26.1.4 nn.101-02, whether having a racially diverse student body is directly related to efficient and effective education, and whether the particular program is the least burdensome alternative to achieving these educational benefits.

For many professors it will seem obvious that having a racially diverse student body is directly related to efficient and effective education for students who will live in a racially and culturally diverse society. For non-professors, however, it may be necessary to marshal (one might even say “Thurgood Marshall” given his role in the Brown line of cases) the evidence. A number of amici briefs discussed the advantages of a racially diverse student body in Grutter and Gratz.260 The third prong of the strict scrutiny test will depend upon the circumstances of each case whether less burdensome alternatives exist than the program adopted by the institution that would advance as effectively the government’s compelling interest in efficient and effective education. This analysis is consistent with the Court’s view in Grutter and Gratz that having a racially diverse student body is related in a number of ways to efficient and effective education, but that any affirmative action program must be narrowly tailored to achieve this end in the least burdensome effective manner. Despite this difficulty for progressives worried about upholding affirmative action programs, this approach is more likely to result in the programs being upheld than trying to convince the Court to adopt a new theory of equal protection that will uphold these programs, either by focusing on impact on groups, not individuals; or adopting a new approach toward discriminatory intent; or proposing to scrap strict and intermediate scrutiny so that race-based affirmative action will not be analyzed under heightened scrutiny but only rational review.261

259 See generally Hunter, 190 F.3d at 1063, citing Brown v. Board of Educ., 347 U.S. 483, 493 (1954) (“[E]ducation is perhaps the most important function of state and local governments.”).


261 See, e.g., Deborah Hellman, The Expressive Dimension of Equal Protection, 85 Minn. L. Rev. 1, 17 (2000) (advocating refocusing Equal Protection doctrine around “the principle of equal concern” for groups, rather than individuals, i.e., focusing on whether affirmative action harms “white students” as a group, rather than the obvious concrete harm to “individual white applicants”;

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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.” This 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.’”

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.


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.”

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.” 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 *Bakke* that “to get beyond racism, we must first take account of race” may be more empirically accurate.

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. First, she noted, “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.” Second, in the absence of prior racial discrimination to which race-based affirmative action is a necessary remedy, whether or not to adopt a race-based affirmative action program is within the discretion of society’s policy-makers. Justice O’Connor noted, “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.”

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 rational review. Such a proposal is consistent with the Stage 6

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267 *Bakke*, 438 U.S. at 407 (Blackmun, J., concurring).

268 *Grutter*, 539 U.S. at 342-43 (O’Connor, J., opinion for the Court).

premises, noted at § 15.4.1 nn.78-81, of (1) equal concern and respect for all citizens and the desire to leave no child behind, combined with the view that (2) American society should eventually be able to deal justly with the legacy of past racism and achieve in the future a just color-blind society of equal dignity for all individuals regardless of race, ethnicity, or national origin.

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.270

Of course, to apply an affirmative action program, decisions must be made about any particular individual’s race. Rather than having state-imposed rules on the matter, as during the Plessy era, noted at § 26.2.1.1.B n.113, most states today permit individuals to self-report their racial identity, and depart from that self-identification only in clear cases of misrepresentation. To the extent that an affirmative action program adopts individualized decisionmaking based on a totality of the circumstances approach, as in Grutter, rather than an automatic preference based on minority identity, as in Gratz, precise racial identification becomes less relevant. Such a Grutter approach is particularly appropriate given the increasing number of individuals of mixed-race background.271

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

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public employment. Two educational cases are set to be decided during the 2006 Term[72]

§ 26.2.1.5 Racial Redistricting Cases

In recent years, the post-instrumentalist Court has considered a number of cases dealing with the issue of racial redistricting of voting districts. In 1993, in Shaw v. Reno (Shaw I),273 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,274 the 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 in Miller, 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 tangible communities of interest, spanning its hundreds of miles. Once strict scrutiny was triggered, the Court did not find a compelling interest. Justice Kennedy said that the Justice Department’s racially-based maximization policy brings the Voting Rights Act, upheld as an exercise of Congress’ authority under § 2 of the 15th Amendment, into tension with 14th Amendment doctrine on racial discrimination. The Court rejected the Justice Department’s interpretation of the Act and thereby avoided the constitutional tension that such an interpretation raised. Justice Kennedy added that the goal of providing an equal opportunity to gain public office regardless of race is neither assured nor well served by carving electorates into racial blocs.

In his solo dissent, Justice Stevens said the plaintiff white voters had not suffered any injury to give them standing merely because the plan had increased the probability that black candidates might win. In her 4-Justice dissent, Justice Ginsburg rejected the “subordination” or race as a “predominant factor” test in favor of asking only whether race “crowded out” traditional districting principles.275

In the following year, 1996, the Court, by the same 5-4 vote, invalidated four more majority-minority districts that were created after the 1990 census with attention to the Justice Department’s

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275 Id. at 929 (Stevens, J., dissenting); id. at 940 (Ginsburg, J., joined by Stevens, Souter & Breyer, JJ., dissenting).
enforcement of the Voting Rights Act. In the North Carolina case, *Shaw v. Hunt (Shaw II)*, Chief Justice Rehnquist wrote for the majority that since race was the “predominant factor” in drawing the questioned district, strict scrutiny should be applied. However, the state had not shown a compelling interest since remediying past or present racial discrimination in voting was not shown to precipitate its use of race in the redistricting plan. The Chief Justice did not then resolve the question of whether an attempt by a state to comply with the Voting Rights Act could be a compelling interest because he went on to hold that since an additional majority-black district in the Northern part of the state was not required by § 2 of the Act, creating that district was not a remedy narrowly tailored to the state’s professed interest in avoiding § 2 liability because of a need to give effect to black and Native American voting strength in the Southern part of the state. Justice Stevens, joined by Justices Ginsburg and Breyer, said that strict scrutiny was inappropriate 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, as he did in *Bush v. Vera*, that the Court should abandon scrutiny in this area as being unworkable in practice.

In the companion Texas 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, which was the predominant factor motivating the legislature’s redistricting decision. 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. One aspect of this case is important to note. 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, called “loose” strict scrutiny at § 7.2.1 nn.38-41. This level of scrutiny adopts the first two elements of strict scrutiny review, but waters down element three to an intermediate level of inquiry.

As noted earlier, the Supreme Court did not clearly adopt strict scrutiny in the context of race-based affirmative action in the employment context in *Fullilove v. Klutznick*, discussed at § 26.2.1.4.B nn.220-25, and *Paradise v. United States*, discussed at § 26.2.1.4.C nn.229-33. However, in an opinion authored by Justice O’Connor, the Court clearly adopted traditional rigorous strict scrutiny for race-based affirmative action in *Adarand Constructors, Inc. v. Pena*, discussed at § 26.2.1.4.C nn.242-48. The *Adarand* opinion followed Justice O’Connor’s dissent in *Paradise* where she criticized the *Paradise* plurality for not adopting traditional rigorous strict scrutiny in a race-based context.

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277 *Id.* at 918 (Stevens, joined by Ginsburg & Breyer, JJ., dissenting); *id.* at 951 (Souter, J., joined by Ginsburg & Breyer, JJ., dissenting).


279 *Id.* at 977, 979.
affirmative action case, stating, “[T]o survive strict scrutiny, the District Court order must fit with greater precision than any alternative remedy.”280 Despite this criticism of a “looser” strict scrutiny approach in *Paradise* and *Adarand*, the adoption by Justice O’Connor of “loose” strict scrutiny in her majority opinion in *Bush v. Vera* suggests that this standard of review has become part of modern Supreme Court doctrine, at least for racial redistricting cases.281

In *Bush*, 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.282 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 § 26.2.1.2 n.147, and the Court applies that standard in other voting rights cases, discussed at § 26.2.1.2 nn.157-62, the requirement that race be a “predominant” factor reflects the precedents in racial redistricting cases.

Justice Stevens, dissenting with Justices Ginsburg and Breyer, called on the Court to abandon the practice of allowing an action for racial gerrymandering. He repeated that strict scrutiny was inappropriate and he said that in any event the record in this case reveals an interest in protecting incumbents and placing predominantly rural voters in one district and predominantly urban voters in another. The state took race into account only to the extent necessary to satisfy federal statutes regarding redistricting not leading to a result of a dissolution of minority voting strength.283 Justice Souter, dissenting, said that the “predominant motive” standard was unworkable as it is not possible to untangle traditional districting principles and race, a questionable conclusion, as discussed at § 12.4.3 n.199-200. He too called for a complete withdrawal from review of redistricting cases.284 Justice O’Connor, replying in a separate concurrence to her own plurality opinion, joined the dissenters in saying that states have a compelling interest in complying with federal voting rights law, in particular the “results test” as this Court has interpreted it.285

Despite these calls for the Supreme Court to abandon its equal protection review of redistricting, a number of additional cases have been decided. One of them was routine, in the sense that it was decided by the usual 5-4 split on the Court in these cases. One was unanimous. In three other cases, the usual dissenters became part of the majority as there was a switch of sides by Chief Justice Rehnquist in one case, Justice O’Connor in another case, and Justice Kennedy in the third case.

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280 480 U.S. at 199 (O’Connor, J., dissenting).
281 See *Bush*, 517 U.S. at 979.
282 Id. at 999-1000 (Thomas, J., joined by Scalia, J., concurring in the judgment). Justice Kennedy also noted concern with a predominant factor test. Id. at 996-99 (Kennedy, J., concurring).
283 Id. at 1003 (Stevens, J., joined by Ginsburg & Breyer, JJ., dissenting).
284 Id. at 1045 (Souter, J., joined by Ginsburg & Breyer, JJ., dissenting).
285 Id. at 990-95 (O’Connor, J., concurring).
The lone routine case was *Abrams v. Johnson*.\(^{286}\) On remand from *Miller v. Johnson*, after the Georgia legislature deadlocked, the district court had established a single majority-minority district. The Court affirmed by the same 5-4 vote as in the original case. Justice Kennedy’s opinion said that the district court acted within its discretion in deciding that it could not draw two majority-black districts without itself engaging in racial gerrymandering. Justice Breyer, dissenting, said that the legislature should be permitted to redistrict if it has a strong basis for believing it necessary. Otherwise, what is essentially political power is shifted from legislatures to federal courts.

One non-routine case was *Lawyer v. Department of Justice*,\(^{287}\) where Chief Justice Rehnquist moved away from his usual group of colleagues, to join Justice Souter, and the other dissenters in the *Shaw* line of cases, Justices Stevens, Ginsburg, and Breyer. Following a legislative impasse, the Florida Supreme Court devised a legislative district. A contest over the constitutionality of that district was settled by all parties except Mr. Lawyer. A federal district court approved the settlement plan without formally adjudicating that the state supreme court’s earlier plan was unconstitutional. Lawyer objected that the settlement plan had a black voting population of 36.2%, a higher percentage of black voters than in any of the three counties from which the district was drawn. For the majority, Justice Souter pointed out that the district comprised a predominantly urban low-income population whose white and black members share a similarly depressed economic condition. And he said that the Court had never suggested that the percentage of black residents in a district may not exceed the percentage of black residents in any of the counties from which the district is created. The dissenters said that the Court had engaged in an unprecedented intrusion on state sovereignty since the district court had not first found the state supreme court’s plan unconstitutional. As to why Chief Justice Rehnquist did not join with this federalism concern, it may be that his conservative Holmesian states’ rights concern, noted at § 10.3.3, was met by the fact that the state’s Attorney General, and counsel for the President of the Florida Senate and the Speaker of the House, all represented their respective government bodies in the litigation and entered into the proposed settlement.

A unanimous Court held in *Hunt v. Cromartie*\(^{288}\) that the district court erred in granting summary judgment to the challengers of a redrawn 12th Congressional District in North Carolina, the district court finding that the legislature disregarded traditional districting criteria and gave race a predominant influence. For the Court, Justice Thomas said that the evidence tends to support an inference that the state drew district lines with an impermissible racial motive, but that this inference was challenged by substantial evidence that the legislature was engaged in political gerrymandering to protect Democrats, an action that is constitutional even if most loyal Democrats happen to be black and the legislature is aware of that fact. Justice Stevens, concurring with Justices Souter, Ginsburg, and Breyer, commented that a bizarre configuration is the traditional hallmark of a

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\(^{286}\) 521 U.S. 74, 87-90 (1997); *id.* at 105-09 (Breyer, J., joined by Stevens, Souter & Ginsburg, JJ., dissenting).

\(^{287}\) 521 U.S. 567, 577-83 (1997); *id.* at 583 (Scalia, J., joined by O’Connor, Kennedy & Thomas, JJ., dissenting).

\(^{288}\) 526 U.S. 541, 548-54 (1999); *id.* at 555-58 (Stevens, J., joined by Souter, Ginsburg & Breyer, JJ., concurring).
political gerrymander and that registered Democrats in the South do not always vote for Democratic candidates in federal elections.

On remand, the district court concluded that the district had been drawn for predominantly racial motives and was unconstitutional. In *Easley v. Cromartie,* Justice O’Connor voted with the usual dissenters to reverse this decision. Writing for the majority, Justice Breyer said that the district court’s conclusion was clearly erroneous. The Court noted:

where an intermediate court reviews, and affirms, a trial court's factual findings, this Court will not “lightly overturn” the concurrent findings of the two lower courts [*citing* Neil v. Biggers, 409 U.S. 188, 193 n.3 (1972)]. But in this instance there is no intermediate court, and we are the only court of review [pursuant to 28 U.S.C. § 2284, discussed at § 17.2.2.1.B n.111.] Moreover, the trial here at issue was not lengthy and the key evidence consisted primarily of documents and expert testimony. Credibility evaluations played a minor role. Accordingly, we find that an extensive review of the District Court's findings, for clear error, is warranted [*citing* Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 500-501 (1984)]. That review leaves us "with the definite and firm conviction" that the District Court's key findings are mistaken [*citing* United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948)].

Emphasizing the demanding nature of the challenger’s burden of proof, he said that a party attacking legislatively drawn boundaries 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 comparably consistent with traditional districting principles and that those districting alternatives would have brought about significantly greater racial balance. As for why Justice O’Connor’s shift occurred, it can be speculated that her legislative experience in Arizona before becoming a judge may have sensitized her to the fact that political and racial considerations are very difficult to separate, particularly if there is racial bloc voting for one party. 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.

The third non-routine case in this series is *League of United Latin American Citizens v. Perry.*

290 Id. at 242-43.
291 Id. at 243-46.
292 Id. at 263 n.4 (Thomas, J., joined by Rehnquist, C.J., and Scalia & Kennedy, JJ., dissenting).
293 126 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).
In this 2006 case, 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 gerrymandering strength. Chief Justice Roberts and Justice Alito indicated they took no position in this case on whether political gerrymandering cases should always be viewed as political questions, as a 4-Justice plurality opinion, including Chief Justice Rehnquist and Justice O’Connor, had concluded in Vieth, discussed at § 17.3.4.5 nn.568-70. Justices Scalia and Thomas held to their view in Vieth that such cases always are political questions.

Given the variations in Justices making up the majority blocks in the recent racial redistricting cases, how these cases will be decided with Chief Justice Roberts and Justice Alito replacing Chief Justice Rehnquist and Justice O’Connor on the Court will be a matter of some interest, and difficult to predict in advance. In many of these cases, as in other areas of constitutional law, in the near term Justice Kennedy is likely to be the swing vote, as noted in this book’s Addendum, at § G n.35.294

§ 26.2.1.6   Racial Discrimination in the Context of the Criminal Justice System

A.   Peremptory Challenges Based on Race

In 1880, the Court held that a state denies a black defendant equal protection of the laws when it puts him on trial before a jury from which members of his race have been purposefully excluded.295 The Court has noted that a defendant has no right to a "petit jury composed in whole or in part of persons of his own race." However, a defendant does have the right to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria.296

The Court stated in in Batson v. Kentucky297 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. . . . Discrimination within the judicial system is most pernicious because it is ‘a stimulant to that race prejudice which is an impediment to securing to [black citizens] that equal justice which the law aims to secure to all others.’” For this reason, while prosecutors ordinarily can exercise peremptory challenges "for any reason at all, as long as

294   For general discussion of the issues involved in the racial redistricting cases, see Symposium: Democracy in a New America, 79 N. Car. L. Rev. 1207-1567 (2001).

295   Strauder v. West Virginia, 100 U.S. 303, 305 (1880).

296   See Martin v. Texas, 200 U.S. 316, 321 (1906); Ex parte Virginia, 100 U.S. 339, 345 (1880).

297   476 U.S. 79, 87-88 (1986), citing, inter alia, Strauder, 100 U.S. at 308.
that reason is related to his [or her] view concerning the outcome" of the case to be tried,298 the Equal Protection Clause forbids prosecutors from challenging potential jurors solely on account of their race or on the assumption that black jurors will be unable impartially to consider the state's case against a black defendant.

In deciding whether peremptory challenges are based upon race, the Court concluded in 1965 in Swain v. Alabama299 that an inference of purposeful discrimination would be raised on evidence that a prosecutor, "in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be, is responsible for the removal of Negroes who have been selected as qualified jurors by the jury commissioners and who have survived challenges for cause, with the result that no Negroes ever serve on petit juries." Lower courts following Swain reasoned that proof of repeated striking of members of a racial group over a number of cases was necessary to establish a violation of the Equal Protection Clause. This interpretation of Swain placed on defendants a crippling burden of proof, making prosecutors' peremptory challenges largely immune from constitutional scrutiny.300 In order to make the Swain remedy more effective, and consistent with the natural law principle, noted at § 12.3.3 n.13, that “where there is a right, there should be a remedy,” in 1986, in Batson v. Kentucky,301 the Court clarified the standard of proof necessary to establish that peremptory challenges had been used in a racially discriminatory manner. The Court stated in Batson:

[A] defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial. To establish such a case, the defendant first must show that he is a member of a cognizable racial group, and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits "those to discriminate who are of a mind to discriminate." Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race. This combination of factors in the empaneling of the petit jury, as in the selection of the venire, raises the necessary inference of purposeful discrimination.

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. . . .


300 See Batson, 476 U.S. at 92-93, and cases cited therein.

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 prosecutor may not rebut the defendant’s prima facie case of discrimination by stating merely that he challenged jurors of the defendant’s race on the assumption – or his intuitive judgment – that they would be partial to the defendant because of their shared race. . . . [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.302

As the Court noted in 2005 in Miller-El v. Dretke,303 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.

The majority’s decision in Miller-El indicates that the natural law and instrumentalist Justices on the Court take seriously the Batson requirement of no racially-based peremptory challenges. This is particularly true since a number of the arguments relied upon by Justice Souter were based on evidence not presented to the state courts in their Batson consideration, and thus the majority had to create a seemingly case-specific exception in Miller-El to the normal rule, pointed out by the dissent, that on habeas corpus review whether “the state court decision was unreasonable must be assessed in light of the record the court has before it.”304

In applying the Batson test, the Court has held that the challenger need only establish an inference of racial discrimination to establish a prima facie case and shift the burden to the other party to explain a race-neutral justification. The challenger need not establish initially that the peremptory challenge was more likely than not the product of racial discrimination, although, as in all cases of establishing discriminatory intent, ultimately the burden does remain on the challenger to establish

302 Id. at 96-98 (citations omitted). On Batson generally, see Sheri Lynn Johnson, Batson Ethics for Prosecutors and Trial Court Judges, 73 Chi.-Kent L. Rev. 475, 476, 480-81 (1998).


by a preponderance of the evidence that race discrimination occurred.\footnote{305}{See Johnson v. California, 545 U.S. 162, 168-73 (2005).}

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.\footnote{306}{See Edmonson v. Leesville Concrete Co., Inc, 500 U.S. 614 (1991) (private attorneys); Georgia v. McCollum, 505 U.S. 42 (1992) (defense counsel); J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127 (1994) (gender).} 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.\footnote{307}{See generally Clare Sheridan, Peremptory Challenges: Lessons from Hernandez v. Texas, 25 Chicano-Latino L. Rev. 77 (2005).} 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.\footnote{308}{See generally Courtney A. Waggoner, Peremptory Challenges and Religion: The Unanswered Prayer for a Supreme Court Opinion, 6 Loy. U. Chi. L.J. 285 (2004); People v. Garcia, 92 Cal. Rptr. 2d 339, 347-48 (2000) (applying Batson to sexual orientation, while acknowledging that usually the sexual orientation of prospective jurors would not be known; codified in Cal. Civ. Proc. Code § 231.5 (West 2003): "A party may not use a peremptory challenge to remove a prospective juror on the basis of an assumption that the prospective juror is biased merely because of his or her race, color, religion, sex, national origin, sexual orientation or similar grounds."}\

**B. Race Discrimination in Prison Management and Control**

Consistent with other cases of race discrimination, the Court has applied strict scrutiny when evaluating a state’s policy of race segregation in prisons.\footnote{309}{See, e.g., Lee v. Washington, 390 U.S. 333 (1968).} With regard to less than undue burdens on unenumerated fundamental rights, such as the right of access to courts, discussed at § 26.5.2; the right to vote, discussed at § 26.5.3; and the right to marry, discussed at § 27.3.3.1.A, prisoners have been held to be entitled only to a version of rational basis scrutiny, not strict scrutiny, given the fact that prisoners give up some rights when incarcerated and the deference owed to the legitimate penological interests of prison administrators. In 2005, in Johnson v. California,\footnote{310}{543 U.S. 499, 502 (2005).} the Court was presented with the question whether that lesser rational basis standard should be applied to race discrimination in the context of a California prison administration policy of racially segregating prisoners in double cells in reception centers for up to 60 days each time a prisoner initially enters a correctional facility.
In *Johnson*, a majority of the Court rejected the invitation to apply the lesser scrutiny applicable in the unenumerated fundamental rights cases to race discrimination. Justice O’Connor stated:

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").

Instead of remanding the case for the lower court to apply strict scrutiny, Justice Stevens would have ruled the policy unconstitutional on the merits. Justices Ginsburg, joined by Justices Souter and Breyer, joined the majority’s opinion, but concurred, repeating their view, stated in the race-based affirmative action cases, discussed at § 26.2.1.4 nn.246-48, that “benign” racial discrimination should only trigger intermediate scrutiny, not strict scrutiny. Chief Justice Rehnquist took no part in the decision. Dissenting, Justice Thomas, joined by Justice Scalia, would have applied rational basis scrutiny based on the deference toward prison administrators in the fundamental rights cases.

### § 26.2.2 Classifications Disadvantaging Aliens

#### § 26.2.2.1 Alienage Classifications in State Law

A. **Classifications Applied to Legal Resident Aliens: Strict Scrutiny, with Political Function Exception Triggering Only Rational Review**

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

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311 *Id.* at 507-08 (some citations omitted).

312 *Id.* at 1152 (Rehnquist, C.J., took no part in the decision); *id.* at 1152-53 (Ginsburg, J., joined by Souter & Breyer, JJ., concurring); *id.* at 1153 (Stevens, J., dissenting); *id.* at 1157 (Thomas, J., joined by Scalia, J., dissenting).


few protective decisions, such as *Yick Wo v. Hopkins*,\(^{316}\) 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*,\(^{317}\) 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.

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* and its “suspect classification” doctrine, discussed at § 26.2.1.1.C nn.124-26, 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.\(^{318}\) 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.\(^{319}\)

During the instrumentalist era, the Court took a big step. In 1971, in *Graham v. Richardson*,\(^{320}\) the Court held that with respect to persons in the United States alienage is a “suspect classification.” Citing footnote 4 in *Carolene Products Co. v. United States*, discussed at § 26.1.2.2 nn.68-72, the Court said that aliens are a prime example of a discrete and insular minority for whom strict scrutiny is appropriate. In addition to discreteness and insularity, Professor Tribe has suggested that another reason for strict scrutiny is that the alienage classification is so unlikely to prove relevant to any legitimate governmental purpose that its use to disadvantage persons probably signals a response to disadvantage a politically weak and unpopular group based upon some illegitimate stereotype.\(^{321}\)

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,\(^{322}\) practicing law,\(^{323}\) or becoming an engineer.\(^{324}\) However, the instrumentalist Court created one significant exception to the application of strict scrutiny. It is the “political function” exception. If state employment positions involve functions that go to the heart of representative government, barriers

\(^{316}\) 118 U.S. 356 (1896).
\(^{317}\) 239 U.S. 33 (1915).
\(^{318}\) Takahashi v. Fish & Game Comm’n, 334 U.S. 410 (1948).
\(^{323}\) In re Griffiths, 413 U.S. 717 (1973).
against aliens are given only rational review. The reason for this exception 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.\footnote{See Bernal v. Fainter, 467 U.S. 216, 220-22 (1984).}

To determine whether the “political function” exception applies, the Court uses a two-part test first announced in \textit{Cabell v. Chavez-Salido}.
\footnote{454 U.S. 432, 454 (1982).} Applying the \textit{Cabell} test, the Court asks two questions:

\begin{enumerate}
    \item 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
    \item 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.
\end{enumerate}

Applying the above tests, the Court concluded in \textit{Bernal v. Fainter} that a Texas law that barred aliens from service as a notary public did not fit within this exception and did not pass strict scrutiny. Justice Marshall explained that the statute was not overinclusive because it applied narrowly to only one category of persons. However, the Court did not need to decide whether it was underinclusive on the ground that other officers, such as court reporters and the Secretary of State, were not required to be citizens, because the law failed the second prong of the \textit{Cabell} test. The Court noted that a notary's duties, essentially clerical and ministerial, do not go to the heart of representative government. Since the exception did not apply, the law was subject to strict scrutiny.

Once the Court determined that strict scrutiny should apply, the statute was easily determined to be unconstitutional. The Court noted that the law was not directly related to advancing the state's compelling interest in insuring familiarity with the law. The law did not require a test or any other evidence of familiarity with the law. In addition, no facts supported an asserted compelling interest in assuring the later availability of notaries to testify.

public school teachers, the Court stated in *Ambach v. Norwich*,[332] “Public education, like the police function, ‘fulfills a most fundamental obligation of government to its constituency.’” “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.”[333]

State discrimination against aliens may be prevented by preemption. For example, the Court held in *Graham v. Richardson*[334] that durational residence requirements for welfare to aliens conflicted with a congressional policy of not imposing burdens on aliens who become indigent after their entry into the United States. In *Toll v. Moreno*,[335] 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.

### B. Classifications Applied to Illegal Aliens: Rational Review for Adults, Intermediate Review for Children Attending School

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 mere rational basis review.[336]

However, in *Plyler v Doe*,[337] a case involving the rights of the children of illegal immigrants to attend public school, a 5-4 Court applied intermediate scrutiny to find that Texas could not deny free public education to the children of illegal immigrants. Four instrumentalists, Justices Brennan, Marshall, Blackmun, and Stevens, were joined by Justice Powell. Justice Brennan began his reasoning for the Court by holding that unlawful aliens are "persons" within the meaning of the 14th Amendment. He noted that the usual standard for equal protection review is rational basis, but that less deference is given to classifications that disadvantage a suspect class because typically they may reflect prejudice rather than rationality or which impinge on a fundamental right. Then, Justice Brennan pointed to the gender discrimination and non-marital children cases as examples of classifications that "give rise to recurring constitutional difficulties" where the Court requires a state to further a substantial interest. That intermediate scrutiny standard should be applied here, he said,

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335 458 U.S. 1, 13-17 (1982).
because of the social costs of having an uneducated group of residents, and the injury to children who are in a class beyond their control. Justice Powell, concurring, with the crucial fifth vote, said the case was analogous to that of illegitimate children, where such children were often punished for the misdeeds of their parents. Since cases involving discrimination against illegitimate children trigger intermediate scrutiny, as discussed at § 26.3.2, Justice Powell agreed with Justice Brennan that intermediate scrutiny should apply here as well.\textsuperscript{338} This conclusion is consistent with the natural law concern that individuals should not be punished for something not the product of that individual’s choice, as discussed at § 26.1.2.1 nn.63-64.

The Brennan opinion in \textit{Plyler} was not particularly careful in its linguistic use and did phrase the ultimate test as whether the statute could “be considered rational unless it furthers some substantial goal of the State.”\textsuperscript{339} Later cases have indicated, however, consistent with the thrust of both Justice Brennan’s opinion for the Court, and Justice Powell’s concurrence, that the level of review in \textit{Plyler} is a standard intermediate scrutiny kind of test.\textsuperscript{340}

Applying the intermediate "substantial goal" standard in \textit{Plyler}, the Court found that Texas did not show that any substantial goal was implemented by the classification, be it preserving resources for its own citizens (since administrative costs savings are usually not viewed as a substantial government interest, as noted at §§ 26.1.1.2 n.44 & 26.1.4 n.100); guarding against an influx of illegal immigrants (the record containing no evidence that illegal entrants impose significant burdens on the state's economy); improving educational quality (the record not supporting the claim that excluding undocumented children will improve the overall quality of education in the state); or avoiding the education of people who will leave the state or not put their education to productive use within the state (the record making clear that many of the children disabled by the classification would remain indefinitely and some would become lawful residents or citizens). And, as Justice Powell noted, denial of education to the children of illegal aliens bears no substantial relation to any substantial state interest because no one benefits from the creation within our borders of a subclass of illiterate persons.\textsuperscript{341}

Chief Justice Burger, dissenting with Justices White, Rehnquist, and O’Connor, said that the Court was adopting a policy role, abusing the 14th Amendment in an effort to become an omnipotent and omniscient problem solver. Once it is conceded, as here, that illegal aliens are not a suspect class and that education is not a fundamental right, the inquiry should be whether the classification bears a rational relationship to a legitimate state purpose. It does here because it is rational 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 has in providing for persons lawfully present.\textsuperscript{342}

\textsuperscript{338} \textit{Id.} at 217-24; \textit{id.} at 238-40 (Powell, J., concurring).

\textsuperscript{339} \textit{Id.} at 224.


\textsuperscript{341} \textit{Plyler}, 457 U.S. at 224-30; \textit{id.} at 239-41 (Powell, J., concurring).

\textsuperscript{342} \textit{Id.} at 242 (Burger, C.J., joined by White, Rehnquist & O’Connor, JJ., dissenting).
As discussed at § 12.4.2 n.191, during 1981-84, Justice O’Connor more often voted with Holmesian Justice Rehnquist than natural law Justice Powell, before finding her natural law voice after that.

One consequence of *Plyler* has been an increasing number of children of illegal immigrants graduating from American high schools. Beginning in 2002, a number of states (California, Illinois, Kansas, New Mexico, New York, Oklahoma, Texas, Utah, and Washington) have enacted legislation allowing such alien students who have two to three years of residency to apply for, and receive, in-state tuition at one of their public colleges, as long as the students sign an affidavit promising to seek legal immigration status. While the states argue that such conditions are more stringent than for out-of-state students seeking to gain in-state tuition, since the alien must come forward and agree to seek legal immigration status, lawsuits have been filed in a number of states arguing that such legislation discriminates against out-of-state United States citizens who wish to be granted in-state tuition status, and thus violates either the Equal Protection Clause or the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. In terms of public universities’ overall budgets, the amount of money involved in granting in-state tuition to such aliens is relatively small. So far, not many illegal aliens have taken advantage of these laws – in part because such students are not legally employable upon graduation – although, as an example, in 2006, anecdotally, slightly over 100 such aliens were attending the University of Texas-Austin out of their population of 48,000 students.343

§ 26.2.2.2 Alienage Classifications in Federal Law: Rational Review Applied

Federal action with respect to aliens – whether by Congress, the President, or administrative agencies pursuant to validly delegated power – is tested by minimum rational review. Congress has the primary responsibility for regulating the relations between the United States and aliens. Further, such regulations may implicate foreign relations, and the reasons that raise political questions concerns in foreign relations cases, discussed at § 17.3.4.6 nn.578-86, also support a very deferential standard of review of decisions made by Congress or the President over regulation of aliens.344 As the Court noted in 1976 in *Mathews v. Diaz*,345 “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 rational basis scrutiny for alienage classifications, the Court held in *Diaz* that Congress may condition medical benefits to aliens on continuous residence for 5 years or on admission for permanent residence. Justice Stevens distinguished *Graham v. Richardson*, discussed at § 26.2.2.1.A n.320, on the ground that Congress has control over travel across the borders of the United States, whereas there is little basis for states treating citizens of another country differently than persons who are citizens of another state. State statutes that incorporate such federal rules for the treatment of aliens, as can occur under the Medicaid

343 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).


program, similarly trigger only rational basis review.\textsuperscript{346}

This extra level of special deference applicable in \textit{Diaz}, however, does not mean that a level of scrutiny different than standard minimum rational review is being applied in federal equal protection cases. As noted at § 26.1 n. 3, the Court did say in 1976 in \textit{Hampton v. Mow Sun Wong}, a case which held that the Civil Service Commission had no delegated authority to make special employment rules for aliens, that “the two protections are not always coextensive." However, as noted at § 26.1 n.4, the Court stated in 1995 in \textit{Adarand Constructors, Inc. v. Pena}, “[E]qual protection obligations imposed by the Fifth and Fourteenth Amendments [are] indistinguishable.”\textsuperscript{347}

As a companion to this relaxed Equal Protection Clause review for federal statutes or other federal actions regarding aliens, the Court also applies a relaxed Due Process Clause review with respect to immigration-related matters such as admission, removal, and detention of aliens. This Due Process Clause doctrine is discussed at § 27.4.4.8.

\textbf{§ 26.2.3 Classifications Discriminating on the Basis of Religion}

Discrimination based upon religion also triggers strict scrutiny under the Equal Protection Clause. As the Court noted in 1976 in \textit{New Orleans v. Dukes},\textsuperscript{348} classifications drawn upon “inherently suspect distinctions such as race, religion, or alienage” trigger strict scrutiny. In practice, the Court typically analyzes these cases as a matter of strict scrutiny under the Free Exercise Clause, as in the 1993 case of \textit{Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah}, discussed at § 32.2.2.5 n.254. Thus, these cases are addressed as part of the Free Exercise Clause, discussed at § 32.2.

\textbf{§ 26.3 Classifications Involving Intermediate Scrutiny}

\textbf{§ 26.3.1 Gender Discrimination}

\textbf{§ 26.3.1.1 Gender Discrimination Cases Before 1970: Only Rational Basis Review}

The Equal Protection Clause was not ratified until 1868. As noted at § 26.2.1.1.B n.104, the first Equal Protection Clause case was the \textit{Slaughter-House Cases}, which in 1873 ushered in the formalist era of constitutional interpretation. The Court doubted in the \textit{Slaughter-House Cases} "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 that provision." However, in 1885, based on the literal text of the Equal Protection Clause, the Court brought the full

\textsuperscript{346} See, e.g., Soskin v. Reinertson, 353 F.3d 1242, 1247-57 (10\textsuperscript{th} Cir. 2004) (Colorado statute that eliminated Medicaid coverage for some aliens constitutional under rational basis review because federal 1996 Personal Responsibility and Work Opportunity Reconciliation Act permits states to stop funding Medicaid benefits for aliens who do not meet the statutory definition of “qualified aliens”).


\textsuperscript{348} 427 U.S. 297, 303 (1976).
range of legislative classifications within the clause by requiring in *Barbier v. Connolly*\(^{349}\) all legislation to be not “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 19\(^{th}\) Amendment giving women the right to vote was not ratified until 1920. In *Bradwell v. Illinois*,\(^{350}\) an 1873 case brought under the Privileges or Immunities Clause, the Court upheld a refusal to license women to practice law, with Justice Bradley adopting a conservative formalist deference to customs and tradition 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 law.

Responding to a Due Process challenge, the Court in 1908 in *Muller v. Oregon*\(^{351}\) 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. The Court noted:

> 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, though 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

\(^{349}\) 113 U.S. 27, 31-32 (1885).

\(^{350}\) 83 U.S. 130, 141 (1873) (Bradley, J., concurring).

\(^{351}\) 208 U.S. 412, 418-23 (1908) (discussing, *inter alia*, the brief filed by Louis Brandeis, who served as counsel for Oregon, which defended the statute by arguing for the inequality of women, saying they were not able to work for the same hours as men).
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.\textsuperscript{352}

Despite this protective rhetoric regarding women, the practical impact of the statute 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 since they could not easily be plugged into the shift structure. That this might have been one explanation for the rule is supported by the fact that the statute exempted from its operation jobs traditionally held by women, such as nursing.\textsuperscript{353}

During the latter part of the formalist era, as in 1920 in \textit{F.S. Royster Guano Co. v. Virginia},\textsuperscript{354} 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." Though such a difference was found in \textit{Muller}, it was not found in 1923 in \textit{Adkins v. Children's Hospital}.\textsuperscript{355} 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 \textit{Lochner} approach to liberty of contract, the Holmesian-era Court did overrule \textit{Adkins} in \textit{West Coast Hotel v. Parrish}.\textsuperscript{356} 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 14\textsuperscript{th} Amendment.

During the Holmesian era, the Court continued to apply rational basis scrutiny to classifications in economic and social legislation without regard to whether the statute involved gender discrimination. For example, in \textit{Goesaert v. Cleary},\textsuperscript{357} the Court in 1948 upheld a Michigan statute

\textsuperscript{352} Id. at 422-23.


\textsuperscript{354} 253 U.S. 412, 415 (1920).

\textsuperscript{355} 261 U.S. 525, 553 (1923).

\textsuperscript{356} 300 U.S. 379 (1937).

\textsuperscript{357} 335 U.S. 464, 466-67 (1948).
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 possible "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. 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 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.

§ 26.3.1.2 Gender Discrimination Cases After 1970: Movement to Intermediate Review

The statutes and executive orders of the 1960s presaged judicial reform. Prior to 1971, there was no suggestion in Supreme Court opinions that anything other than minimum rational basis scrutiny would be applied to gender classifications in state or federal law. That began to change in *Reed v. Reed*. In 1971, an Idaho court appointed the father of a decedent, rather than his mother, to administer his estate. This was pursuant to an Idaho statute which provided that if several persons were otherwise equally entitled to administer an estate, "males must be preferred to females." The purpose of the law was to reduce the workload on probate courts by eliminating the need for a

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hearing on the relative merits of eligible candidates. In *Reed v. Reed*, the mother challenged the law as a denial of equal protection. The Court agreed. Quoting from *F.S. Royster Guano Co. v. Virginia*, cited at § 26.3.1.1 n.354, Chief Justice Burger said that the test was whether a difference in the sex of competing applicants bears a "fair and substantial relationship" to the state's objective, a heightened kind of rational review, as defined at § 7.2.1 text following n.42, and sometimes used during the formalist era for economic regulations, as noted at §§ 26.4.1 nn.424-31 & 27.3.2.1 nn.149-60. Without the deference usually given to legislatures under rational basis scrutiny, the Court found that the legislature's choice of males over females in the administration of estates was "arbitrary."

Two years after *Reed v. Reed*, in *Frontiero v. Richardson*, the Court concluded that discrimination against military service women in quarter allowances for dependents, designed to serve only administrative convenience by assuming that women, but not men, were dependent on their military service spouses, was invalid since the government had not shown it produced any savings and, further, gender discrimination solely to serve administrative convenience is arbitrary. Writing for himself and Justices Marshall, Douglas, and White, Justice Brennan cited *Reed* for "implicit support" that sex classifications are suspect and entitled to strict scrutiny. He noted that women have been victims of stereotypical distinctions, sex is immutable and not related to ability, and women are vastly underrepresented in government. Justice Brennan said the situation was analogous to race classifications because of history, current discrimination, the immutability of the characteristic, and because, unlike nonsuspect categories such as intelligence or physical disability, gender frequently bears no relation to ability to perform or contribute to society. Justice Brennan also noted that Congress has been increasingly sensitive to sex discrimination in legislating under the 14th Amendment. Justices Burger, Powell, Blackmun, and Stewart concurred in the result, but used the rational basis scrutiny as applied in *Reed*. Each of these Justices, except for Justice Stewart, also said that the Court should not go beyond *Reed* at this time because the issue was before the public in the form of the Equal Rights Amendment. Justice Rehnquist dissented, saying that under rational basis scrutiny the classification was rationally related to the legitimate interest of cost management.

In the first case to invalidate discrimination against males, *Craig v. Boren*, Justice Brennan, speaking for the Court, abandoned his quest for strict scrutiny in favor of what has come to be known as intermediate review. Borrowing the "substantial relationship" language from *Reed*, Brennan said that gender classifications "must serve important governmental objectives and must be substantially related to achievement of those objectives." Applying that standard to the facts, 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 pointed out that "Oklahoma’s statute prohibits only the

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362 411 U.S. 677, 682-88 (1973); id. at 691 (Stewart, J., concurring in the judgment); id. at 691-92 (Powell, J., joined by Burger, C.J. and Blackmun, J., concurring in the judgment); id. at 691 (Rehnquist, J., dissenting).


364 Id. at 197.
sells 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 the statute, which banned only the buying but not the drinking of beer, and traffic safety was thus far too tenuous to satisfy the “substantially related” part of the Craig v. Boren test.

In addition, under the standard phrasing today of the third prong of intermediate review, the Oklahoma statute probably would be viewed 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 under intermediate review to justify gender discrimination. Of course, banning all 18-20 years olds from buying, or drinking, beer to deal with the serious problem of teenage drunk driving would just involve age discrimination, triggering only minimum rational review, discussed at § 26.4.4, even absent the authorization for states to determine drinking age in the 21st Amendment, which repealed Prohibition, discussed at § 20.4.1.

Although joining the Court’s opinion, Justices Powell, Stevens, and Blackmun filed concurring opinions, and Justices Stewart concurred only in the judgment, finding that the statute “amounts to total irrationality” and failing rational basis as described in Reed. In his concurrence, Justice Powell expressed concern with how Justice Brennan had used language in Reed to create a “middle-tier” approach between rational basis scrutiny and strict scrutiny. Justice Stevens said in his concurrence that he would prefer a "single standard" approach to equal protection analysis focusing on how an impartial lawmaker would deal with a claim to equal treatment, and not different “standards of review.” On the issue of the appropriate test, Justice Blackmun joined Justice Brennan’s opinion in its entirety. Dissents were filed by Chief Justice Burger and Justice Rehnquist, who thought the law needed to pass only "rational basis" review. In particular, Justice Rehnquist said that it was objectionable that men, challenging a law which treats them less favorably than women, can invoke a more stringent standard of review than pertains to most other classifications. The only redeeming feature of the case, he said, was that it signaled a retreat from the plurality opinion in Frontiero which had called for strict scrutiny.

By 1980, the Craig v. Boren test had more adherents. Justices Burger, 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

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365 Id. at 201-04.

366 Id. at 210 n.* (Powell, J., concurring); id. at 211-12 (Stevens, J., concurring); id. at 214 (Blackmun, J., concurring); id. at 215 (Stewart, J., concurring in the judgment).

367 Id. at 217 (Burger, C.J., dissenting); id. at 217-18 (Rehnquist, J., dissenting).

368 446 U.S. 142 (1980); id. at 154-55 (Stevens, J., concurring in the judgment).
to extend the dependency presumption to widowers or eliminate it for widows. Justice Stevens concurred in the Court’s judgment, but not the precise reasoning of the majority opinion. It appeared that only Justice Rehnquist still clung to rational basis scrutiny. By this time, the Court had clearly decided that even though the Equal Rights Amendment was not going to pass, with only 35 states ratifying the Amendment, rather than the required 3/4 majority of 38, the Court was going to be more vigorous in scrutinizing gender discrimination anyway.

In 1981, Justice Rehnquist muddied the waters a bit in a plurality opinion in Michael M. v. Superior Court. The plurality opinion was joined by Chief Justice Burger and Justices Stewart and Powell. Michael M. involved a challenge to a California statutory rape law that made men alone criminally liable for intercourse with a partner under 18. Regarding the standard of review, Rehnquist said that the cases have held that the traditional minimum rational test takes on a somewhat "sharper focus" when gender-based classifications are challenged. In Reed, the Court referred to a "fair and substantial relationship" to legitimate purposes; in Craig to a “substantial relationship” to “important governmental objectives.” Underlying both decisions, said Rehnquist, was the principle that a legislature may not make overbroad generalizations based on sex, but the Court has upheld laws where the gender classification is not invidious but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances. Applying these principles, Justice Rehnquist explained that the classification in this case was to protect women from the risks of teenage pregnancy. For that risk, he said, men and women are not similarly situated. Legislators could reasonably chose to punish the actor who by nature suffers fewer consequences of the conduct. Justice Blackmun concurred in the judgment, saying that the California law was a sufficiently reasoned effort to control the problem of teenage pregnancy.

Even under standard intermediate scrutiny, the statute in Michael M. can be constitutional. Discouraging teenage pregnancy is certainly an important governmental interest. The statute is “substantially related” to advancing that interest if one accepts, as the state of 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,” as only women have the risk of an unwanted pregnancy.

Justices Brennan, White, and Marshall dissented, saying that 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 actual statute which the state did adopt is “substantially related” to advancing its ends, and not “substantially more burdensome than

369 Id. at 153-54 (Rehnquist, J., dissenting).
370 450 U.S. 464, 468-69, 472-73 (1981); id. at 482 (Blackmun, J., concurring in the judgment).
371 Id. at 473-74.
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. Justice Stevens also dissented in the case, concluding that the gender discrimination in this case that “authorizes punishment of only one of two equally guilty wrongdoers violates the essence of the constitutional requirement that the sovereign must govern impartially.” Soon after Michael M, California amended its statutory rape law to make it gender neutral, like virtually all states today, but with greater punishments the more one of the parties is significantly older than the party under 18 – a form of age discrimination 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 under the Fifth Amendment for authorizing the President to require the registration of males but not females. Justice Rehnquist wrote for a majority 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. A more complete opinion would also have pointed out that requiring men to register for the draft by filing out a registration card is “not substantially more burdensome than necessary” to facilitate the drafting of combat troops. 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. It only showed that inducting a large number of men and a limited number of women, as set by non-combat personnel needs, was substantially related to government objectives. Once again, the dissenters seemed to be applying a “least burdensome effective alternative” approach, which pointed out 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 regarding a “substantial relationship” would still be true today, even though some combat positions can be held by women today. However, given some women in combat, the statute would not be “directly related” to achieving its end if strict scrutiny applied.

That Justice Rehnquist had failed in his effort to move a majority of the Court from the Craig v. Boren intermediate test became quite clear one year later in Mississippi University for Women v. Hogan. In that case, Justice O’Connor wrote for five Justices that the government’s burden is to show an "exceedingly persuasive justification" for gender classifications and that this 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."
This showing was not made, she held, with respect to a state policy of excluding males from admission to a state School of Nursing. The evidence showed that males in the classroom did not disrupt education of females or that women lacked opportunities to obtain nurses training or attain positions of leadership in the field.

Chief Justice Burger, and Justices Blackmun, Powell, and Rehnquist, dissented. Justice Powell, with whom Rehnquist joined, said the Court was creating needless uniformity in nursing education since plaintiff could attend another nursing school. Their dissent also suggested that Hogan should be limited to areas, like nursing, where no history of discrimination against women existed. Justice Blackmun agreed with this view in his separate dissent, as did Chief Justice Burger. Justice O'Connor's majority opinion stated that there may be gender discrimination in favor of women only if it is substantially related to an important governmental purpose, such as compensating women for past discrimination, and in the nursing field no such evidence of prior discrimination existed.

Two significant post-instrumentalist era decisions in the area of gender discrimination are J.E.B. v. Alabama ex rel. T.B. and United States v. Virginia. The Court held that the Equal Protection Clause forbids peremptory challenges on the basis of gender in J.E.B., in addition to the basis of race, as had previously been held in Batson v. Kentucky. Justice Blackmun wrote that our Nation's long history of sex discrimination warrants intermediate scrutiny for gender-based classifications. With respect to peremptory challenges, the state's 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. Justice Blackmun did note that parties may exercise peremptory challenges to remove any group or class of individuals normally subject to "rational basis" review. Justice O'Connor, concurring, on state action grounds, would have limited the Court's holding to the government's use of peremptory strikes. Justice Kennedy concurred on the ground that an individual denied jury service because of his or her sex is denied individual personal dignity and the right to participate in the political process that the Equal Protection Clause was designed to guarantee.

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. Justice Scalia expressed a concern that holding would provide the basis for

376 Id. at 728; id. at 733 (Burger, C.J., dissenting); id. at 733-34 (Blackmun, J., dissenting); id. at 736-42 (Powell, J., joined by Rehnquist, J., dissenting).

377 511 U.S. 127, 140-44 (1994), citing Batson, 476 U.S. 79 (1986); id. at 146-51 (O'Connor, J., concurring); id. at 151-54 (Kennedy, J., concurring in the judgment).
extensive collateral litigation over peremptory challenges, which criminal defendants especially could be expected to pursue.378

In United States v. Virginia,379 the Court held that the male-only admissions policy at Virginia Military Academy (VMI) denied equal protection to women and was not adequately remedied by the state's creation of the Virginia Women's Institute for Leadership (VWIL). Justice Ginsburg delivered the Court's opinion, which was joined by Justices Stevens, O'Connor, Kennedy, and Breyer. Justice Thomas, whose son was enrolled in VMI, did not participate. Justice Ginsburg first stated the current standard of review for gender discrimination cases, but also used the “exceedingly persuasive justification” language from Justice O'Connor’s opinion in Hogan not only as a preliminary observation about the difficulty of meeting intermediate scrutiny, but throughout her opinion as if it were part of the test. Justice Ginsburg also mentioned several corollaries of intermediate review, e.g., that the justification must be genuine, not hypothesized or invented post hoc in response to litigation. Further, it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.

Applying the intermediate level of review and these corollaries, Justice Ginsburg said that VMI had not shown that its exclusion of women was supported by an “exceedingly persuasive justification.” VMI had contended that single-sex education provides important educational benefits and contributes to diversity in educational approaches. Justice Ginsburg replied that the record contained no persuasive evidence that VMI was created or maintained for the “actual purpose” of advancing diverse educational options, and thus that interest could not be considered by the Court.

With respect to whether the VMI program bore a substantial relationship to an actual valid important government purpose that the Court could consider – the effectiveness of VMI’s adverisive method of instruction – Justice Ginsburg replied that VMI's goal of producing citizen-soldiers was not substantially advanced by women's categorical exclusion, in total disregard of their individual merit, as it had been found that some women can meet VMI's physical standards and that its implementing methodology is not inherently unsuitable to women.

With respect to remedy, Justice Ginsburg cited Milliken v. Bradley, discussed at § 26.2.1.3. A n.175, which held that a remedial decree 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 the discrimination. The creation of VWIL did not meet this test because it did not qualify as VMI's equal in terms of student body, faculty, course offerings, and facilities. Further, VWIL graduates are not united with the legions of VMI graduates who have distinguished themselves in military and civilian life.

Chief Justice Rehnquist concurred in the result but provided a different analysis. He first said that the Court's use of the phrase "exceedingly persuasive justification," originally used as an observation

378 Id. at 154 (Rehnquist, C.J., dissenting); id. at 156 (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., dissenting).

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 more recent gender discrimination case, *Nguyen v. INS*, which also involved illegitimacy, and thus is discussed at § 26.3.2 nn.417-22, 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.

Second, Justice Rehnquist said that he agreed with Justice Ginsburg’s opinion that under the intermediate standard the proffered purpose for a challenged law must be the actual purpose and that Virginia had not established the goal of diversity among its public institutions was the actual purpose for its single-sex admissions policy at VMI. As discussed at § 26.1.3 nn.92-99, it is not clear that the Court’s precedents on intermediate review support this requirement of looking only to “actual purposes,” rather than “plausible purposes.” The Court’s more recent case of *Nguyen INS*, discussed at § 26.3.2 nn.417-22, perhaps followed this observation, as the dissent of Justices O’Connor, Souter, Ginsburg, and Breyer criticized the majority for not requiring “actual purposes” in a case involving intermediate scrutiny.

Chief Justice Rehnquist noted that one way Virginia could have shown that educational diversity was their policy was to establish, shortly after *Mississippi University for Women v. Hogan* made it clear that VMI’s men-only admissions policy was open to serious question, single-gender undergraduate institutions for women, with support substantially comparable to that given VMI. In short, the state had not demonstrated that its interest in providing some single-sex education for men was matched by an interest in providing the same opportunity for women. Thus, on these facts, VMI could not have even argued that an interest in educational diversity was “plausible.” With respect to maintaining the adversative method, that is not an important governmental objective, said Rehnquist, because there is no evidence in the record that the method is pedagogically beneficial or is any more likely to produce character traits than other methodologies. With respect to the remedy, Justice Rehnquist said that the violation is not the exclusion of women from VMI, but the failure to provide a comparable institution for women. That could be shown if Virginia were to establish a women's institution offering the same quality of education as VMI. Here, however, VWIL is distinctly inferior to the men's institution. It is not a self standing institution and is substantially underfunded as compared to VMI.

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380 *Id.* at 558-59 (Rehnquist, J., concurring in the judgment).

381 533 U.S. 53, 60-61, 70 (2001); *id.* at 89-91 (O’Connor, J., joined by Souter, Ginsburg & Breyer, JJ. dissenting).

382 518 U.S. at 559 (Rehnquist, J., concurring in the judgment).


384 518 U.S. at 565-66 (Rehnquist, J., concurring in the judgment).
Justice Scalia delivered a dissent. He first made clear that VMI's single-sex policy did not violate the equal protection principle that he would apply, regardless of whether scrutiny is intermediate or strict, namely, “[W]hen 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.” The principle is just another restatement of the Stage 4 formalist reliance on customs and traditions to determine morality, as discussed at §§ 16.1 & 16.3. VMI's policies, of course, come squarely within such a governing tradition. The people can change such a tradition through democratic processes, Justice Scalia said, but it should not be done by the Court.

Justice Scalia's second point was that the Court had misapplied the test it had been using for two decades with respect to sex-based classifications. The test calls for the sex-based classification to be "substantially related" to an important goal. But the Court, he said, seemed to require a least-restrictive means analysis because Justice Ginsburg said that the dispositive realities in the case were that “VMI's implementing methodology is not inherently unsuitable to women; some women do well under the adversative model; some women, at least, would want to attend VMI if they had the opportunity; some women are capable of all of the individual activities require of VMI cadets and can meet the physical standards VMI now imposes on men.”

Justice Scalia then moved on to apply the intermediate standard as he thought it should be applied. Virginia's important goal here was providing effective college education for its citizens. Single-gender education, at the college level, as found by the Court of Appeals, is beneficial to both sexes. That should be enough. Beyond that, however, to maintain a school which uses the adversative method is substantially related to the goal of good education. The fact that the state's only single-sex school is for males only must be taken in context that there are four all-female private colleges in the state and one private all-male college, and that the state provides funds for residents of Virginia who attend private colleges in the state in the form of tuition assistance, scholarship grants, guaranteed loans, and work-study funds. Justice Scalia then proceeded to identify what he considered flaws in the majority opinion and in Justice Rehnquist's concurrence. Contrary to the majority opinion, he said that there is evidence that a desire for diversity of educational options was a purpose in Virginia's maintaining VMI as an all-male institution. Regarding Justice Rehnquist's opinion, Justice Scalia said there is evidence in the record on the educational benefits of the adversative method and on diversity as a goal for higher education in Virginia.

Justice Scalia predicted that the decision would mean the end of both public and private single-sex education in the United States. Private schools can of course discriminate against a sex without violating the Constitution. However, private education is dependent on government aid in a variety of ways, and, in Justice Scalia’ view, under the Court's opinion the government itself would be violating the Constitution by providing support to single-sex colleges. Justice Ginsburg's reply to that concern appeared in her footnote seven. There she said:

385 518 U.S. at 568 (Scalia, J., dissenting).

386 Id. at 572 (Scalia, J., dissenting).

387 Id. at 576-95 (Scalia, J., dissenting).
We do not question the State's prerogative evenhandedly to support diverse educational opportunities. We address specifically and only an educational opportunity recognized by the District Court and the Court of Appeals as “unique” . . . available only at Virginia's premier military institute, the State's sole single-sex public university or college. Cf. Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 720, n. 1 (1982) (“Mississippi maintains no other single-sex public university or college. Thus, we are not faced with the question of whether States can provide 'separate but equal' undergraduate institutions for males and females.”).

The Court’s decision in the VMI case has not had the negative consequences that Justice Scalia feared for private single-sex colleges. Title IX is a 30-year-old statute codified at 20 U.S.C. 1681, et. seq., which 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." In 1988, 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, discussed at § 32.1.2.1.B nn.135-37. 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 single-sex colleges using federal financial aid should continue to be permissible under Title IX and the Equal Protection Clause.

For public universities, it appears that there is a only a small window of opportunity for single-gender institutions of higher education if educational efficiency or diversity is established as a goal and if the opportunity is provided equally for men and women. However, Justice Scalia may be right when he says that the potential costs of litigating the constitutionality of a single-sex program are simply too high to be embraced by public officials.

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. However, as one author has observed, “The real problem facing the nation . . . is that public schools are failing so many children, regardless of their sex. 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,

388 Id. at 534 n.7.


we] need to focus on both the equality and quality in education for all children, all girls and all boys. Realistically, that means co-education for all but a very few. So we had better make sure that that education is as excellent and as bias-free as possible.”

On a different topic, under various 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 the public accommodations law or the Constitution. State courts in different states have reached different conclusion on this issue. 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.

§ 26.3.1.3 Problems in Identifying Gender Discrimination

Sometimes it is not easy to determine whether women have been discriminated against or whether, although discrimination exists, those discriminated against are males, females, both, or couples. A number of such cases came before the Court during the instrumentalist era.

In 1974, in *Geduldig v. Aiello*, 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. Two years later, in *General Electric Co. v. Gilbert*, 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.

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In 1978, Congress reversed the result in *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 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. In 1987, in *California Federal Savings and Loan Association v. Guerra*, the Court held that Title VII, as amended by the PDA, did not preempt the California Fair Employment and Housing Act, which required employers to provide up to four months leave and reinstatement to employees disabled by pregnancy. Justice Marshall said the state law did not compel employers to treat pregnant women better than other disabled employees, but merely established a benefit that employers must provide, and was consistent with federal policy.

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 the statute bars discrimination against any "individual" because of race, color, religion, sex, or national origin. 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. A similar result was reached in *Arizona Governing Committee v. Norris*, where there were equal pay-ins but unequal pay-outs.

A related result was reached in *Wengler v. Druggists Mutual Insurance Co.* There, the Court held that providing worker death benefits automatically to widows, but only to widowers on proof of dependency, was not shown substantially related to the purpose of providing for needy spouses, as the government did not establish any substantial economic consequences that would result if men and women were treated equally. Justice Rehnquist dissented in the case, applying rational review, although he later acquiesced in intermediate scrutiny in gender cases, as noted at § 26.3.1.2 n.380.

In terms of whether discriminatory intent can be found, 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

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399 446 U.S. 142, 147-53 (1980); *id.* at 153 (Rehnquist J., dissenting), noted § 26.3.1.2 n.368.
400 442 U.S. 256, 276-80 (1979); *id.* at 281-86 (Marshall, J., joined by Brennan, J., dissenting).
"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. For example, women often suffer disproportionately 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.

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 identify solely on the individual’s initial chromosomes (XX for women, XY for men), while other states more sensibly 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.

§ 26.3.1.4  Government Affirmative Action Programs Based on Gender

Gender-based affirmative action programs are a relatively new legal phenomenon, and constitutional law on this subject is almost entirely a product of decisions during the instrumentalist era. For example, in 1974, in *Kahn v. Shevin*, a majority of the Court, using rational basis scrutiny, upheld Florida's annual $500 property tax exemption for widows. Writing for the Court, Justice Douglas said that the exemption cushioned the financial impact of spousal loss upon the sex for whom that loss imposes a heavier burden. Prior to agreeing on intermediate scrutiny for gender discrimination

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405  416 U.S. 351, 355-56 (1974); *id.* at 357-60 (Brennan, J., joined by Marshall J., dissenting); *id.* at 360-62 (White, J., dissenting).
in 1976 in *Craig v. Boren*, Justices Brennan, White, and Marshall, in dissent, applied strict scrutiny based on Justice Brennan’s plurality in *Frontiero*, discussed at § 26.3.1.2 n 362. Here the state had not shown why inclusion of rich widows was necessary to advance the purpose of ameliorating the effects of past economic discrimination against women.

By 1976, a majority of the Court in *Craig v. Boren* had begun the process of coalescing around intermediate scrutiny for gender discrimination cases, which requires the state to show the law serves important governmental objectives and that the discriminatory means are substantially related to achieving those purposes. Applying that test in 1977 in *Califano v. Webster*, the Court permitted Congress to allow female workers to eliminate three more low-earning years from retirement benefit calculations than male workers, which gave female wage earners higher monthly old-age benefits under Social Security, where the purpose was to redress disparate treatment of women in the economy, and the calculation remedied some effects of past wage discrimination. *Califano* involved calculation for earlier years, as Congress rescinded the different calculation method in 1972.

On the other hand, many affirmative action programs with respect to women have not survived the intermediate level of scrutiny. For example, in 1979, in *Orr v. Orr* Justice Brennan wrote that Alabama had not shown that imposing alimony obligations on men but not women was substantially related to the state’s goal of providing support for needy wives of broken marriages. Justice Brennan explained that there is no reason to use sex as a proxy for need when individualized hearings already occur and, further, the law gives an advantage only to the financially secure wife whose husband is in need. With respect to any argument that the state was saving money by not requiring individualized hearings in cases where men might otherwise seek alimony, and that this cost savings could make the Alabama statute constitutional, while saving administrative costs is a legitimate interest that can be used to support not requiring individualized hearings under rational review, as in *New York City Transit Authority v. Beazer*, discussed at § 26.1.1.1 nn.30-31, saving administrative costs is not usually viewed by the Court as an important or substantial interest to justify government action at intermediate scrutiny, as noted at § 26.1.1.2 n.44.

In 1982, in *Mississippi University for Women v. Hogan*, the Court struck down a Mississippi's statute that excluded males from enrolling in a state-supported nursing school. The state said this rule was for the benefit of women. For the Court, Justice O’Connor said that Mississippi had not established that its purpose in barring men from a School of Nursing was to compensate for discrimination against women since the state had not shown that women lack opportunities for training or positions of leadership in nursing. Although four Justices in Justice Brennan’s plurality opinion in *Bakke* had concluded thatremedying general societal discrimination was an important government interest that could be used to justify a statute under intermediate scrutiny, discussed at § 26.2.1.4.A n.219, a majority of the Court has never adopted that position. Thus, although granting this preference to women could be viewed as related to remedying general societal discrimination


against women in employment, the majority focused in Hogan only on whether there was prior discrimination in the nursing industry. This is consistent with the race-based affirmative action cases where only one’s own prior racial discrimination in a particular industry can be used to justify race-based affirmative action in that industry, as in Richmond v. J.A. Croson Co., discussed at § 26.2.1.4.C n.234.

Further, Mississippi did not prove that barring men from nursing school was substantially related to any interest in educational effectiveness. Mississippi had suggested that having men in the class would alter the classroom dynamics to the detriment of the women nursing students. However, the record in the case showed that admitting men to nursing classes as auditors had not affected teaching style or the performance of female nursing students.

Justice O'Connor's opinion contained two corollaries relevant to gender-based affirmative action. These were: (1) if the program reflects stereotypes, e.g., that one gender is innately inferior, the objective is not legitimate, and (2) whether the means are substantially related is determined by reasoned analysis, not by assumptions on the proper roles of men and women or by using gender as a proxy for other, more germane considerations.

§ 26.3.2 Discrimination Based Upon Illegitimacy

Almost the entire development of constitutional law relating to non-marital children occurred during the instrumentalist era. The instrumentalist Court began in 1968 by applying rational basis scrutiny in Levy v. Louisiana, but over the dissent of formalist Justice Black, and Holmesian Justices Harlan and Stewart, held that even the lowest level of review was not met by a statute that permitted legitimate but not illegitimate children to sue for wrongful death of their mother. Three years later, over the dissent of Justice Brennan, joined by Justices Douglas, White, and Marshall, the Court did allow 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.

409 391 U.S. 68, 71-72 (1968); id. at 76 (Harlan, J., joined by Black & Stewart, JJ., dissenting).


In 1976, in *Mathews v. Lucas*, the trial court treated illegitimacy as a suspect classification, requiring strict scrutiny. The Supreme Court reversed and applied a standard of second-order rational review, the “not toothless” scrutiny of *Reed v. Reed*, discussed at § 26.3.1.2 n.361. 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*, 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, some form of rational review and strict scrutiny, and rejecting strict scrutiny, as in *Mathews*, the Court now had a third definable option, intermediate scrutiny.

In *Trimble v. Gordon*, 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. One factor supporting heightened scrutiny, as discussed at § 26.1.2.1 n.64, is for discrimination based on classifications that are not the product of individual choice.

Applying intermediate 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*, Chief Justice Burger, and Justices Stewart, Rehnquist, and Blackmun, dissented in the case.

The following year, in *Lalli v. Lalli*, 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

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414 Id. at 776-77 (Burger, C.J., joined by Stewart, Rehnquist & Blackmun, JJ., dissenting).

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 also 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*,416 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. Perhaps reflecting the modern natural law concern with analytic consistency in the law, 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.

A similar requirement of a substantial relationship to an important government interest occurred in 2001 in *Nguyen v. INS*.417 This case considered a requirement that in order to become a United States citizen an illegitimate child born of a citizen father and a non-citizen mother must, before becoming 18, be “legitimated” or otherwise have “paternity” acknowledged by the father or found by a court. Because there was no such requirement if the father had been the non-citizen and the mother the citizen, the Court viewed the case through the lens of gender discrimination. Of course, there was no such requirement if the father and mother were married, so the case also involved illegitimacy discrimination. In either case, intermediate scrutiny applied.

In applying intermediate scrutiny, the Court considered two important interests. The first interest was “the importance of assuring that a biological parent-child relationship exists.” This interest was apparently not “put forward in litigation” by the government attorneys in the case.418 Nevertheless, under the approach discussed at § 26.1.3 nn.92-99, it would be appropriate for the Court to consider this interest if it were an “actual purpose” or a “plausible purpose” of the regulation, whether argued to the Court or not. Given that birth from citizen parents is “often critical to our constitutional and statutory understanding of citizenship” and that the focus of the rule at issue in the case concerned “legitimation” or other determination of “paternity,” a Court could easily find this was an actual or plausible purpose of the rule in question.419

418 Id. at 79-80 (O’Connor, J., joined by Souter, Ginsburg & Breyer, JJ., dissenting).
419 Id. at 60-64.
The Court then noted that the statute’s requirement of some legitimation or finding of paternity made before the age of 18 was substantially related to this interest in determining that a parent-child relationship exists. The statute was perhaps not the least burdensome effective alternative, as the Court acknowledged that clear and convincing evidence of paternity might be established after 18 years of age today “given the sophistication of modern DNA tests.” However, since the case involved only intermediate scrutiny, not strict scrutiny, there was no least burdensome effective alternative requirement. The only requirement was that the statute not be “substantially more burdensome than necessary.” As to this point, the Court noted that “we are mindful the obligation it imposes with respect to the acquisition of citizenship by the child of a citizen father is minimal. . . . Only the least onerous of the three options provided for [‘legitimation,” paternity “acknowledged” the father, or “established” by a court] must be satisfied.”

The second important government interest was “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.” This was an interest argued to the Court by the government attorneys. Although no review was done by the Court to determine if this were an “actual purpose” of the legislation, under the approach discussed at § 26.1.3 nn.92-99, it would be enough if this were a “plausible” purpose. The Court then noted that 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.”

The Court acknowledged that the rules at issue in this case regarding the citizen father would not in every case create such a similar opportunity for a relationship to develop. In terms of the standard of review, there is thus no “direct relationship” between the rules at issue in this case and the important governmental end. However, as the Court noted, under intermediate scrutiny there is no requirement of a direct relationship so that “the statute under consideration must be capable of achieving its ultimate objective in every instance.” It is enough if the statute is “substantially related to the achievement of” the important governmental end.

In dissent, Justice O’Connor, joined by Justices Souter, Ginsburg, and Breyer, criticized the majority for not establishing clearly enough that these two interests were important; that they were actual purposes of the legislation, rather than merely court-stated purposes; or that the rules at issue actually substantially advanced the government’s ends. Part of the dissent focused on less burdensome alternatives – for the first interest, either allowing paternity to be established after 18 years through DNA testing or adopting a sex-neutral scheme requiring both fathers and mothers to prove paternity, and, for the second interest, requiring some degree of regular contact between the child and citizen parent over time. However, it must be remembered that at intermediate scrutiny there is no least burdensome alternative requirement. Instead, the existence of alternatives is used at intermediate scrutiny to help show that the particular statute actually adopted does not

\[420\] Id. at 63-64, 70.

\[421\] Id. at 64-70.

\[422\] Id. at 74-91 (O’Connor, J., joined by Souter, Ginsburg & Breyer, JJ., dissenting).
“substantially advance” its ends, or that the statute is “substantially more burdensome” than it needs to be. In this case, while the statute is not as narrowly drawn as it could be, and would fail strict scrutiny given the alternatives mentioned by the dissent, it is not surprising that the majority found the statute substantially related to its ends and not substantially more burdensome than necessary to survive intermediate scrutiny.

§ 26.4 Classifications Involving Rational Basis Scrutiny

§ 26.4.1 Standard Social and Economic Regulatory Legislation

As noted at § 26.1.1 n.12, 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. The challenger has the burden of establishing that the classification, on its face or as applied, is not rationally related to any legitimate conceivable governmental interest.423

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. Ellis424 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,425 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,426 “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. The Court stated, “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.” A substantial number of statutes were similarly struck down that discriminated against corporations


424 165 U.S. 150, 155 (1897).


426 277 U.S. 389, 400-02 (1928).
or made tax classifications not based on circumstances “peculiarly applicable to corporations, as are
taxes on their capital stock or franchises.” Similar decisions striking down regulations on
corporations were reached using a due process analysis, discussed at § 27.3.2.1, or a dormant
commerce clause analysis, discussed at § 20.3.2.1.B.

These decisions reflected the general predisposition of the conservative formalist-era Court to be
a bulwark against what the Court perceived as “socialist” legislation, as discussed at § 14.2.2 nn.36-
55. 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 once cent price advantage in competition with larger, well-advertised businesses, like
Borden’s. 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.

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, as discussed at § 27.3.2.1 nn.161-
66. Thus, a 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. 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

v. Harding, 272 U. S. 494, 507-17 (1926); Fidelity & Deposit Co. v. Tafoya, 270 U. S. 426, 434-35
(1926); Western Union Tel. Co. v. Foster, 247 U. S. 105, 112-14 (1918).

on corporation based on earnings out of the state violates due process), and cases cited therein.

429  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.

430  Borden's Farm Products Co. v. Ten Eyck, 297 U.S. 251, 262-63 (1936).


432  304 U.S. 144, 154 (1938).
support for it." The same approach began to be used in equal protection review of classifications in economic laws and laws dealing with government benefits. Indeed, during the Holmesian era, the Court invalidated only one law in the realm of purely economic regulation. In Morey v. Doud, the Court held that a statute imposing licensing and financial standards on sellers and issuers of money orders unconstitutionally exempted the American Express Company. As noted at § 26.4.1 n.437, however, even this precedent was overruled during the instrumentalist era.

Minimum rational review, with great deference given to legislative decisions, has remained in place during the instrumentalist and post-instrumentalists eras with respect to social and economic legislation. Under this approach, most laws have been sustained against an equal protection challenge. For example, in Williamson v. Lee Optical Co. of Oklahoma, the Court rejected a challenge to exempting sellers of ready-to-wear glasses from regulations imposed on opticians that forbid an optician from fitting or duplicating lenses without a prescription from an ophthalmologist or optometrist. Justice Douglas noted, “Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. . . . For all this record shows, the ready-to-wear branch of this business may not loom large in Oklahoma or may present problems of regulation distinct from [opticians].”

Similarly, in Dandridge v. Williams, 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 [rational basis 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, 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.

Applying this kind of deferential approach, the Court overruled Morey v. Doud in 1976 in New Orleans v. Dukes. 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\textsuperscript{438} 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, strongly influenced by the natural law tradition which gives great weight to \textit{stare decisis}, continues to follow minimum rational review for standard social and economic legislation. Since the Court's formulation of the standard has not changed since the 1940s, it is not surprising that the Court's comments on the application of the standard are consistent in all post-formalist decades. In a number of these cases, the Court has been clear about how deferential to the government minimum rational review is in practice. The Court has noted:

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.\textsuperscript{439}

The Court strongly presumes the constitutionality of laws that confer monetary benefits.\textsuperscript{440}

Judicial deference is strong where a tax classification is alleged to infringe equal protection.\textsuperscript{441}

On the other hand, in some cases, the Court has focused on how the minimum rational review test, while involving substantial deference to the government, does not require blind deference to government. Thus, the Court has noted that even under minimum rational review:

All persons similarly situated should be treated alike, and a bare desire to harm a politically unpopular group is not a legitimate state interest.\textsuperscript{442}

\textsuperscript{438} 449 U.S. 166, 174-76 (1980).

\textsuperscript{439} Heller v. Doe, 509 U.S. 312, 320-21 (1993), and cases cited therein.

\textsuperscript{440} Schweiker v. Wilson, 450 U.S. 221, 243 (1981).


\textsuperscript{442} City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 447 (1985).
A state may not treat those within its borders unequally solely on the basis of their different residences or states of incorporation.443

A state may legitimately promote local business, but promoting local business by discriminating against nonresident competitors is not a legitimate state purpose when done by imposing higher taxes on nonresident corporations solely because of nonresidence.444

In some cases the underinclusiveness or overinclusiveness of a classification will be so severe that it cannot be said that the classification is motivated by anything other than animus toward a group.445

Instrumentalist justices have occasionally tried to increase this level of scrutiny by not permitting “any conceivable basis” to be used to defend a statute under rational basis review. While not adopted by a majority of the Court, Justice Brennan stated in dissent:

The rational basis standard "is not a toothless one," and will not be satisfied by flimsy or implausible justifications for a legislative classification, proffered after the fact by Government attorneys.446

§ 26.4.2 Classifications Involving Wealth

Despite support from some instrumentalist Justices for heightened scrutiny regarding wealth classifications,447 during the instrumentalist era the Court rejected heightened scrutiny for cases involving the poor or indigent. As the Court noted in Harris v. McRae,448 “[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:

The States, of course, are prohibited by the Equal Protection Clause from discriminating between “rich” and “poor” as such in the formulation and application of their laws. But it is a far different thing to 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. 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. . . .

Laws such as these do not deny equal protection to the less fortunate for one essential reason: the Equal Protection Clause does not impose on the States “an affirmative duty to lift the handicaps flowing from differences in economic circumstances.” To so construe it would be to read into the Constitution a philosophy of leveling that would be foreign to many of our basic concepts of the proper relations between government and society. 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.449

Using the factors discussed at § 26.1.2.1, 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 certain substantial or undue burdens on the poor in the context of the exercise of a fundamental right. For example, financial burdens on welfare recipients that substantially burden the right to travel trigger strict scrutiny, discussed at § 26.5.1; 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, discussed at § 26.5.2; and poll taxes or other laws that substantially burden the poor from exercising their fundamental right to vote trigger strict scrutiny, discussed at § 26.5.3.

Even under rational basis scrutiny, some legislative schemes have been found to be unconstitutional. For example, in United States Department of Agriculture v. Moreno,450 the Court concluded that barring otherwise eligible unrelated members of households living together from receiving food stamps, while permitting related members of households to receive food stamps, was unconstitutional as reflecting an illegitimate animus toward “hippie” communes and as not rationally related to a legitimate interest in preventing fraud in the food stamp program


§ 26.4.3  Classifications that Disadvantage Non-Resident Corporations

The Privileges and Immunities Clause of Article IV, § 2 has been held not to apply to corporations, as discussed at § 20.3.3.1 n.292. However, the Equal Protection Clause has been applied where a state discriminated against a non-resident corporation. Thus, in *Metropolitan Life Insurance Co. v. Ward*, the Court held that a state gross-premiums tax on insurance companies may not impose a higher rate on out-of-state companies than on domestic companies. For a 5-4 Court, Justice Powell held that Alabama's goal of encouraging domestic companies by discriminating against nonresident competitors was not a legitimate state purpose. In addition, a purpose to encourage capital investment in Alabama assets was not legitimate when furthered by discrimination. A dormant commerce clause analysis did not apply in this case because Congress, through the McCarran Act, had exempted the insurance industry from its restraints. Dissenting in *Ward* with Justices Brennan, Marshall, and Rehnquist, Justice O'Connor objected to the Court's collapse of the two prongs of rational basis testing into one, *i.e.*, judging the legitimacy of a goal by the discriminatory means used, and not engaging in the deferential inquiry the Court typically uses as a brake on judicial impeachment of legislative policy choices.

Justice Rehnquist sought to limit *Ward* in the case of *Northeast Bancorp, Inc. v. Board of Governors*, a case in which Justice Powell did not participate. In *Northeast Bancorp*, the Court upheld a Massachusetts law that allowed an out-of-state bank holding company to acquire a local bank, provided that the out-of-state acquirer was also from New England. For the Court, Justice Rehnquist noted that Congress had consented to this kind of state regulation, and he emphasized language in *Ward* which said that a state may not regulate its economy by "imposing discriminatorily higher taxes on nonresident corporations solely because they are nonresidents." Here, he said, the state is favoring out-of-state corporations domiciled in New England (thus cutting out some large banks in New York and other places) in accord with the fact that our country traditionally has favored widely dispersed control of banking so as to avoid threats to the independence of local banking institutions.

Justice O'Connor, concurring, said the case involved no meaningful distinction from *Ward*, since both banks and insurance companies have historically been regulated by the states. She took another shot at *Ward*, saying that when Congress has sanctioned the barriers to commerce that might result from fostering local industry, the Court has no authority under the Equal Protection Clause to invalidate classifications designed to encourage local businesses because of their special contribution.

The precise doctrine in *Ward* is not of much practical significance, since taxes on non-resident corporations are reviewed under the heightened rational review dormant commerce clause doctrine.

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452 *Id.* at 883 (O’Connor, J., joined Brennan, Marshall & Rehnquist, JJ., dissenting).


454 *Id.* at 179-80 (O’Connor, J., concurring).
discussed at 20.3.2.4.A, except in the rare case of being preempted by federal law, like the McCarran Act for insurance companies. Given this reality, it seems likely Ward will be confined to its precise facts.

§ 26.4.4  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 § 26.1.2.1, 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 second-guessing legislative judgment and opening a Pandora’s box all outweigh, as for classifications involving the poor, any argument of heightened scrutiny based on the status not really being the product of individual choice.

In the classic case of age discrimination involving the elderly, Massachusetts Board of Retirement v. Murgia, the Court stated:

old age does not define a “discrete and insular” group, in need of “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.455

Standard economic or social regulations involving children similarly trigger rational review. 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.”456

Of course, in cases involving regulations where the child is burdened for something not the product of the child’s choice, such as burdening illegitimate children, discussed at § 26.3.2 nn.413-22, or burdens on the children of illegal aliens in the United States being denied a public school education, as in Plyler v. Doe, discussed at § 26.2.2.1.B nn.337-42, the Court will apply intermediate scrutiny.


A similar case of children being punished for something not the product of their choice was decided by the Second Circuit in *Lewis v. Thompson*.\(^{457}\) In this case, the court 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 here 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 is appropriate in *Lewis* because, as stated in *Plyler*,\(^ {458}\) “[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.”

§ 26.4.5  **Classifications Involving Physical or Mental Disabilities**

Cases involving physical or mental disability also trigger rational basis review. As the Court noted in *City of Cleburne v. Cleburne Living Center*,\(^ {459}\) even though mental retardation is not the product of the individual’s choice, and often is an immutable characteristic, many factors support applying only rational review to classifications disadvantaging the mentally retarded. They include concerns with the ability of the Court to second-guess 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. 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.

Despite this rational basis scrutiny, the Court struck down the legislative classification in *Cleburne* regarding mental disability. This has given rise to speculation that the Court was applying something above minimum rational basis review, principally because the Court looked very carefully at the record, which reflects second-order rational review, as discussed at § 7.2.1 text following n.42, rather than assuming possible facts that might make the classification rational. As

\(^{457}\) 252 F.3d 567, 590 (2nd Cir. 2001).


Justice Marshall noted in his dissent in *Cleburne*, supra note 24, at 1444. "To be sure, the Court does not label its handiwork heightened scrutiny, and perhaps the method employed must hereafter be called ‘second order’ rational-basis review rather than ‘heightened scrutiny.’ But however labeled, the rational basis test invoked today is most assuredly not the rational-basis test of *Williamson v. Lee Optical of Oklahoma, Inc.*” Professor Tribe has similarly remarked that the Court did not substantially defer to the legislature’s judgment regarding means and ends, but rather determined for itself “whether the policies hypothesized to save the challenged action were actually supported by fact.” Professor Chemerinsky has noted, “It can be argued the Court’s review was more rigorous than usual for rational basis analysis.”

In *Cleburne*, the city required a special use permit for the operation of a group home for the mentally retarded, even though no such permit was required for apartment houses, boarding and lodging homes, fraternity or sorority houses, convalescent homes, and the like. Four interests were alleged to support the statute, but each of them failed part of the rational basis scrutiny test.

One alleged interest was responding to the views of persons in the neighborhood who did not want mentally retarded persons living close by. Justice White noted that such irrational prejudice against the mentally retarded reflected illegitimate animus not appropriate to use even under rational basis review. A second interest, concern about harassment of the mentally retarded by neighboring school students, was legitimate, but the Court concluded the ban on the home for the mentally retarded was not rationally related to achieving that benefit, as those same students did not harass the 30 or so mentally retarded students attending their school. Given this, it was irrational to assume they would harass residents of a home for the mentally retarded. The third interest, that such a home would rest on a 500-year flood plain, also violated the second prong of rational basis review. The ban was viewed as irrationally underinclusive, since a home for the aged or infirm could be placed on the property, and the Court concluded they would pose the same problem of evacuation in the event of a flood. Thus, the government was not addressing a greater part of the problem first. Similarly, the fourth interest in population concentration posing additional demands on neighborhood services was viewed as irrationally underinclusive, as fraternity and sorority homes would pose the same problem of population concentration as a home for the mentally retarded. Again the government was not addressing the greater part of the problem first, or explaining why that was not being done, as is required even under rational basis scrutiny, as discussed at § 26.1.1.1 nn.25-27.

Of these four, probably the best chance for the government under standard minimum rational review deference would have been to argue that the mentally impaired do pose special problems of evacuation in the event of a flood, since at least the infirm, although they would need to be carried, could mentally understand the nature of the crisis. Nonetheless, in *Cleburne*, the Court did not defer

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460 *Id.* at 458-59 (Marshall, J., joined by Brennan & Blackmun, JJ., concurring in the judgment in part and dissenting in part).

461 Tribe, supra note 24, at 1444.

462 Chemerinsky, supra note 24, at 755.

463 473 U.S. at 447-50.
to that potential government argument, but concluded for itself that it was irrational to assume the mentally impaired posed any greater evacuation problem than the infirm.

In *Heller v. Doe*, Justice Kennedy, writing for a 5-4 Court, said that rational-basis review, as used in *Cleburne*, would continue to apply to classifications affecting mentally retarded people. Applying that standard, he said that a state 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. Explaining, Justice Kennedy said the state could find that (1) mental retardation is easier to diagnose, and (2) dangerousness to self or others is established more easily, as a general rule, since mental retardation is a relatively stable condition. Further, the usual treatment for mental retardation, attempting to encourage self-care and self-sufficiency, is less invasive than treatment for mentally ill persons. Dissenting Justices Blackmun, Stevens, O’Connor, and Souter did not consider whether some form of heightened scrutiny applied, since in their judgment the distinctions between mentally retarded and mentally ill persons failed even rational-basis scrutiny as applied in *Cleburne*. Their dissent, however, made it clear that they viewed *Cleburne* as applying a kind of second-order rational basis scrutiny. Justices Stevens, Souter, Ginsburg, and Breyer would probably hold to that position today.

§ 26.4.6 Classifications Involving Sexual Orientation

Classifications involving sexual orientation currently trigger only minimum rational 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 some 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 is a form of gender discrimination. Despite such arguments, the Supreme Court, and thus

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464 509 U.S. 312, 319-28 (1993); *id.* at 335-46 (Souter, J., joined by Blackmun & Stevens, JJ, and O’Connor, J., in part, dissenting).


lower federal courts, have consistently treated cases under the United States Constitution of discrimination based upon sexual orientation as involving only minimum rational review.468

Despite applying such minimum rational review, the Supreme Court has found some statutes discriminating on the basis of sexual orientation to be unconstitutional. For example, in Romer v. Evans,469 Justice Kennedy wrote for the Court that Amendment 2 of the Colorado Constitution violated the Equal Protection Clause because it lacked a rational relation to a legitimate end. Amendment 2 barred any law entitling gays, lesbians, or bisexuals to “claim any minority status, quota preferences, protected status or claim of discrimination.” The state had argued that the Amendment was designed to respect other citizen's freedom of association, particularly landlords or employers who had personal or religious objections to homosexuality, and that the state had an interest in conserving resources to fight discrimination against other groups. Justice Kennedy replied that the breadth of Amendment 2 was so far removed from these particular justifications that they could not be credited, and the law seemed merely to make homosexuals unequal to everyone else with respect to seeking aid from the government, and thus was the product of an illegitimate animus toward persons based upon sexual orientation. However, Justice Kennedy did not accept an argument that heightened scrutiny should be applied on the theory that Amendment 2 burdens a fundamental right or targets a suspect class.

Justice Scalia, dissenting with Justices Rehnquist and Thomas, said that the law reflected legitimate interests, i.e., that it reflects the customary or traditional view that homosexuality is morally wrong and socially harmful. Justice Scalia also said that Amendment 2 was analogous to the constitutions of four states whose admission to the Union was made contingent on providing that polygamy is forever prohibited.470 As discussed at § 27.3.4.2 nn.259-64, in the context of discussing Lawrence v. Texas, a substantive due process challenge to the state of Texas’ ban on homosexual sodomy, this kind of reasoning reflects a Stage 4 commitment to customs and traditions as defining moral behavior, rather than a Stage 6 commitment to the rational principle of treating all individuals with “equal concern and respect,” a difference in moral reasoning developed at §§ 16.1 & 16.3. Justice Scalia also noted to the extent that Amendment 2 was only about denying homosexuals preferential treatment in the form of affirmative action, that might be a legitimate interest. While Justice Scalia’s dissent was willing to read Amendment 2 in that fashion, the majority in Romer concluded that the

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468 See generally Chemerinsky, supra note 24, at 758-59, and sources cited therein, including, inter alia, 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 particular case, 875 F.2d 699 (9th Cir. 1989). Since Watkins, the Ninth Circuit has applied rational 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).


470 Id. at 636-50 (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., dissenting).
language of Amendment 2 was so broad in scope that it could not conceivably be limited to that more legitimate interest. In lower court cases, the interest in preventing a group from an affirmative action preference has been held to be a legitimate governmental interest.\(^{471}\)

It should be noted that the Court is likely to use the “illegitimate motive” or “animus” characterization with some care. For example, in *Village of Willowbrook v. Olech*,\(^{472}\) a Village demanded a 33-foot easement as a condition of connecting the plaintiff’s property to the municipal water supply, while the Village required only a 15-foot easement from other similarly situated property owners. The Court acknowledged that this could constitute an Equal Protection violation if proven that the Village's demand was "irrational and wholly arbitrary," but the Court declined to consider an alternative Equal Protection theory that the state action was motivated solely by “subjective ill will” to get the plaintiff for reasons unrelated to any legitimate state objective. In the lower federal courts and state courts, cases outside the context of discrimination based on sexual orientation, including many cases involving prisoners claiming “animus” to various provisions of the Prison Litigation Reform Act of 1996, have met with little success.\(^{473}\)

With respect to cases involving discrimination based upon sexual orientation, the case results following *Romer* have been more mixed. For example, in one case involving a public school teacher's claim of sexual orientation discrimination when his teaching contract was not renewed, a federal 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.\(^{474}\) Similarly, in a case involving a teacher's challenge to her removal as a volleyball coach and restraints on her speech, the court held that the only justification for the action was bias against the teacher's homosexuality.\(^{475}\)

On the other hand, an *en banc* opinion of the Eleventh Circuit supported the Attorney General of Georgia's decision to withdraw an offer of employment to a woman after it became known that she had been married to her partner in an unofficial same-sex marriage ceremony. The court distinguished *Romer*, noting that it was not unreasonable to think that the woman’s acts were likely to cause the public to be confused and to question the Georgia Department of Law’s credibility; to interfere with the Department's ability to handle certain controversial matters, including enforcing

\(^{471}\) *Id.* at 635; *id.* at 638-39 (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., dissenting). For lower court cases, *see*, e.g., Equity Foundation of Greater Cincinnati, Inc. v. City of Cincinnati, 54 F.3d 261 (6th Cir. 1995) (Cincinnati charter providing for “no ordinance, regulation, rule or policy which provides that homosexual, lesbian, or bisexual orientation, status, conduct, or relationship constitutes, entitles, or otherwise provides a person with the basis to have any claim of minority or protected status, quota preference or other preferential treatment” advances a legitimate interest).

\(^{472}\) 528 U.S. 562, 565 (2000).


the law against homosexual sodomy; and to endanger working relationships inside the Department.476

More generally, as suggested by the discussion at § 16.3 nn.79-83, the Northern “Blue States” are likely to be more receptive to using Romer-like “animus” analysis, where needed, to promote gay rights more broadly, including recognizing same-sex marriages or civil unions, as in Vermont, Massachusetts, and Connecticut.477 In cases decided before October, 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.478

This conclusion is perhaps supported by the first and second prongs of rational basis 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 rational basis scrutiny – 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.479

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


477 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, 949 (Mass. 2003) (under rational basis review, violation of equal protection to deny same-sex couples the right to marry); Conn. Gen. Stat. Ann. Title 46B. Family Law § 46b-3800 (a bill authorizing civil unions was passed by the Connecticut legislature and was signed by the Governor of Connecticut on April 20, 2005).


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 rational basis 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 rational review.

The “Midwest, Plains, and Western” Red States are more likely to grant equal kind of rights in terms of health, pension, medical visitation, and other such rights, as reflected in decisions in Alaska and Montana, but not civil union or marriage status, as in Arizona and an Eighth Circuit opinion regarding a Nebraska law. In contrast, the “Deep South” Red States will likely continue, in the absence of Supreme Court binding precedent, to support limiting gay rights generally. For example, a Texas case upheld against an equal protection challenge a referendum that amended the city of Austin's charter to prohibit employment benefits for same-sex partners of city employees.

Issues surrounding parental rights and custody decisions are likely to reflect a similar split. For example, Vermont has 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

480 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).

481 Alaska Civil Liberties Union v. State of Alaska, 122 P.3d 781 (Alaska 2005) (under rational review, a violation of equal protection to deny state and municipal employee benefits provisions to same-sex domestic partners, while unmarried public employees in opposite-sex domestic relationships had opportunity to obtain benefits by marrying); Snetsinger v. Montana Univ. System, 104 P.3d 445 (Mont. 2004) (under rational review, a violation of equal protection for state to deny health insurance benefits to unmarried same-sex partners of public employees, while granting the benefits to unmarried opposite-sex couples who sign affidavit claiming common law marriage).

482 Standhardt v. Superior Court ex rel. County of Maricopa, 77 P.3d 451 (Ariz. App. Div. 1, 2003) (statute banning gay marriage was rationally related to state's legitimate interest in encouraging procreation and child-rearing within marriage, and not the product of animus based upon sexual orientation); Citizens for Equal Protection v. Bruning, 455 F.3d 859 (8th Cir. 2006) (same).

483 Bailey v. City of Austin, 972 S.W.2d 180, 183-84 (Tex. App. – Austin 1998).
determinations involving the presence of a same-sex partner is 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.484

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 and an Indiana Court of Appeals, 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).485 In a “Deep South” Red State case, the Eleventh Circuit upheld Florida’s ban on gay adoption, one of few such bans in the Nation.486

Following the Massachusetts Supreme Court’s opinion in 2003 in Goodridge v. Department of Public Health, cited at § 26.4.6 n.477, which legalized gay marriages in Massachusetts under the Massachusetts Constitution, a number of states, through public referenda or otherwise, have amended their state constitutions to ban recognition of marriages other than between one man and one woman. As of October, 2006, such a ban now appears in roughly 20 state constitutions, with more states likely to follow, including 7 states where the issue is on the ballot for the November, 2006 elections.487 These bans do not directly affect other issues of gay rights under state constitutional law. They do mean that any right to gay marriage would have to be found under the federal Equal Protection Clause in those states, rather than under the state constitution.

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. This issue is addressed as part of the discussion of the Full Faith and Credit Clause at § 23.1.4 nn.45-51. As discussed there, the federal Defense of Marriage Act of 1996, dealing with the obligation to recognize same-sex marriages, provides: “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


486 Lofton v. Secretary of Dept. of Children & Family Services, 358 F.3d 804 (11th Cir. 2004).

487 See Same-Sex Marriage in the United States (Wikipedia) (Online encyclopedia) (Search using “Same-Sex Marriage”, “United States”, and “Wikipedia”; click on “Efforts to Ban Same-Sex Marriage by Constitutional Amendment” for updated list of states with such amendments).
right or claim arising from such relationship.” In 2005, that law was held not to violate full faith and credit, due process, or equal protection principles by a federal district court in Wilson v. Ake.488

As noted at § 23.1.4 text following n.51, eventually, as with the issue of interracial marriages, where the Full Faith and Credit Clause issue was mooted by the Supreme Court in Loving v. Virginia, discussed at § 26.2.1.1.D n.132, which struck down all bans on interracial marriages, the Supreme Court will likely eventually join the educated, enlightened view of Western Europe and Canada, discussed at §§ 16.1 text following n.5 & 16.2.4, which supports equal rights for gays and lesbians. This will moot the full faith and credit issue with respect to same-sex marriages as well. This view of equal rights for gays and lesbians would naturally be adopted more quickly by natural law Justices following an Enlightenment model of natural law, who balance arguments of text, context, history, practice, and precedent against a model of pure reason and equal concern and respect (perhaps adopted 10 years from 2006 on the Court, given the need for some more substantial shift away from traditional state practices denying equal rights so as not to outweigh arguments of reason in this balance). Even a Burkean model of natural law will eventually come to adopt the view of equal rights, but only after a longer period of legislative, executive, and social acceptance in the states (perhaps 25 years from 2006 on the Court). This difference between an Enlightenment and a Burkean model of natural law in terms of impact of reason versus traditions on interpreting a natural law concept like “equality” or “liberty” is discussed at § 12.3.3 nn.116-28. The view that the Court is usually cautious not to get too far out in front of society in implementing notions of equal concern and respect, where they conflict with well-established societal traditions, is noted at § 16.3 nn.79-83.

While the view of equal marriage rights for gays and lesbians may seem an “extreme” view to some, the likely best historical parallel in United States history is the struggle for equal rights for African-Americans during the 19th and 20th centuries. During the first half of the 19th century, customs and traditions supported the practice of slavery, including the ban on slaves getting married. A number of “moderate” individuals supported various half-measures, such as gradual elimination of slavery, compensation for slave owners if slaves were freed, and return of freed slaves to Africa. The view that slaves should be freed, no compensation paid, and African-Americans permitted to remain in the United States as full citizens was viewed as the “radical” abolitionist position. Full equal rights eventually became, of course, the mainstream view, supported by virtually everyone today. As discussed at § 16.2.4, an important part of this shift was a change in attitudes regarding what religious documents said about the issue, particularly a shift in whether the Bible was best read to support the discrimination inherent in the institution of slavery or instead was best read to support the cause of equal rights and human dignity for all.

§ 26.5 Classifications Interfering with Fundamental Rights

The cases discussed at §§ 26.2-26.4 all involved classifications that the Court determined deserved strict scrutiny (§ 26.2), intermediate scrutiny (§ 26.3), or rational basis review (§ 26.4), depending upon whether the classification used a characteristic that is “suspect,” like race or ethnicity; “quasi-suspect,” like gender or illegitimacy; or “non-suspect,” like age or mental disability. In addition to

this branch of Equal Protection Clause doctrine, a second branch of Equal Protection Clause doctrine focuses on classifications that interfere with “fundamental” rights.

The issue of how to determine if some right is “fundamental” is discussed at § 27.1.1. The discussion here provides the details for those fundamental rights that have triggered an Equal Protection Clause analysis. These are a right to travel, discussed at § 26.5.1; access to the courts, discussed at § 26.5.2; and a right to vote and access to the ballot, discussed at § 26.5.3. This discussion also addresses the Court’s conclusion that there is no fundamental right to equal educational funding in the public schools under the United States Constitution, discussed at § 26.5.4.

As a preliminary matter it is important to note that each of these fundamental rights is not listed in the text of the Constitution. Thus, they form part of what is called the “unenumerated” fundamental rights analysis. As discussed at § 27.1.1, these rights are viewed as “deeply rooted in our Nation’s history and traditions” or “fundamental to our concept of constitutionally ordered liberty,” even though not mentioned in the text of the Constitution. For many of these rights, as noted at § 21.2.3, the Court has adopted the view that “undue” or “substantial” burdens on these unenumerated fundamental rights trigger strict scrutiny, while “lesser” burdens on these rights trigger only some version of rational review, probably best understood as “second-order rational review.” This aspect of fundamental rights doctrine is reflected in the cases discussed below.

§ 26.5.1 Right To Travel

The first major case concerning the fundamental right to travel under Equal Protection Clause analysis occurred in 1969 in Shapiro v. Thompson.489 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. The right to travel within the United States was viewed as fundamental because, although not mentioned in the Constitution, the Constitution created “one Nation,” and thus travel within that Nation was a fundamental right.

Reflecting his Holmesian deference-to-government predisposition, Justice Harlan dissented in the case. He said that the Court, in substance, was treating travel as a suspect classification, and this was a return to the "superlegislature" days of due process review, as in Lochner v. New York.490 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.”491


490 198 U.S. 45 (1905), discussed at § 27.3.2.1 nn.149-60.

491 394 U.S. at 662 (Harlan, J., dissenting).
Shapiro was extended in 1972 by Dunn v. Blumstein.\footnote{492} In Dunn, the Court said that there is no need to show the actual deterrence of travel; it is enough that a law penalize exercise of the right. Travel is an "unconditional" right, and a one-year durational residence law on voting penalizes exercise of the right. 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.

Later cases have qualified the right to travel analysis. For example, in Vlandis v. Kline,\footnote{493} 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. Similarly, in Memorial Hospital v. Maricopa County,\footnote{494} 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. 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.

With only Justices Brennan and Marshall dissenting on the right to travel issue, Justice Rehnquist wrote for the Court in Sosna v. Iowa\footnote{495} that Iowa could impose a one-year durational residence requirement for obtaining a divorce. Rehnquist explained that this law was reasonably justified on grounds other than budget or administrative convenience, \textit{i.e.}, protecting judgments from collateral 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. Under this line of cases, Shapiro can be explained as holding that a one-year durational residence requirement for welfare was a substantial interference with the right to travel, while Sosna, where no right was "irretrievably foreclosed," was not a substantial interference. In Jones v. Helms,\footnote{496} 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 that the case did not involve disparate treatment of residents and non-residents or new and old residents.

\footnotesize{\begin{itemize}
\item 405 U.S. 330, 336-60 (1972).
\item 415 U.S. 250, 253-70 (1974); \textit{id. at} 283-88 (Rehnquist, J., dissenting).
\item 419 U.S. 393, 404-10 (1975); \textit{id. at} 418 (Brennan, J., joined by Marshall, J., dissenting).
\end{itemize}}
Subsequent developments have provided evidence that some Justices would prefer to use another mode of analysis in cases that classify people by the length of their residence. 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 did not discuss whether this disadvantage for recent residents was a penalty on exercise of the right to migrate to Vermont. Instead, 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. Justice Blackmun, dissenting with Justices Rehnquist and O’Connor, said that 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.

Another example of the use of rational basis review in a right to travel case occurred in *Zobel v. Williams*. Chief Justice Burger there wrote for the Court that distinctions between new and old residents in payments from Alaska’s mineral fund violated the Equal Protection Clause, even under rational basis scrutiny. 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. Justice Brennan concurred in this opinion, with Justices Marshall, Blackmun, and Powell. Justice Brennan added that rewarding citizens on length of residence tended to keep people in Alaska and, thus, interfered with the right to travel, a right intended to preserve mobility essential to economic progress. Justice O’Connor, concurring only in the judgment, said that rewards to long-time residents might sometimes be reasonable, but since non-residents were not a source of evil here, there was a violation of the Article IV, § 2 Privileges and Immunities Clause. Justice Rehnquist, dissenting, said the illegitimacy of recognizing past contributions was established only in a few cases on the right to travel. Here, however, no travel was impeded.

An analysis similar to that in *Zobel* was applied by the Court in *Hooper v. Bernalillo*. There 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.

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497 472 U.S. 14, 21-28 (1985); *id.* at 28-37 (Blackmun, J., joined by Rehnquist & O’Connor, JJ., dissenting).

498 457 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).

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 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 the rational basis test, 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. Here the law did not restrict the freedom to move to New York nor did it impose discriminatory fees, taxes, or other direct restraints.

A slightly different way to view the right to travel appeared in *Saenz v. Roe*. Instead of viewing the right to travel as an aspect of the “unenumerated” fundamental rights analysis, the Court said that the right to travel is partly a privilege of citizens of the United States, protected by the Privileges or Immunities Clause of the 14th Amendment, discussed at § 25.3 nn.65-76. In *Saenz*, the Court held that the discrimination against new citizens by the California law, which for one year limited welfare payments to the amount payable by the state of the family’s prior residence, not California’s typically more generous payment for longer-term residents, triggered strict scrutiny, which the law could not pass. The one-year classification could not be justified by a purpose to deter welfare applicants from migrating to California since this is an illegitimate purpose. Nor could a fiscal justification provide the required necessity since neither the duration of residence nor the identity of the prior state of residence has any relevance to the need for benefits. Chief Justice Rehnquist dissented, with Justice Thomas, saying that the California law imposed an appropriate test for the bona fides of residence in California. When revamping its total welfare packages, as California was doing, it should have the authority and flexibility to ensure that the new programs are not exploited, a concern that Congress has recognized by specifically authorizing the program California adopted. Justice Stevens responded to this contention by saying that Congress may not authorize the states to violate the 14th Amendment, unlike the ability of Congress to preempt a dormant commerce clause challenge, as discussed at § 20.3.2.2.B.

The *Saenz* theory has not yet been applied in any subsequent case, so it remains unclear whether it will be limited to durational limits on welfare benefits, or any benefits or burdens that affect travel, or to any classification relating to newer or older residents. Since the strict scrutiny approach in *Saenz*, and the result in *Saenz*, track the Court’s earlier decision in *Shapiro v. Thompson*, discussed

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500 476 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).

501 526 U.S. 489, 498-511 (1999); id. at 511-21 (Rehnquist, C.J., joined by Thomas, J., dissenting).
at § 26.5.1 n.489, it is unclear what practical difference it makes to ground this aspect of the right to travel cases in the Privileges or Immunities Clause. As an aspect of that clause, however, the Saenz case is discussed in greater depth at § 25.3 nn.65-76. \[5\]

§ 26.5.2 Access to Courts

When indigents sought access to the courts or were brought before a court, cases during instrumentalist era held that under the Due Process Clause or Equal Protection Clause "fundamental fairness" required that in some cases fees must be waived, or counsel or other services must be provided, particularly for indigent parties. The post-instrumentalist Court does not appear to have backed away from the instrumentalist-era precedents. Fairness determinations are influenced by the importance of the rights involved and the extent to which alternatives to litigation are available to the indigent person. Thus, the cases need to be divided into criminal and civil proceedings.

In criminal cases the states must not impose filing fees or transcript costs that bar access to appeal by an indigent defendant,\(^\text{502}\) and must provide counsel for an indigent at trial and for taking a first appeal as a matter of right.\(^\text{503}\) However, a state need not supply counsel for a discretionary appeal to the highest state court or for certiorari to the United States Supreme Court.\(^\text{504}\) Indeed, in 1987, the Court held that states have no constitutional duty to provide counsel to a defendant in postconviction proceedings in non-capital cases.\(^\text{505}\) Nor is there a state duty to supply counsel for postconviction proceedings in capital cases unless an inability is shown otherwise to obtain counsel.\(^\text{506}\)

In civil cases the states must waive filing fees for the poor in divorce cases,\(^\text{507}\) and probably in other cases where access to court is an indigent’s only way to protect a fundamental right. As discussed at § 27.3.3.1.A, individuals have a fundamental right to marry or not to marry, which is affected by the ability to get a divorce. As discussed at § 27.3.3.1.C, in most circumstances individuals also have a fundamental right to rear their biological children. Thus, a state must furnish blood grouping tests to an indigent defendant in a civil paternity case where state officials are parties to the action.\(^\text{508}\) And, in an action brought by the state, it must pay for the transcripts needed for effective review of


a trial court's order terminating a mother's parental rights. However, states need not waive filing fees in voluntary bankruptcy, since the proceeding does not relate to a fundamental constitutional right and is not the exclusive way to adjust creditor relationships. Similarly, the states need not waive a $25 filing fee for appeal from a reduction in welfare benefits after a pre-termination hearing. Even where a fundamental right may be involved, states usually do not need to providing funding for the exercise of that right. They just need not to burden the exercise of it. Thus, states need not supply counsel to terminate parental status unless special factors are present that would make the presence of counsel determinative of the result, as where there are disputed allegations of abuse or neglect or testimony of expert witnesses.

These cases are consistent with the observation 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, and thus are usually invalid. “Less than substantial” burdens on the right to access to courts trigger only rational basis scrutiny, 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 in the case, the Court noted that the proper standard of review was thus whether the prison regulation was “reasonably related to legitimate penological interests.”

§ 26.5.3 Right to Vote and Access to the Ballot

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. In Harper v. Virginia State Board of Elections, Justice Douglas wrote for the Court in 1966 that Virginia's poll tax was unconstitutional because the right to vote in a free and unimpaired manner is "fundamental," as it is preservative of other basic civil and political rights. Indeed, there was a suggestion in the opinion, not later picked up by the majority on the Court, that classifications drawn on the basis of wealth or poverty not only triggered strict scrutiny in the context of obtaining a ballot, but in other contexts as well. 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 and the Court cannot defer to the government when government
action violates equal rights, citing Brown v. Board of Education. Justice Douglas concluded by
saying that where fundamental rights are asserted under the Equal Protection Clause, classifications
which might invade or restrain them must be closely scrutinized and carefully confined.\textsuperscript{516}

The Court applied a similar strict scrutiny approach in Kramer v. Union Free School District No.
15.\textsuperscript{517} 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. The state justified
the law by saying the attempt was to limit voting rights to those persons “directly affected” by
school board decisions. Under a strict scrutiny approach, however, the law was not “directly
related” to advancing this interest, because the law “permit[s] inclusion of many persons who have,
at best, a remote and indirect interest, in school affairs and, on the other hand, exclude[s] others who
have a distinct and direct interest in the school meeting decisions.” For example, the Court noted
that some property owners, particularly those getting ready to move, may have little interest in
school board matters. On the other hand, parents of children too young to attend school could well
have an interest in the kind of school their children soon would be attending, and yet they were
denied an opportunity to vote for the school board under the New York law.

Despite application of strict scrutiny in Harper and Kramer, the Court has applied only rational basis
scrutiny for less serious burdens on the right to vote. The Court noted in Burdick v. Takushi:

The Constitution provides that States may prescribe "[t]he Times, Places and Manner of holding
Elections for Senators and Representatives," Art. I, § 4, cl. 1, and the Court therefore has
recognized that States retain the power to regulate their own elections. Common sense, as well
as constitutional law, compels the conclusion that government must play an active role in
structuring elections; "as a practical matter, there must be a substantial regulation of elections
if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the
democratic processes." . . . [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."\textsuperscript{518}

\textsuperscript{516} Id. at 669-70, citing Brown, 347 U.S. 483, 492 (1954); id. at 670-72 (Black, J., dissenting);
id. at 680-86 (Harlan, J., joined by Stewart, J., dissenting).


For example, in *Ball v. James*,\(^{519}\) voting rights for an Arizona water reclamation district were weighted depending on how many acres of land each voter had. This weighting would normally have violated the principle of “one person, one vote” recognized in *Reynolds v. Sims* and many other cases. Under that doctrine, only variations from equal voting that can satisfy a strict scrutiny, least restrictive alternative analysis are permissible. In practice, this 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 traditional political boundaries; geographic barriers, such as rivers or mountains; or district shape compactness.\(^{520}\) However, since the district in *Ball* “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,’” the Court applied only rational basis scrutiny and upheld the law because “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 burdens of the District’s water operations.”

The Court has applied the same kind of analysis in cases involving the right of access to the ballot. For example, in *Timmons v. Twin Cities Area New Party*,\(^{521}\) the Court dealt with Minnesota’s ban on fusion tickets appearing together on the ballot. The majority and the two dissenting opinions agreed that for “severe” burdens strict scrutiny would be appropriate. As discussed at § 21.2.4.2 nn.88-93, for the less severe burden at issue in this case, the majority applied second-order rational basis review, while the dissenting opinions opted for intermediate review. Such intermediate review is contrary to the rational review approach adopted in cases like *Ball v. James*\(^{522}\)

The Court has also applied rational review in cases dealing with limitations on the rights of prisoners to vote, as in *O’Brien v. Skinner*.\(^{522}\) 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, cannot be denied a right to vote, and must be provided with absentee ballots. Once convicted, however, the Court has permitted states to limit the right to vote based upon specific text in the 14th Amendment, as discussed in *Richardson v. Ramirez*,\(^{523}\) 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”


\(^{521}\) 520 U.S. 351, 358, 364 (1997); id. at 374 (Stevens, J., joined by Ginsburg, J., & Souter, J., dissenting); id. at 382 (Souter, J., dissenting).


consistent with state practice in 1868. As of 2004, states were dealing 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.”

It is beyond doubt that imposing such a deprivation for loss of a civil case would be unconstitutional.

The most noteworthy recent case involving equal protection issues and the right to vote is unquestionably *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 the punch card but either did not pierce the card at all or left only 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. In both kinds of cases, manual inspection of the ballot can reveal the voter’s actual intent. 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. 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

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526 On these and other issues surrounding the electoral count in Florida, see Lynne H. Rambo, *The Lawyer’s Role in Selecting the President: A Complete History of the 2000 Election*, 8 Tex. Wesleyan L. Rev. 105 (2002), and sources cited therein.

527 531 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).
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. Nor, for that matter, is there any reason to think that the Constitution’s Framers would have reached a different conclusion.” 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

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528 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.”).

529 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 . . . before the date set for the meeting of electors, December 18. . . . There is no justification for denying the State the opportunity to try to count all disputed ballots now.”).

530 Id. at 129 (Souter, J., joined by Stevens, J., Ginsburg, J., and Breyer, J., dissenting).

531 Id. at 154-55 (Breyer, J., joined by Stevens, J., & Ginsburg, J., dissenting).


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 § 17.3.4.4, to determine if a political question exists. The opposing political questions argument is that while the Court routinely addresses equal protection complaints regarding 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 the state legislature. Thus, under these provisions, there are “textually demonstrable constitutional commitments” to “coordinate political departments,” and thus under Baker v. Carr it could reasonably be regarded as a political question.535

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, by having names on each side 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.536

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

534 See Rambo, supra note 526, at 325 n.1479.

535 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).

in Florida during the 2000 election, a mid-range estimate of 4,000 is probably most likely.\textsuperscript{537} 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 nearly thirty-six percent of all those disenfranchised nationwide.”\textsuperscript{538} Challenges to such disenfranchisement laws on grounds that, given this effect, they are the product of racially discriminatory intent and thus violate the Equal Protection Clause, or in any event violate the Voting Rights Act, typically fail.\textsuperscript{539}

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 of the ballot. That confusion apparently led approximately 26,000 voters, many in predominantly African-American precincts, to punch holes on both pages of the ballot, thus voting for two candidates for President, and invalidating their votes for Al Gore on the first page of the ballot.\textsuperscript{540}

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 that if a further recount was going to be ordered by the


\textsuperscript{539} See generally \textit{id}. at 852-99; Hayden v. Pataki, 449 F.3d 305, 309-10 (2d Cir. 2006) (8-5 \textit{en banc} decision) (Voting Rights Act provisions on dilution of minority voting strength do not apply to felony disenfranchisement statutes); \textit{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 14\textsuperscript{th} and 15\textsuperscript{th} Amendments).

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.\textsuperscript{541} 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 have adopted the Bush attorneys’ view that the overvote recounting should be done.

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 any individual who went home would have voted, a court could not have compensated for that problem. How many voters actually went home is speculative, as other candidates were on the ballot, including a close Senate race.

Since \textit{Bush v. Gore} was decided in December, 2000, few election challenges based upon \textit{Bush v. Gore} as a precedent have succeeded. \textit{Bush v. Gore} was decided under rational basis review, indicating that the Court viewed the various problems with the Florida recount as constituting “less than substantial” burdens on the fundamental right to vote. The recount authorized by the Florida Supreme Court was nonetheless 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, despite the Florida Supreme Court’s statement that a statewide recount was being done) that it was irrational in terms of an attempt to count votes equally, 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 irrational under a rational basis test. This is so particularly because considerations of administrative costs can be used as a legitimate government interest under rational basis scrutiny to justify such disparities. For this reason, \textit{Bush v. Gore} has not been viewed as very relevant in other election cases, because those cases do not present the same irrationality as was present in the Florida recount.\textsuperscript{542}

\textsuperscript{541} See Rambo, supra note 526, at 325 n.1479.

\textsuperscript{542} See generally Richard B. Saphire & Paul Moke, \textit{Litigating Bush v. Gore in the States: Dual Voting Systems and the Fourteenth Amendment}, 51 Vill. L. Rev. 229 (2006), discussing, \textit{inter alia}, Southwest Voter Registration Educ. Project v. Shelley, 334 F.3d 882 (9\textsuperscript{th} Cir. 2003) (preliminary injunction granted based upon reasonable likelihood of success that in the gubernatorial recall election in California using punch-card ballots for 44\% of the electorate, but more reliable machines in other precincts, violates equal protection), rev’d, 344 F.3d 914 (9\textsuperscript{th} Cir. 2003) (unanimous \textit{en banc} opinion). \textit{But see} Stewart v. Blackwell, 444 F.3d 843, 860-62 (6\textsuperscript{th} Cir. 2006) (2-1 panel decision) (disparities between punch card ballots and optical scan machines in Ohio more than a minimal burden, and thus strict scrutiny triggered, rendering state’s differential use unconstitutional),
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.\textsuperscript{543} Given these problems, states are increasingly requiring a voter-verified paper trail for counties using DRE devices.\textsuperscript{544}

\textbf{\textsection{26.5.4} No Fundamental Right of Equal Funding for Public Education}

Do students have a constitutional right under the Equal Protection Clause to equal access to education that includes a right to have as much money spent per pupil in their public school system as is spent in other systems throughout the state? The simple answer is no, but the reasons have shifted during the various eras of Supreme Court history.

As discussed at \textsection{26.2.1.1.B} nn.104-18, in 1873, the \textit{Slaughter-House Cases} reviewed legislative history and doubted that the Equal Protection Clause would ever be applied to state action beyond race discrimination. Responding more to the literal text of the provision, the Court in 1885 brought all legislative classifications within the Equal Protection Clause in \textit{Barbier v. Connolly}. However, most schools were racially segregated at that time and, under the “separate, but equal” and “reasonableness” tests of \textit{Plessy v. Ferguson}, decided in 1896, that condition prevailed for many decades. As discussed at \textsection{26.2.1.1.C} nn.119-22, the Court began to moderate the impact of the \textit{Plessy} doctrine during the Holmesian era by holding some disparities in educational opportunities were constitutionally “unequal.” As discussed at \textsection{26.2.1.1.D} nn.127-31,during the instrumentalist era, the Court overruled \textit{Plessy} in \textit{Brown v. Board of Education}, and, as noted at \textsection{26.2.1.4.D} n.259, said that education is perhaps the most important function of state and local governments. In \textit{Harper v. Virginia Board of Elections},\textsuperscript{545} decided in 1966, Justice Douglas said for the Court, "Lines drawn on the basis of wealth or property, like those of race . . . are traditionally disfavored."

In 1973, the Court decided a key case regarding funding of public education, \textit{San Antonio Independent School District v. Rodriguez}.\textsuperscript{546} On a 5-4 vote, the Court held in \textit{Rodriguez} that there is no fundamental right to equal funding in education under the United States Constitution, and that 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, the Court rejected the heightened scrutiny for classifications involving the poor suggested in \textit{Harper}. Accordingly, rational basis scrutiny was used to test the unequal distribution of tax moneys among Texas school districts. The test was passed because


\textsuperscript{545} 383 U.S. 663, 668 (1966).

\textsuperscript{546} 411 U.S. 1, 17-44 (1973).
Texas had 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 responsible studies by qualified people, and there were similar plans in most states. Justice Powell explained for the Court that the large, diverse and amorphous class of persons who were poor and living in districts with a low tax base had not been saddled with the disabilities, the history of purposeful unequal treatment, or the political powerlessness that had led the Court to give extraordinary protection to certain classes, such as race. Nor is education among those rights given explicit protection by the Constitution. Further, there is no basis for saying that education is implicitly so protected, particularly when the Court, as here, is dealing with matters of fiscal and educational policy for which it lacks both expertise and familiarity.

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 and the asserted state interests in support of a classification. The invidiousness of wealth classifications should be gauged with an awareness of the importance of the interests being affected and the relevance of personal wealth to those interests. In his view, the discrimination on the basis of group wealth in Rodriguez called for heightened scrutiny because education is such an important personal interest. 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. He also agreed with Justice White that the Texas scheme was devoid of a rational basis.547

Despite this decision in Rodriguez, a number of state courts have found a fundamental right to education under their own state Constitutions, and thus applied a strict scrutiny approach toward the question of equal funding of public schools.548 These cases have served to moderate, somewhat, unequal funding for public schools in rich versus poor school districts.549

The decision regarding no fundamental right to equal funding for education under the United States Constitution is consistent with Court doctrine on funding matters generally. For example, with respect to the need of indigents for some kind of welfare assistance, the Court has not held that there exists a right to minimum protection against economic hazards that would impose an affirmative

547 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).


duty on government to supply basic human needs. Further, classifications in welfare laws have been treated as economic or social matters and, thus, given only rational basis review, as discussed at § 26.4.1. Similarly, a refusal by the government to fund medically necessary abortions as part of Medicaid was held in *Harris v. McRae* not to deny equal protection, even though its purpose was to encourage childbirth, as discussed at § 27.3.3.3 n.230. The majority explained that Congress need not remove obstacles in the path of exercising a fundamental right which are not of its own doing. Dissenting in *Harris v. McRae*, Justice Brennan, with Justices Marshall and Blackmun, complained that by funding expenses associated with childbirth and none incurred in terminating pregnancy, the government was making an offer that an indigent women could not afford to refuse, and thus interfering with her constitutionally protected right of choice.

Despite *Rodriguez*, the Court noted in *Papasan v. Allain* that *Rodriguez* had "not yet definitively settled . . . whether a minimally adequate education is a fundamental right and whether a statute alleged to discriminatorily infringe that right should be accorded heightened equal protection review." 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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CHAPTER 27: THE DUE PROCESS CLAUSES OF THE 5th AND 14th AMENDMENTS

The Due Process Clause of § 1 of the 14th Amendment provides, “No State shall deprive any person of life, liberty, or property, without due process of law.” This language mirrors the Due Process Clause in the Fifth Amendment, which provides “nor shall any person . . . be deprived 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, as well as at the time of ratification of the 14th Amendment in 1868, 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.2

Despite this fact, subsequent to ratification of the 14th Amendment, the Court has provided individuals with a number of substantive protections against state or federal infringement through use of the Due Process Clause. As discussed at § 25.3 nn.55-64, the original intent of the framers and ratifiers of the 14th Amendment probably was to provide for such substantive immunities through the Privileges or Immunities Clause of the 14th Amendment. However, the Court gave the Privileges or Immunities Clause a very narrow interpretation in the Slaughter-House Cases in 1873. Since 1876, the Court has provided this kind of substantive protection through the doctrine known as “substantive due process.”

An introduction to “substantive due process” doctrine is discussed at § 27.1. The main consequence of this doctrine is that all “persons” are granted rights under the Due Process Clause, while if the doctrine had been developed under the Privileges or Immunities Clause, the text of that Clause would have limited the rights to “citizens.” This doctrine of substantive due process has two parts: “enumerated” rights and “unenumerated” rights.

“Enumerated” rights under substantive due process doctrine include those rights that are “fundamental” based on the text, context, and history of “life, liberty, and property” in the Due Process Clause, as well as rights based on the text, context, and history of “life, liberty, and property” that are not viewed by the Court as “fundamental.” The basic definition of fundamental rights is discussed at § 27.1.1. The doctrine regarding non-fundamental rights is discussed at § 27.1.2. In addition, “enumerated rights” include those aspects of the Bill of Rights that are sufficiently “fundamental” to be incorporated into the Due Process Clause of the 14th Amendment, and thus made applicable against the states. These rights are discussed at § 27.2. The second part of substantive due process doctrine involves “unenumerated” fundamental rights that form part of substantive due process analysis. These rights, which the Court has held are “implicit in the concept of ordered liberty,” although not textually specific in the Constitution, are discussed at § 27.3.

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).

The final aspect of due process analysis focuses on the original primary meaning of due process as referring to proper procedures that must be followed in order to deprive some person of “life, liberty, or property.” This “procedural due process” doctrine is discussed at § 27.4.

§ 27.1 Introduction to Substantive Due Process Doctrine

Individuals are assured a number of substantive and procedural protections against governmental action by the first eight of the ten Amendments that comprise the Bill of Rights. Although all but the First Amendment speak in general terms, rather than being limited to restrictions on Congress, as is the First Amendment, the Court held in 1833 in Barron v. Baltimore, discussed at § 27.2.1 n.95, that the Bill of Rights restrains only the federal government. The Civil War Amendments – the 13th, 14th, and 15th Amendments, ratified between 1865 and 1870 – added protections for individuals against actions by state governments. In those amendments, there was no explicit reference to any one of the specific protections contained in the first eight Amendments, other than restating the Due Process Clause language of the Fifth Amendment in the 14th Amendment.

Since 1876, however, in Munn v. Illinois, discussed at § 27.3.2.1 nn.142-43, the Court has interpreted the Due Process Clauses of the Fifth and 14th Amendments to provide for a number of substantive protections for individuals against both federal and state action. As a result, today's legal picture cannot be encompassed merely by consulting constitutional text. It has resulted from a series of gradual transformations in what “due process” has been taken to mean. These transformations have mirrored differences in the interpretive predispositions of the various styles of decisionmaking that have predominated on the Court in succeeding eras. As part of an introduction to these transformations, it is important to distinguish between those rights that are deemed “fundamental,” to which some form of heightened scrutiny may apply, and those rights that are not “fundamental,” to which some form of rational review applies.

§ 27.1.1 Introduction to Fundamental Rights Doctrine

A major issue in deciding what kind of protection the Due Process Clause provides regarding substantive rights for individuals concerns whether the particular right is “fundamental.” Finding that a right is fundamental has two major consequences. First, those protections of the Bill of Rights that are deemed fundamental are held to be incorporated into the Due Process Clause of the 14th Amendment, and thereby made applicable against the states, discussed at §§ 27.2.1-27.2.5.1. Second, whether or not the fundamental right is part of the Bill of Rights, the Court typically applies a greater than minimum rational review analysis to determine the constitutionality of government action burdening that right, particularly where a substantial or undue burden exists on that right. This can occur under an “enumerated” fundamental rights analysis, as for the “freedom from bodily restraint,” which includes the right to have the “beyond a reasonable doubt” standard applied in criminal cases, discussed at § 27.2.5.2, or an “unenumerated” fundamental rights analysis under the Equal Protection Clause, discussed at § 26.5, or under the Due Process Clause, discussed at § 27.3.

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4 94 U.S. 113, 125-26 (1876).
In addition to the textually specific fundamental rights, discussed at § 27.2.5.2, like the “freedom from bodily restraint,” fundamental rights have been defined as those rights “implicit in the concept of ordered liberty.” The classic definition of these rights 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*, 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 particularly true for formalist judges, who tend to operate at a Stage 4 level of concrete operational thought, which is based on customs and traditions, as discussed at §§ 16.1 & 16.3. It is also true, however, for Holmesian judges, whose Stage 4½ predisposition to defer to the dominant forces in society suggests that fundamental rights should emerge from legislative and executive traditions, or perhaps popular referenda, not court action. Instrumentalist and natural law judges, as Stage 5 and Stage 6 normativists, 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. In particular, this is part of the modern natural law Stage 6 commitment, discussed at §§

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6 *Id.*


16.1 & 16.3, to reasoned elaboration of what is fundamental to our concept of constitutionally ordered liberty.

In reaching a decision about whether a particular fundamental right exists, the Court must decide three basic questions concerning how to identify fundamental rights. The first question concerns the basic test for defining whether a right is fundamental. This involves determining how precisely to define the term “implicit in the concept of ordered liberty” for purposes of the two branches of fundamental rights analysis. The second question is what sources can be used to determine whether any particular right meets this definition of fundamental rights. The third question is at what level of generality are the sources consulted to determine fundamental rights. In making each of these determinations, the four decisionmaking styles have emphasized different definitions, sources, and levels of generality.

Consistent with the formalist emphasis on literal text and specific historical intent, the formalist approach is to adopt a more literal and historically restrained definition of what rights are “implicit in the concept of ordered liberty.” With regard to the first branch of fundamental rights analysis that focuses on 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, particularly as reflected in legislative and executive practice, since that practice is more certain and predictable than resort to other kinds of evidence. Thus, in Stanford v. Kentucky, Justice Scalia’s plurality opinion concluded that “traditions” must be established from sources of legislative enactments and their application, not from other kinds of indicia, such as public opinion polls, the view of interest groups, and the positions adopted by various professional associations. With regard to what level of generality these sources should be considered, Justice Scalia followed the formalist emphasis on specific intent when he stated 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 that is focused on what rights are “fundamental to our concept of constitutionally ordered liberty,” the formalist approach is to ask whether such a right is sufficiently fundamental that it is acknowledged in American, English, and Continental European systems, so that it is truly “implicit in the concept of ordered liberty” because recognized by all “fair and enlightened” Western democracies. The formalist approach thus tends to support the narrow phrasing of fundamental rights in Palko v. Connecticut, which defined fundamental rights as those to which "a fair and enlightened system of justice is impossible without them" so that "neither liberty nor justice would exist if they were sacrificed."


13 491 U.S. 110, 127 n.6 (1989) (Scalia, J., joined by Rehnquist, C.J., announcing the judgment of the Court).

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 executive practice, as an aspect of deference to government. Thus, in *Stanford v. Kentucky*, Chief Justice Rehnquist and Justice White joined Justice Scalia’s plurality opinion, discussed at § 27.1.1 n.12, 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.” Indeed, in 1977, Holmesian Justices Stewart, White, and Rehnquist expressed some concern in *Moore v. City of East Cleveland* about even using traditions to determine the content of fundamental rights, and thereby second-guess government action, although in 1986 in *Bowers v. Hardwick* they seemed resigned to that definition.

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*.

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 analogical reasoning based on prior precedents 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 individual social practice. As indicated by Justice O’Connor’s refusal to join Justice

15 198 U.S. 45, 75-76 (1905) (Holmes, J., dissenting).


19 *Palko*, 302 U.S. at 325.

20 332 U.S. 46, 67 (1947) (Frankfurter, J., concurring).
Scalia’s plurality opinion in Stanford,21 the natural law approach will not limit traditions analysis to legislative and executive practice, but 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, as discussed at § 12.2.2.1 n.51. Justice Kennedy, who has an occasional predisposition for a formalist approach, as discussed at § 12.4.1, joined Justice Scalia’s opinion in Stanford. However, Justice Kennedy has backed away from this view in a number of subsequent cases, including Atkins v. Virginia and Roper v. Simmons, involving the death penalty for the mentally retarded and juveniles, discussed at §§ 23.2.1.4 nn.200-204, with the Court in Roper overruling the specific holding in Stanford on the constitutionality of the death penalty applied to juveniles, and in Lawrence v. Texas, dealing with the constitutionality of states criminalizing sodomy, discussed at § 27.3.4.2 n.259.22 Regarding the level of generality from which 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.,23 stating that they were not willing to "foreclose the unanticipated" by adopting Justice Scalia's suggested approach which is "somewhat inconsistent with our past decisions in this area.” Of course, the natural law approach also has a strong policy of deference to precedents, which can only be overridden according to factors stated in Planned Parenthood v. Casey.24 These Casey factors regarding precedent are discussed at §§ 7.3.3-7.3.4.

Regarding the second branch of fundamental rights analysis, a natural law judge is willing to let general concepts evolve over time consistent with reasoned elaboration of the law. This is reflected in the joint opinion of Justices O’Connor, Kennedy, and Souter in Casey, where the joint opinion stated, based on “analogical” reasoning regarding liberty as defined in prior cases, “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.”25 Under this approach, the general concept of liberty can also be illuminated by "emanations" or "penumbral" rights from specific constitutional guarantees.26 “Analogical” and “penumbral” reasoning are discussed at § 27.3.3 nn.171-74.

Under an instrumentalist approach, full consideration is given to the natural law approach of considering purposes behind the text, any general concept or general societal tradition, analogical reasoning based upon prior precedents, and reasoning based upon "penumbras" or "emanations" from constitutional provisions. In addition, where leeways exists after this analysis, instrumentalists

21 492 U.S. at 382 (O’Connor, J., concurring) (not willing to adopt Justice Scalia's proposed approach, at least in this Eighth Amendment case applied to the states through the 14th Amendment).


23 Michael H., 491 U.S. at 132 (O’Connor, J., joined by Kennedy, J., concurring).


25 Id. at 851.

26 See Griswold, 381 U.S. 479, 484-85 (1965) (penumbral analysis in opinion for the Court).
are willing to consider arguments of sound social policy to resolve remaining leeways in the law. 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 is not the formalist "a fair and enlightened system of justice is impossible without the right," nor the Holmesian "canons of decency and fairness which express the notions of justice of English-speaking peoples," but rather whether the rights are simply “part of the American scheme of justice.”

In determining this, societal traditions can be established by legislative and executive practice, or by social practice. Further, because the 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, and will not require the right be recognized by American, English, and Continental European countries. As reflected in their Stanford dissent, instrumentalist judges will be willing to use the fact that the right seems fundamental in any one of these systems to argue that it should be viewed as fundamental under the “American” scheme of justice.

In applying this approach, some instrumentalist Justices have asked what the "experience with the requirements of a free society" suggests about what fundamental rights should be held to exist. Further, instrumentalist judges have noted that the Court must remain sensitive to the fact that terms like "liberty" or "property" are "broad and majestic terms" and that the traditions protected by these terms involve consideration of generalized "interests and practices – freedom from physical restraint, marriage, childbearing, childrearing, and others." Thus, they reject Justice Scalia’s specific tradition approach to determining constitutional rights. As Professor Ely 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.”

§ 27.1.2 Non-Fundamental Rights Doctrine

§ 27.1.2.1 Economic and Social Legislation under the Due Process Clause

Where dealing today with liberty or property rights that are not deemed fundamental, the Court tends to apply minimum rational review. The touchstone case for this doctrine is United States v.


28 492 U.S. at 389-90 (Brennan, J., joined by Marshall, Blackmun & Stevens, JJ., dissenting)


In that 1938 case, the Court upheld a federal ban on the interstate shipment of skimmed milk compounded with any fat or oil other than milk fat. Justice Stone wrote 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, said Justice Stone, and the Court will ask whether any state of facts either known or which could reasonably be assumed affords support for the statute. 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. As discussed at § 26.1.2.2, this footnote later helped to justify heightened scrutiny for fundamental rights, discussed at §§ 26.5 & 27.2-27.3, and for suspect or quasi-suspect classes under the Equal Protection Clause, discussed at §§ 26.2-26.3.

Application of theories embodied in Carolene Products has resulted in the Supreme Court rarely declaring basic economic or social legislation invalid since 1938 as a result of substantive due process review. For example, in the 1940s, the Court upheld laws fixing maximum hours and minimum wages, protections for union members, and entry conditions on business. In the 1950s, in Williamson v. Lee Optical Co. of Oklahoma, 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. He noted:

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

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32 304 U.S. 144 (1938).
33 Id. at 152 n.4.
34 United States v. Darby, 312 U.S. 100 (1941).
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.38

In 1963, in Ferguson v. Skrupa,39 the Court wrote that a state legislature could outlaw the business of debt adjusting, except as incident to the practice of law, because the legislature was free to decide for itself whether that business had social utility. However, in 1973, in United States Department of Agriculture v. Murry,40 the Court did hold that a rule denying a household food stamp benefits merely because a child over 18 in that household had been claimed as a dependent on someone else’s tax for the preceding year was not rationally related to preventing fraud in the food stamp program.

As with rational review under the Equal Protection Clause, discussed at § 26.1.1.1, this Due Process Clause review involves three considerations: governmental ends, rational relationship between the benefits obtained by the means and these ends, and no irrational burdens imposed by the means. With regard to the first consideration, under Due Process Clause review, as under Equal Protection Clause review, the legislation must advance “legitimate” governmental interests. For example, just as the Court refused in 1985 in City of Cleburne v. Cleburne Living Center to permit irrational prejudice against mentally retarded persons to be used as a legitimate interest to deny a use permit for the operation of a group home for the mentally retarded under the Equal Protection Clause, discussed at § 26.5.5 n.463, the Court refused under the Due Process Clause to consider prejudice against persons based on sexual orientation as a legitimate government interest in 2003 in Lawrence v. Texas, discussed at § 27.3.4.2 n.259.41 Similarly, a district court held in Santos v. City of Houston42 that any legitimate interest in banning competition by small buses had long since passed.

The focus of the two means inquiries is slightly different under Due Process Clause review than under Equal Protection Clause review. For the second step of the analysis, instead of asking whether there is an irrational underinclusiveness in the statutory classification in terms of who is not regulated—the Equal Protection Clause question, discussed at § 26.1.1.1 nn.25-27—the Due Process question is whether the statute rationally serves to achieve some benefit on those whom the statute does regulate. For the third step in the analysis, instead of asking whether there is an irrational

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38 Id. at 487-88.

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overinclusiveness in the statutory classification in terms of regulating individuals not really part of the problem, discussed at § 26.1.1.1 nn.28-31, the Due Process Clause question is whether there is an irrational burden on those whom the statute is properly regulating.

This difference in the focus of the second and third steps of the analysis results from the different focus of the Equal Protection and Due Process Clauses. With regard to the second step, depending on the standard of review, the statute must have a rational relationship to its ends, a substantial relationship, or a direct relationship, as discussed at § 26.1.1.2 nn.52-53, 56. Logically, this relationship inquiry "has two parts: (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)."43 Similarly, with regard to the third step in the analysis, depending on the standard of review the statute’s burden must be not irrational, not substantially more burdensome than necessary, or be the least restrictive burden that would be effective in advancing the governmental interests, as discussed at § 26.1.1.2 nn.54-55. This burden inquiry also logically "has two parts: (1) the extent to which the statute imposes burdens on individuals who are not [part of the problem] (the overinclusiveness inquiry); and (2) the amount of the burden on individuals who are properly regulated by the statute (the oppressiveness or restrictiveness inquiry)."44

Although the Court has not always been careful to separate the two kind of analyses, when carefully applied, the Court should consider only the underinclusiveness and overinclusiveness inquiries under Equal Protection Clause analysis, and reserve the service and restrictiveness inquiries for Due Process Clause analysis. This is because “a statute which 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 on the individual is sufficiently great compared to the minimal benefit that is achieved.”45 As discussed at § 29.4.4.3 nn.149-53, since First Amendment review regarding the freedom of speech is concerned with all four of these relationship and burden concerns, all four are part of First Amendment free speech review.

In analyzing the Due Process Clause questions for standard social or economic regulations, the level of judicial review since 1986 has continued the minimum rational basis review of the Holmesian and instrumentalist eras. For example, in Pennell v. City of San Jose,46 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


44 Id. at 1281.

45 Id.

legislature is free to adopt.” In Nordlinger v. Hahn, 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, 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, a federal district court held that requiring individuals to have a funeral director license to sell caskets and urns was not rationally 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 currently used by the United States Supreme Court. Typically, such cases adopt the higher standard of review used by the Court for due process review during the formalist Lochner era, discussed at § 27.3.2.1 nn.149-60. 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.

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47 505 U.S. 1, 10-14 (1992).


49 110 F. Supp. 2d 658, 662-64 (E.D. Tenn. 2000), aff’d, 312 F.3d 220 (6th Cir. 2002). But see Powers v. Harris, 379 F.3d 1208 (10th Cir. 2004) (limiting sale of caskets for in-state customers to licensed funeral directors of funeral establishments, not Internet sellers, valid under due process).

50 80 F. Supp. 2d 1101, 1105-08 (S.D. Cal. 1999).


§ 27.1.2.2  The Birth, Life, and Death of the Irrebuttable Presumption Doctrine

Despite the low level of due process review for standard economic regulations, the Court did flirt during the instrumentalist era with a doctrine that would have created some increased scrutiny in the due process area. This was the “irrebuttable presumption” doctrine. In 1973, the Court held in Vlandis v. Kline that if a law denies a benefit by an irrebuttable presumption not necessarily true, and the crucial determination could be made by reasonable alternative means, due process requires that individuals be allowed to show that they satisfy the benefit criteria. Here, in-state tuition had been denied to unmarried persons for their entire time in college if their legal address for any part of a one-year period prior to admission was outside of Connecticut. The Court held that this denied them due process of law.

The Court extended Vlandis the following year by holding in Cleveland Board of Education v. LaFleur that irrebuttable presumptions could be implied. It did this by invalidating a law requiring pregnant teachers to take maternity leave without pay at least 5 months before expected birth. The Court said this amounted to an irrebuttable presumption that every pregnant teacher who reaches the fifth month is unfit. Since this presumption is not necessarily true, it unduly penalizes a woman for exercising the fundamental right to have a child. A year later the Court applied LaFleur in Turner v. Department of Employment Security to invalidate a law making pregnant women ineligible for unemployment benefits from 12 weeks before expected birth to 6 weeks after childbirth. Such a law irrebuttably presumed, in effect, that all women are incapable of work during that interval.

Cases following Turner backed away from using the “irrebuttable presumption” analysis to invalidate laws. For example, in Weinberger v. Salfi, the Court upheld a Social Security rule that refused survivor benefits to surviving wives and stepchildren who had been related in that way to a decedent for less than nine months prior to his death. Justice Rehnquist distinguished LaFleur on the ground that receiving funds from the public treasury, unlike having a child in LaFleur, is not a constitutional right. He distinguished Vlandis on the ground that the Social Security Act did not purport to speak in terms of the bona fides of parties to a marriage and then make plainly relevant evidence inadmissible. Here, Congress could rationally conclude that its rule would protect against sham marriages used to secure Social Security benefits. Justice Brennan dissented, citing Vlandis.

Similarly, in Usery v. Turner Elkhorn Mining Co., the Court upheld a federal law that provided that a miner afflicted with pneumoconiosis is irrebuttably presumed to be totally disabled due to that disease and, if he dies, it is irrebuttably presumed that the miner was totally disabled at death and that his death was due to pneumoconiosis – thus creating entitlement for certain benefits. The Court

said that Congress could have required mine operators to provide benefits for all miners with this affliction and that in a law regulating purely economic matters, Congress’ use of “irrebuttable presumptions” could not invalidate a law whose operation and effect were otherwise permissible.

In recent years, the Court has not relied upon “irrebuttable presumption” analysis to justify greater than minimum rational review. Instead, the focus has been on whether a fundamental right exists or a suspect or quasi-suspect class is involved. For example, in *Michael H. v. Gerald D.*, \(^{60}\) discussed at § 27.3.3.1 nn.201-04, a natural father sought visitation rights to a child he had fathered with a married women who, with her husband, resisted the father’s visitation. The state court denied visitation based on a California statute that provided that a husband in this situation was irrebuttably presumed to be the father. Justice Scalia, joined by Chief Justice Rehnquist, and Justices Kennedy, and O’Connor, said that irrebuttable presumption cases should be analyzed in terms of substantive rules created by presumptions, i.e., irrebuttably presuming a husband to be the father is a substantive rule that an adulterous natural father shall not be recognized as the father. Under a substantive due process analysis, the Court upheld the constitutionality of the California law, saying that a natural father has no fundamental right to custody of, or visitation with, a child being raised within a marriage. Nor does a child have a fundamental right for two persons to be recognized as its father.

The other “irrebuttable presumption” cases mentioned above would likely be analyzed today, as in *Vlandis*, in terms of discrimination against non-residents under the Article IV, § 2 Privileges and Immunities Clause, discussed at § 20.3.3, or under the Equal Protection Clause as part of the right to travel, discussed at § 26.5.1; or, as in *LaFleur* or *Turner*, as an aspect of gender discrimination, discussed at § 26.3.1; or, as in *Usery v. Turner Elkhorn*, as discrimination against the disabled, discussed at § 26.4.5. In each of these cases, there is at least some plausible argument for scrutiny higher than minimum rational review, and that insight perhaps drove the Court to experiment with an indirect way of giving that effect through the “irrebuttable presumption” doctrine.

For example, personal papers of Justice Blackmun make it clear that application of the irrebuttable presumption analysis in *LaFleur* in 1974 was a consequence of the Court majority not willing to apply heightened scrutiny in gender discrimination cases at that time. Heightened scrutiny was only adopted two years later in 1976 in *Craig v. Boren*.\(^{61}\) Where no plausible arguments existed for heightened scrutiny, as in the government funding case of *Salfi*, irrebuttable presumption analysis was rejected. After reflection, the Court decided to address directly the need, or not, for higher scrutiny in these cases, and has rejected irrebuttable presumption analysis. It is thus a dead letter in constitutional doctrine today.\(^{62}\)

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§ 27.1.2.3 Unconstitutional Conditions Doctrine

An unconstitutional conditions problem arises when the government offers a benefit conditioned on the beneficiary's waiver of a constitutional right. As the Court stated in Perry v. Sindermann,63 “[E]ven though a person has no ‘right’ to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests. . . . This would allow the government to ‘produce a result which [it] could not command directly.’"

This unconstitutional conditions doctrine reflects, in part, a constitutional commitment to protect the dignity of individuals in choices that they make. It rejects the idea that the government's greater power to deny a benefit entirely includes the lesser power to attach any conditions it wishes. On the other hand, most conditional offers by governments are constitutionally permissible. For example, the unconstitutional conditions cases do not generally encompass plea bargaining, which has long been analyzed under the separate doctrine of "criminal waiver." Under that doctrine, criminal defendants may waive various constitutional protections under the Fourth, Fifth, and Sixth Amendments, as referenced at § 24.1 text following n.14.64

In general, the Court has been more vigorous in enforcing the general prohibition of unconstitutional conditions with regard to waiver of noncriminal constitutional rights.65 However, the Court's "failure to provide coherent guidance on the subject is . . . legendary."66 Perhaps the best treatment of the Court’s unconstitutional conditions doctrine appears in an article by Kathleen M. Sullivan entitled, Unconstitutional Conditions.67 Using the major cases she discusses as examples, it can be seen that, as might be expected, the Court’s conclusion on whether something is an unconstitutional condition varies depending upon the level of scrutiny applied in the case.

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For example, where strict scrutiny is applicable, a finding that some condition on funding is an unconstitutional condition is much more likely. For example, in *Sherbert v. Verner*, discussed at § 32.2.2.4 n.241, a Free Exercise strict scrutiny case, the Court held that it was unconstitutional to condition public unemployment compensation on acceptance of work on one's sabbath day. In *Arkansas Writers' Project, Inc. v. Ragland*, discussed at § 29.6.2.5 n.358, a First Amendment free speech case, the Court held that selective exemption of some magazines from state taxation on the basis of subject matter unconstitutionally infringed speech. In *Regan v. Taxation With Representation*, the Court conceded that selective subsidies that explicitly discriminated on the basis of viewpoint, and thus would trigger strict scrutiny, as discussed at § 29.4.3.1, would be invalid. The Court said, “The case would be [problematic] if Congress were to discriminate invidiously in its subsidies in such a way as to ‘aim[.] at the suppression of dangerous ideas.’”

On the other hand, where minimum rational review is applied, a finding that some condition on funding is an unconstitutional condition is not so likely. For example, in *Harris v. McRae*, discussed at § 27.3.3.3 n.230, the Court held that the selective subsidy of the medical expenses of childbirth, but not abortion, did not unconstitutionally infringe reproductive autonomy. In *Regan v. Taxation With Representation*, the Court held that denying tax exemptions for nonprofit organizations that engage in substantial lobbying activities was constitutional. Strict scrutiny was not triggered as the case merely involved the government refusing to pay for lobbying out of public monies, a government funding case involving rational review, as discussed at § 29.3.2. In *South Dakota v. Dole*, discussed at § 18.3.2.2 nn.163-68, the Court held that Congress conditioning a state receiving federal highway money on the state raising its drinking age to 21 was not an unconstitutional condition under a minimum rational review Spending Clause analysis.

Cases involving “third-order” rational review or intermediate scrutiny pose more difficult questions for the Court. In these cases, instrumentalist and natural law Justices more often find an unconstitutional condition, while deference-to-government Holmesian Justices and formalist Justices more often view the case as merely involving the government choosing how to spend its own funds. For example, in *FCC v. League of Women Voters*, as discussed at § 30.3.1 n.209, the Court held

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74 468 U.S. 364, 386-402 (1984) (applying intermediate scrutiny); id. at 402-05 (Rehnquist, J., joined by Burger, C.J., and White, J., dissenting) (applying rational basis scrutiny); id. at 414-19 (Stevens, J., dissenting) (rejecting heightened scrutiny).
under an intermediate scrutiny approach that it was unconstitutional to condition public broadcasting subsidies on abstinence from editorializing. Chief Justice Burger, and Justices White, Rehnquist, and Stevens, dissented in the case. In *Elrod v. Burns*, a case analyzed by a Brennan plurality opinion as triggering strict scrutiny, but analyzed today under the “third-order” rational review standard of *Pickering v. Board of Education of Will County, Illinois*, as discussed at § 30.2.2 nn.199-203, the Court held that the government may not condition tax exemptions or government jobs on political party affiliation. Chief Justice Burger, and Justices Rehnquist and Powell, dissented in the case, and Justice Stevens took no part in the decision. On the other hand, in *Dolan v. City of Tigard*, another case of “third-order” rational review, discussed at § 22.2.5.1 nn.9-10, formalist, Holmesian, and natural law Justices joined to find a violation of the Takings Clause when the government conditioned the granting of a building permit on the individual granting the government an easement to the property. Justices Blackmun, Stevens, Souter, and Ginsburg dissented in the case.

Of course, rejection of an unconstitutional conditions challenge does not relieve the Court of reviewing conditioned benefits for minimum rationality under a due process or equal protection analysis. Typically, such a challenge fails. For example, in *Bowen v. Gilliard*, the Court upheld amendments to the AFDC program that effectively reduced benefits to families with children who receive support payments from noncustodial parents. The majority viewed the government's action as rationally related to a legitimate interest in reserving resources for the most pressing cases, stating, “That some families may decide to modify their living arrangements in order to avoid the effect of the amendment, does not transform the amendment into an act whose design and direct effect is to 'intrud[e] on choices concerning family living arrangements,' nor into an effort ‘to foist orthodoxy on the unwilling.'"

On the other hand, in *United States Department of Agriculture v. Moreno*, the Court concluded that barring otherwise eligible unrelated members of households living together from receiving food

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75 427 U.S. 347, 356-59 (1976) (plurality opinion of Brennan, J., joined by White & Marshall, JJ.); *id.* at 374-75 (Stewart, J., joined by Blackmun, J., concurring in the judgment); *id.* at 374 (Stevens, J., took no part in the decision); *id.* at 376-77 (Powell, J., joined by Burger, C.J., and Rehnquist, J., dissenting).

76 512 U.S. 374, 383-91 (1994); *id.* at 407-11 (Stevens, J., joined by Blackmun & Ginsburg, JJ., dissenting); *id.* at 411-14 (Souter, J., dissenting).

77 *See, e.g.*, *Lyng v. International Union, UAW*, 485 U.S. 360, 370-74 (1988) (constitutional to preclude household from becoming eligible for food stamps if member of household were on strike and to preclude increase in allotment of food stamps household was receiving because income of striking member had decreased); *id.* at 374 (Marshall, J., joined by Brennan & Blackmun, JJ., dissenting).


stamps, while permitting related members of households to receive food stamps, was not rationally related to a legitimate interest in preventing fraud in the food stamp program. The Court has also rejected government spending programs under a rational review analysis where the spending scheme burdened an individual’s right to travel, as in *Zobel v. Williams* and *Hooper v. Bernalillo County Assessor*, discussed at § 26.5.1 nn.498-99.

As these cases suggest, the term “unconstitutional conditions” is predominantly a conclusion the Court reaches based upon its analysis applying strict scrutiny, intermediate scrutiny, or some version of rational review under some other provision in the Constitution. When viewed in this way, there is not really an independent “unconstitutional conditions” doctrine separate from the other constitutional doctrines. In addition, as the Court noted in 2006 in *Rumsfeld v. Forum for Academic and Institutional Rights, Inc. (FAIR)*,80 “It is clear that a funding condition cannot be unconstitutional if it could be constitutionally imposed directly.” In *Fair*, the Court concluded that the government could constitutionally require law schools to grant equal access to military recruiters on their campuses, and this would not violate any First Amendment freedom of speech or freedom of associational rights belonging to law school. Thus, the Solomon Amendment, which conditioned federal funding on the granting of such equal access, was not an unconstitutional condition.

§ 27.1.2.4  **Unconstitutionality of Excessive Punitive Damages 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*81 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, as noted at § 27.2.5.1 n.128. 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 *Pacific Mutual*, Justice Blackmun's opinion for the Court 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. However, 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, concuring from his formalist perspective, said that it was not appropriate for members of 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, reflecting a Stage 4 focus

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on customs and traditions, the Due Process Clause is not violated if a particular procedure is traditional.\textsuperscript{82}

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."\textsuperscript{83}

The next case in this series was BMW of North America, Inc. v. Gore,\textsuperscript{84} decided in 1996. There, in a 5-4 opinion, the Court struck down for the first time a punitive damages award as excessive. The plaintiff had recovered $4,000 as compensatory damages for fraud, since he was sold as “new” a BMW sports sedan that actually had been repainted prior to sale. At that time, BMW had a policy of selling cars as “new” without advising the dealer that any repairs had been made if the repair cost did not exceed 3 percent of the suggested retail price. The jury's verdict added a $4 million dollar punitive damages award, based on evidence that BMW has sold roughly 1,000 such repaired cars as new ($4 million equaling $4,000 damages for each car times 1,000 cars). The Alabama Supreme Court reduced the punitive damages award to $2 million. The United States Supreme 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. Reflecting a “second-order” rational review factor balancing test, discussed at § 7.2.1 nn.21-22, Justice Stevens said three "guideposts" sustained the conclusion that here the award was grossly excessive: the slight degree of reprehensibility of the nondisclosure; the disparity between the harm suffered by the plaintiff and the punitive damages award; and the difference between this remedy and the smaller civil penalties authorized or imposed by law in comparable cases.

Justice Breyer, concurring with Justices O'Connor and Souter, defended the result in BMW based on background principles which underlie the Due Process Clause. Justice Breyer said that the Due Process Clause is a guarantee of nonarbitrary governmental behavior. Examining Alabama law, he found that the standards applied by its courts were so vague and open-ended that they risked arbitrary awards. That fact warranted the Court in making a detailed examination of the award in this case. The lack of proportionality between the size of the award and the underlying punitive damages objectives showed the award to be grossly excessive. Thus, the lack of standards and the excessive award, taken together, overcame what would otherwise amount to a strong presumption of constitutional validity for laws relating to economic matters.\textsuperscript{85}

\textsuperscript{82} Id. at 15-24 (Blackmun, J., opinion); id. at 24-26 (Scalia, J., concurring in the judgment).

\textsuperscript{83} Id. at 40-42 (Kennedy, J., concurring in the judgment); id. at 63 (O’Connor, J., dissenting).

\textsuperscript{84} 517 U.S. 559, 575-85 (1996).

\textsuperscript{85} Id. at 586-88 (Breyer, J., joined by O’Connor & Souter, JJ., concurring).
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 in relation to the conduct for which it was assessed. This provides virtually no guidance to legislatures or to state or federal courts. By the Court's logic, he concluded, every dispute as to evidentiary sufficiency in a state civil suit poses a question of constitutional moment, subject to review by the Supreme Court. That, he said, "is a stupefying proposition."86

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. She pointed out that the Alabama court's judgment was entitled to a presumption of legitimacy and that under the Court's own Rule 10, the United States Supreme Court rarely grants certiorari to review erroneous factual findings or misapplications of a properly stated rule of law. 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."87

Justices Scalia’s and Ginsburg’s concern with predictability was addressed in 2003 in State Farm Mutual Automobile Insurance Co. v. Campbell.88 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 noted in Campbell 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

86  Id. at 607 (Scalia, J., joined by Thomas, J., dissenting).

87  Id. at 613 (Ginsburg, J., joined by Rehnquist, C.J., dissenting).

88  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).
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 conduct to be used to demonstrate deliberateness and culpability of in-state conduct to bolster the reprehensibility factor under the 3-factor BMW approach. The extent to which due process permits a jury to punish the defendant for effects of its conduct on non-parties to the lawsuit will be the subject of a case considered during the 2006 Term, Philip Morris USA, Inc. v. Williams. Similar to the Court’s resolution of the federalism issue in Campbell, the better analysis would seem to be that only effects on the party to the litigation may be directly considered, since that party is the only party before the court to whom punitive damages will be paid, but that effects on other parties can be used as evidence to indicate deliberateness and culpability to bolster the reprehensibility factor regarding the party to the litigation – a distinction calling for careful jury instructions on how such evidence can be used by the jury. Like the limitation on use of out-of-state conduct, this result would help deal with the problem of “multiple punitive damages,” where the same conduct is used to grant punitive damages in multiple cases.

Following Campbell, federal and state courts have decided literally 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. During the 2006 Term, the Court will consider in the aforementioned case, Philip Morris USA, Inc. v. Williams, 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. The result in the case may mirror that of Boeken v. Philip Morris USA, Inc., 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). The trial court judge reduced punitive damages to $100 million (ratio roughly 18:1), and, on appeal, the appellate court reduced the punitive damages award to $50 million, bringing the ratio to single-digits of 9:1. In all of these cases, the appellate courts use a de novo standard of review, as required in Campbell, since “excessiveness” is a mixed question of law and fact.

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91 See Campbell, 538 U.S. at 418 (de novo standard of review used, as is usual for mixed questions of law and fact, as discussed at § 26.14 nn.101-02 ); Williams, 127 P.3d 1165 (Or. 2006), cert. granted, 126 S. Ct. 2329 (2006); Boeken, 26 Cal. Rptr. 3d 638 (2nd Ct. App. Cal. 2006), cert. denied, 126 S. Ct. 1557 (2006). For a sampling of other cases, 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
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*, discussed at § 21.1.2.3 nn.12-14. As noted there, 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.92

The future development of all the issues surrounding punitive damages awards is difficult to predict. Justices Scalia and Thomas will likely continue to dissent from Court scrutiny of punitive damages awards. Justice Ginsburg has indicated great reluctance to overrule punitive damages awards, as did Chief Justice Rehnquist, to an extent. Chief Justice Roberts and Justice Alito may join in these views, or join Justices Stevens, Kennedy, Souter, and Breyer in their willingness to use the Due Process Clause to limit punitive damages awards. Even those Justices embracing the due process analysis may split on the reasonable of various awards or the extent non-party effects can provide a basis for a punitive damages award. These last two issues will be before the Court during the 2006 Term in the *Philip Morris USA, Inc. v. Williams* case, which could provide some guidance on how the current Court will resolve these issues in the near future. A related issue of whether statutory caps on punitive damages might violate plaintiff’s due process rights is discussed at § 27.4.2.4 n.337.

§ 27.2  Enumerated Fundamental Rights Under Substantive Due Process

§ 27.2.1  The Original Natural Law Era

Since the 14th Amendment was not ratified until 1868, cases from the original natural law era looked to constitutional provisions other than the Due Process Clause to provide substantive protection.
against state action. Even as against federal action, the Fifth Amendment Due Process Clause was predominantly restricted to procedural matters during the natural law era.

During the first half of the original natural law era, the Court interpreted the Constitution to grant the federal government great power, as discussed at §§ 18.1-18.2. When it came to protecting individuals from excessive or abusive use of power by federal or state governments, the Court's natural law perspective tended to support a pro-individual bias for both economic and civil rights. For example, in *Fletcher v. Peck*, the Court held in 1810 that a grant of land from a state is a contract not to reassert rights to the land, and is protected by the Contracts Clause. Chief Justice John Marshall, following John Locke and Adam Smith, treated the ownership of property as a natural right. With respect to legislative deprivations of property and contract rights, he said that “it may well be doubted, whether the nature of society and of government does not prescribe some limits to the legislative power.”

Even so, potential property or contract rights against government action were limited when the Court, predominantly as part of protecting "states rights," narrowly interpreted several prohibitions on governmental power. First, the Ex Post Facto Clause was limited to criminal law, so it did not bar all retroactive legislation. Next, the Article IV, § 2 Privileges and Immunities Clause was interpreted by Justice Washington, while traveling circuit, to encompass only fundamental rights, and not a right to be treated equally regarding all rights. Justice Washington said that the Clause protected only those rights thought fundamental to citizens of all free governments, such as the rights to pass through a state, to habeas corpus, to sue, and to own property. Third, the Contracts Clause was limited to contracts previously made. This made possible various state reforms of commercial law, including adoption of bankruptcy laws with prospective application only.

In addition, in 1833, the Court held in *Barron v. Baltimore* 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. Further, people who wanted added protection from their own state would not have used the cumbersome process of amending the United States Constitution. Finally, the Bill of Rights was intended only to secure against federal encroachments discussed during the ratification campaign.

During this period, the Due Process Clause of the Fifth Amendment was predominantly limited to requiring procedures called for by the Constitution or by settled common law usage, as held in *Murray's Lessee v. Hoboken Land and Improvement Co.* A broader interpretation of "due process"

93 10 U.S. (6 Cranch) 87, 133 (1810).


96 59 U.S. (18 How.) 272 (1856).
was reflected in *Dred Scott v. Sandford*, discussed at § 25.1 nn.9-16, where the Court said in 1857 that depriving a citizen of property, a slave, merely because the citizen brought the slave into a free state, 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*, the New York Court of Appeals held that an act to prevent intemperance substantially destroyed the property in intoxicating liquors by persons within the state in its application to liquors owned and possessed at the time the act was passed, depriving those owners of property without due process. Had the act been applicable only to liquors imported or manufactured after it took effect, it would have been constitutional.

§ 27.2.2 The Formalist Era

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*, decided in 1873. As noted at § 25.2 nn.45-51 the Court held that the first sentence of the 14th Amendment overruled the holding in *Dred Scott* that African-Americans could not be citizens by providing, "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."

The Court next held 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, as discussed at § 25.3 nn.59-64. Reflecting formalist reluctance to use legislative history, the Court did not mention the legislative history used by Justice Black, dissenting in *Adamson v. California*, 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.

The Court 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. Four extreme, conservative formalists in dissent – Justice Field, joined by Chief Justice Chase, and Justices Bradley and Swayne – would have found under the Privileges or Immunities Clause a “liberty of contract,” a result eventually reached under the Due Process Clause

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97 60 U.S. (19 How.) 393 (1857).
98 13 N.Y. 378, 393-395 (1856).
99 83 U.S. (16 Wall.) 36 (1873).
100 Id. at 79-80.
102 *Slaughter-House Cases*, 83 U.S. at 80-81; id. at 97-103 (Field, J., joined by Chase, C.J., and Bradley & Swayne, J., dissenting).
in 1905 in *Lochner v. New York*, discussed at § 27.3.2.1 nn.149-60. The majority in the case, including moderate formalists Justices Miller and Davis, reflected more the purpose behind the Due Process Clause which was not to advance such a “liberty of contract” doctrine. After the *Slaughter-House Cases*, the privileges of state citizens 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 § 20.3.3.1 nn.283-93. Today, these cases trigger intermediate review, as discussed at § 20.3.3.2 nn.294-305.

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 § 25.1 nn.20-44. The development with respect to equal protection is discussed at § 26.2.1 (race, ethnic, and national origin discrimination), § 26.2.2 (alienage classifications), § 26.3.1 (gender discrimination), § 26.3.2 (illegitimacy classifications), § 26.4.5 (disability classifications), and § 26.5 (right to travel, access to court, and access to the ballot and right to vote).

With respect to due process, the first significant development occurred in 1876, where the Court held in *Munn v. Illinois* that under some circumstances a regulation of business could be found to violate due process because “in mere private contracts, relating to matters in which the public has no interest, what is reasonable must be ascertained judicially.” Next, in 1877, the Court held that jurisdiction over persons was a due process issue. In 1884, due process was held to guarantee fair proceedings, and it was said that the Fifth and 14th Amendments called for similar kinds of proceedings. In 1897 in *Allgeyer v. Louisiana*, and again in 1905 in *Lochner v. New York*, the Court held that due process prevented unreasonable interference with the right to contract and use property. Many state and federal economic laws subsequently were struck down as not bearing a “fair and substantial” relationship to a legitimate government interest, as discussed at § 27.3.2.1.

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 in 1897 in *Chicago, Burlington & Quincy Railroad v. Chicago*. Previously, as noted at § 22.2 n.57, the Court had applied the Takings Clause against the states under an Equal Protection Clause analysis in one case in 1894. In *Chicago, Burlington*, the Court held that the

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103 94 U.S. 113 (1876).


105 Hurtado v. California, 110 U.S. 516, 534 (1884).

106 Allgeyer v. Louisiana, 165 U.S. 578 (1897) (right of out-of-state insurance company to do business within the state); *Lochner v. New York*, 198 U.S. 45 (1905) (New York could not limit bakers’ weekly hours to 60 because this would interfere with the freedom of contract).

107 166 U.S. 226, 244-46, 253-57 (1897).
Takings Clause of the Fifth Amendment was an aspect of Due Process in the 14th Amendment, 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 United States Supreme Court.108

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.109 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 opened its opinion by saying 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 the 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. Also, the historic documents usually looked to in determining 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 incorporate into the Constitution the privilege against self-incrimination. Given all these facts, the Court held due process did not include the privilege against self-incrimination.110

In 1925, in dicta, the Court said in Gitlow v. New York111 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. California112 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 of the 14th Amendment.

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108 Id. at 242-43.
109 211 U.S. 78, 91-99 (1908).
110 Id. at 99-114.
111 268 U.S. 652, 666 (1925).
112 274 U.S. 357, 646 (1927).
Five years later, in 1932, the Court concluded in Powell v. Alabama\textsuperscript{113} 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.\textsuperscript{114} The Court noted that a right against double jeopardy was not universally available in England or other European countries, 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.

\textbf{§ 27.2.3 The Holmesian Era}

In the realm of reviewing commercial regulations, the Holmesian era opened with cases that enlarged the Commerce Clause power of Congress, as discussed at § 18.2.3. Also, when engaged in review of economic legislation, the Court retreated from the formalist era’s more vigorous "fair and substantial" relationship “reasonableness” review under the Equal Protection Clause, discussed at § 26.4.1 nn.424-31, and the Due Process Clause, discussed at § 27.3.2.1 nn.149-60, to the much lower level of minimum rational review, where substantial deference was given to legislative judgment, placing the burden on the challenger to show the lack of any rational connection to a legitimate governmental interest. This lessening of constitutional rights occurred with respect to the Equal Protection Clause, discussed at § 26.4.1 nn.432-45, and the Due Process Clause, discussed at § 27.3.2.1 nn.161-66. With respect to legislation affecting non-economic interests, the law remained relatively static in the Holmesian era in terms of case results. However, the Court did note in footnote 4 in Carolene Products, discussed at § 26.1.2.2, that some cases might trigger heightened scrutiny. The Court also talked about "strict scrutiny" of a sterilization law in Skinner v. Oklahoma, and “most rigid scrutiny” of racial classifications in Korematsu v. United States.\textsuperscript{115}

With respect to whether the protections against the United States given citizens by the Bill of Rights are applicable to the states through the Due Process Clause of the 14th Amendment, a famous debate developed in the Holmesian era. In Adamson v. California,\textsuperscript{116} 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.

Using a formalist style of reasoning, but differing from the conservative formalist Justices of the formalist era that only viewed those Bill of Rights as incorporated into the 14th Amendment to which "a fair and enlightened system of justice is impossible" so that "neither liberty nor justice would exist if they were sacrificed," liberal formalist Justice Black dissented in Adamson, joined by liberal

\textsuperscript{113} 287 U.S. 45 (1932).

\textsuperscript{114} 302 U.S. 319, 325 (1937).

\textsuperscript{115} Carolene Products, 304 U.S. 144, 152 n.4 (1938); Skinner, 316 U.S. 535, 541 (1942); Korematsu, 323 U.S. 214, 216 (1944).

\textsuperscript{116} 332 U.S. 46, 49-53 (1947).
instrumentalist Justice Douglas. Justice Black concluded that as a historical matter the framers of the 14th Amendment intended to make the entire Bill of Rights apply to the states. The legislative history 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 Black accused the majority of using a theory by which the Court could periodically expand and contract constitutional standards to conform to what the Court, at any time, feels is fundamental liberty and justice, rather than what the framers and ratifiers intended.117

Justices Murphy and Rutledge, liberal instrumentalist in their decisionmaking style, also dissented, agreeing with Justice Black that all of the specific guarantees of the Bill of Rights were embodied in the 14th Amendment. However, they insisted that the 14th Amendment was not limited by the Bill of Rights. The Court could find that other requirements were also essential for “fundamental fairness” – and that was the central concept of due process. This analysis was based upon resort to the “conscience of the people” to determine fundamental fairness, in addition to the textual and historical arguments of Justice Black.118

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 first eight Amendment protections should be viewed as “selectively incorporated” into the 14th Amendment.119

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 reasoning, rather than Justice Frankfurter’s deference-to-government Holmesian reasoning, 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 at § 27.2.4. In addition, certain additional due process rights have been declared a fundamental part of the American scheme of ordered liberty, as discussed at §§ 27.2.5.2 & 27.3. Thus, the views of Justices Murphy and Rutledge ultimately prevailed on that issue.

§ 27.2.4 The Instrumentalist Era

With respect to incorporation of Bill of Rights protections into the 14th Amendment, an important

117 *Id.* at 69-72 (Black, J., joined by Douglas, J., dissenting).

118 *Id.* at 68 (Murphy, J., joined by Rutledge, J., dissenting).

119 *Id.* at 67-68 (Frankfurter, J., concurring). Under this approach, the Holmesian-era Court incorporated the Sixth Amendment right to a public trial in *In re Oliver*, 333 U.S. 257 (1948).
summing-up occurred during the instrumentalist era in 1968 in *Duncan v. Louisiana*.

The majority opinion followed the general course of reasoning suggested by Justice 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 criminal processes maintained in the United States, processes heavily influenced, of course, and mandated for the federal government, by the Bill of Rights. Given this bias toward incorporation, the Court held in *Duncan* that the right to have a jury trial for serious crimes was a phase of the Sixth Amendment jury trial provision that 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 straitjacket. As a conservative Holmesian, Justice Harlan favored an evolving concept of fundamental fairness that took account more of the conservative preference for states’ rights and tolerance for experimentation.

Justice Black, concurring with Justice Douglas, replied to Justice Harlan, and said he did not believe that under the guise of federalism the states should be able to experiment with the protections afforded citizens through the Bill of Rights. He repeated his arguments for total incorporation, saying that an eminently reasonable way of expressing the idea that henceforth the Bill of Rights should apply to the states was to provide, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

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 by 1968, often over the dissents of Holmesian Justices remaining on the Court. These included the Fourth Amendment ban on unreasonable searches and seizures; the Fifth Amendment privilege against self-incrimination, incorporated in 1964, overruling *Twining* and *Adamson*; and the Sixth Amendment, with respect to a speedy trial, the confrontation of witnesses, and the right to counsel.

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120 391 U.S. 145, 149-56 (1968).

121 *Id.* at 161-62.

122 *Id.* at 173-78 (Harlan, J., joined by Stewart, J., dissenting).

123 *Id.* at 165-70 (Black, J., joined by Douglas, J., concurring).

124 *Duncan*, 391 U.S. at 147-49 (discussing the Fourth Amendment, Mapp v. Ohio, 367 U.S. 643 (1961) (Holmesian Justices Harlan, Frankfurter & Whittaker dissenting); the Fifth Amendment privilege against self-incrimination, Malloy v. Hogan, 378 U.S. 1 (1964) (Holmesian Justices Harlan, White, Clark & Stewart dissenting); the Sixth Amendment, with respect to speedy trial, Klopfer v. North Carolina, 386 U.S. 213 (1967) (Holmesian Justice Harlan rejecting the conclusion regarding incorporation, and concurring, as did Justice Stewart, only in the result, based on the
Based on the approach laid out in Duncan in 1968, the instrumentalist-era Court overruled Palko the next year in Benton v. Maryland, and thereby incorporated the Fifth Amendment prohibition on "double jeopardy." This was done over the dissents of Holmesian Justices Harlan and Stewart. Two years later, in 1971, the Court unanimously incorporated the Eighth Amendment ban on "excessive bail" in Schilb v. Kuebel. The Eighth Amendment ban on cruel and unusual punishment was unanimously incorporated in 1972 in Furman v. Georgia, although the Court had assumed it was incorporated as early as 1965 in Robinson v. California. 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.

§ 27.2.5  The Modern Natural Law Era

§ 27.2.5.1  Selective Incorporation and the Modern Natural Law Era

The natural law judicial tradition calls for reasoned elaboration of the law in light of text, purpose, context, history, respect for legislative or executive practice, fidelity to precedent, and prudential consideration of background natural law principles embedded in the Constitution. This approach to decisionmaking leads a Court to be less likely than an instrumentalist Court to discover or extend individual rights in civil or criminal cases, but also to a Court not likely to overrule precedents.

Regarding the topic of incorporation, the Court held in 1989 in Browning-Ferris Industries v. Kelco Disposal, Inc, 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, discussed at § 27.1.2.4. Given this concern with excessive punitive damages awards in civil cases, and the fact that the Eighth Amendment ban on excessive bail was unanimously viewed as “fundamental” in Schilb, discussed at § 27.2.4 n.126, it is likely that the Eighth Amendment ban on excessive fines is not applicable to civil cases.

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125 395 U.S. 784, 793-96 (1969); id. at 808-09 (Harlan, J., joined by Stewart, J., dissenting).

126 404 U.S. 357, 365 (1971) (unanimous on the issue of incorporation).


excessive fines in criminal cases would be viewed as “fundamental” and incorporated against the states if a case ever raised that issue for review.

Similarly, based on a reasoned elaboration of the approach laid out in *Duncan*, the Second and Third Amendments would likely be viewed as “fundamental” and incorporated against the states if a case ever raised that issue for review. No matter what their precise scope, discussed at §§ 23.1.1-23.1.2, the Second and Third Amendments are equally civil liberties protections as the provisions in the First, Fourth, Fifth, and Sixth Amendments that have been incorporated under the *Duncan* approach. In practice, whether the Second or Third Amendments are incorporated into the 14th Amendment may not be all that critical. Regarding the Second Amendment, no gun control laws to date have ultimately ever be held to violate the Second Amendment, as discussed at § 23.1.1 nn.17-19, and 44 states have constitutional provisions protecting gun ownership under their state constitutions, as discussed at § 23.1.1 n.4, which apply without regard to an incorporation analysis. 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 should be viewed as incorporated into the 14th Amendment, as discussed at § 23.1.2 n.22.

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, not just by grand jury indictment, although roughly half the states have state constitutional provisions regarding grand jury indictment, as discussed at § 23.2.1.2 n.110. Despite the Seventh Amendment, states can follow a practice of trying some factual issues to a court, rather than a jury, in those rare cases where that might apply. This would not be true for the same issue if the case were heard in federal court under diversity jurisdiction, as discussed at § 23.1.3 nn.24-31.

§ 27.2.5.2 Non-Bill of Rights “Enumerated” Fundamental Rights and the Modern Natural Law Era

In 1992, the Supreme Court noted in *Foucha v. Louisiana*, 129 “Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action.” Of course, whatever the exact scope of the fundamental right to "freedom from bodily restraint," it is not a right applicable to all persons in all contexts. For example, if convicted prisoners could always claim such a right, all prison sentences would be subjected to some form of heightened scrutiny, which the Court has refused to do.130 In *Foucha*, the issue involved the rights of persons involuntarily committed to mental institutions, discussed at § 27.4.4.1. Another issue of “freedom from bodily restraint” involves the rights of teenagers and juvenile curfew statutes, discussed at § 27.3.4.4.
In 1970, the Court held in *In re Winship*\(^{131}\) 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*,\(^{132}\) 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*\(^{133}\) as an “enumerated” liberty right, *i.e.*, based directly on “liberty,” and distinguished from “unenumerated” rights “implicit in the concept of ordered liberty,” discussed at § 27.3.3. The doctrines of *In re Winship* and *Rochin*, along with other aspects of due process for criminal defendants, are discussed at § 23.2.1.2.D.

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*\(^{134}\) 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 find a way 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 did this by acknowledging 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).”

Justice Kennedy justified the "very narrowly" approach adopted in *Medina* in terms of judicial review, the separation of powers, and considerations of federalism. Emphasizing separation of powers and concerns about the limits of judicial review, he said, “The Bill of Rights speaks in explicit terms to many aspects of criminal procedure, and the expansion of those constitutional guarantees under the open-ended rubric of the Due Process Clause invites undue interference with both considered legislative judgments and the careful balance that the Constitution strikes between liberty and order.” Emphasizing federalism, 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 arena.” In determining the contours of due process, Justice Kennedy noted that the Court had considered not only historical customs and traditional practices, but also whether the rule in operation transgressed any recognized principle of fundamental fairness that was part of the conscience of our people. In *Medina*, Justice Kennedy concluded, “We cannot say that the allocation of the burden of proof to a criminal defendant to prove incompetence ‘offends some


\(^{133}\) 481 U.S. 739, 746 (1987).

principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.”

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.

In addition to the analysis in cases like In re Winship and Medina, the Court has also considered cases where the Due Process Clause operates as a limitation on government for “non-fundamental” liberty rights not specifically mentioned by the Bill of Rights. The cases triggering a substantive due process review for “non-fundamental” economic and social rights are discussed at § 27.1.2.1. Those cases dealing with excessive punitive damages awards are discussed at § 27.1.2.4. The cases triggering a procedural due process review of “non-fundamental” liberty interests are discussed at § 27.4.2.3. In certain of these cases, the modern natural law Court has refined an instrumentalist-era precedent to make it more rational and effective in its operation. For example, as discussed at § 27.4.2.3 nn.322-24, the Court overruled Hewitt v. Helms in Sandin v. Conner. Hewitt had asked whether the prison had created a liberty interest by using language of a mandatory character. The Sandin Court said this created disincentives for states to codify prison management procedures and was squandering federal court time in day-to-day management of prisons.

§ 27.3 Unenumerated Fundamental Rights Under Substantive Due Process

Although not related to any clear constitutional text, the Supreme Court stated as early as 1876 in Munn v. Illinois that under some circumstances a regulation of business could be found to violate due process because “in mere private contracts, relating to matters in which the public has no interest, what is reasonable must be ascertained judicially.” Despite this being a formalist-era doctrine, a formalist methodology has difficulty accepting this kind of review of “unenumerated” rights, since it is not based on constitutional text, unless it reflects well-established traditions. Holmesians are concerned that it may not give proper deference to legislative or executive decisions.

In contrast, just as instrumentalist Justices expanded the number of Bill of Rights provisions that were deemed fundamental during the instrumentalist era, as discussed at § 27.2.4, they expanded the list of “unenumerated” rights previously recognized by the Court. This occurred in part by giving weight to considering the detriment that would occur to individuals if a particular right were not recognized. For example, as discussed at § 27.3.3, the original discovery of a right of privacy, applied initially to interference with sexual relations in marriage, led in a direct line of cases to

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135  Id. at 443-46 (citations omitted).

136  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).

137  94 U.S. 113, 134 (1876).
privacy rights regarding access to contraceptives for single individuals, access to abortion, and living with relatives. As discussed at §§ 26.5.1-26.5.3, a related development during the instrumentalist era was application of strict scrutiny to non-privacy related fundamental rights found implicit in the Constitution, such as a right to travel, access to courts, and access to voting and the ballot.

In contrast to this more free-wheeling approach, natural law adherents are open to the possibility of different levels of scrutiny once they have appeared in some precedents, since natural law Justices respect the rationale of decided cases, as well as the basic values that they perceive the framers and ratifiers regarded as forming the core of individual autonomy in our society. However, natural law Justices need to find some basis, such as a long-standing tradition, or reasoned elaboration from existing precedents, or background natural law principles implicit in equal protection or due process, from which to conclude that an alleged fundamental right is implicit in the Constitution.

As a result of these different style-related perspectives, a majority of the current Supreme Court Justices are not actively engaged in extending instrumentalist precedents that discovered various unenumerated fundamental rights. For example, in Washington v. Glucksberg, discussed at § 27.3.4.3 nn.275-80, the Court held that states can ban terminally ill people from killing themselves with the help of a doctor because there is no fundamental right to assistance in committing suicide. On the other hand, the respect natural law Justices have for precedent inhibits them from overruling instrumentalist precedents with which they might not have agreed as an initial matter, as in the joint opinion of Justices O’Connor, Kennedy, and Souter in Planned Parenthood v. Casey, which refused to overrule Roe v. Wade, discussed at 27.3.4.1 nn.243-44. In addition, a number of privacy-related questions remain open, such as what are the limits on a woman's right to choose to have a partial-birth abortion, discussed at § 27.3.4.1 nn.250-52; can certain sexual acts traditionally regulated by the criminal law, like fornication or adultery, continue to be made illegal, discussed at § 27.3.4.2 nn.259-64, given the Court’s decision in Lawrence v. Texas, which held it was unconstitutional to make sodomy illegal; and do persons have a right to medical treatment that will relieve pain even though it may accelerate death, discussed at § 27.3.4.3 nn.281-82.

§ 27.3.1 The Original Natural Law Era

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, discussed at § 18.1.2. There Chief Justice Marshall said, “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 principle, combined with the further principle announced by Justice Marshall that the Court will not inquire into the degree of the necessity for particular legislation, resulted in a very low level of judicial review. Further, as noted at § 27.2.1 nn.96-98, the Due Process Clause at this time 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. Thus, there really was not a textual source in the Constitution during the original

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natural law era that the Court could have used as a basis for finding some implied individual personal rights—other than, perhaps, the Ninth Amendment, discussed in Chapter 24. However, as discussed in Chapter 24, the Ninth Amendment has remained a largely unused provision of the Constitution.

§ 27.3.2 The Formalist Era: Substantive Due Process was Developed, But No Distinction Was Made in Judicial Review Between Economic and Personal Rights

As noted at § 27.1 n.4, and discussed at § 27.3.2.1 nn.142-43, beginning in 1876 in *Munn v. Illinois*, the Court gradually discovered a substantive aspect to the Due Process Clause. This led to reasonableness review of economic legislation, as in *Lochner v New York*, discussed at § 27.3.2.1 nn.149-60. Several cases during this era also involved reasonableness review of governmental action that interfered with non-economic personal interests. For example, in 1923 in *Meyer v. Nebraska*, the Court struck down a state ban on teaching German. The Court said the ban denied due process because it was not reasonably related to any legitimate end.

In *Meyer* there was no suggestion that a higher level of review would be given to interference with whatever right was involved merely because that right was non-economic in nature. Indeed, the Court dealt in the same sentence with each of the economic and non-economic rights protected during the formalist era, discussed at § 27.3.2.1-27.3.2.4, saying the liberty protected by due process:

> 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."
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 toward the "affected with a public interest" doctrine, discussed at §§ 9.3.2 nn.71-74 & 27.3.2.1 nn.155-56, Chief Justice Waite then 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.143

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*,144 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*,145 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.146 This gave rise to the substantive standard in 1898 that such rates had to be reasonable in light of the fair value of the property in use.147 A year earlier, in 1897, the Court had struck down its first statute on liberty of contract grounds in *Allgeyer v. Louisiana*,148 which held that liberty of contract includes the right to earn a living by lawful means, and thus a state could not make it illegal for residents to use the mails to contract with a New York insurance company, even where the state’s ban was only applied against insurance companies refusing to have sufficient presence in the state to permit state citizens to sue in Louisiana courts in the event of breach of contract.

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143  *Id.* at 126-33.

144  96 U.S. 97, 101-03 (1878).

145  123 U.S. 623, 661 (1887).


148  165 U.S. 578, 583-93 (1897).
Substantive due process review of economic regulations came to full flower in *Lochner v. New York*, 149 decided in 1905. There the Court squarely held that the right to make a contract in relation to one's business is part of a "liberty of contract" protected by the 14th Amendment, reflecting the views of the 4 extreme formalist dissenters in the *Slaughter-House Cases*, discussed at § 27.2.2 n.102. This “liberty of contract” could be interfered with only by laws which reasonably relate to the health and safety, morals, or general welfare of the public. While this doctrine might have been applied in a sensitive natural law manner, as discussed at § 14.2.2 nn.48-54, the Court applied a more rigid analysis, concluding that a law that barred a bakery employee from working more than 60 hours a week was a mere "meddlesome interference" with the rights of the individual, and, citing *Mugler*, concluded that the law had “no substantial effect” upon the health of employees to justify the Court regarding it as a health law. Justice Harlan dissented, saying the Court should place the burden of proof on the challenger to show *Mugler’s* lack of any “real or substantial relation” between means and ends. Justice Holmes, dissenting, with his usual willingness to defer to legislative decisions, said the entire *Mugler* doctrine was in error. He said the Constitution does not embody a particular economic theory, and the word "liberty" is perverted unless “a rational and fair person necessarily would admit that the statute proposed would infringe fundamental principles as the have been understood by the traditions of our people and our law.”

In terms of the standards of review, although the *Lochner* court did not indicate it was applying any heightened scrutiny, the test of *Mugler*, requiring a “fair and substantial” relationship, not a mere rational relationship, between the statute and the health of the employee, was higher than minimum rational review. As in the Takings Clause case of *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, discussed at § 21.2.5.1 nn.84-94, the requirement of a “substantial relationship to a legitimate government interest” is best understood as reflecting a heightened rational review factor balancing approach. Since in *Lochner* the Court placed the burden on the government, not the challenger, this makes the *Lochner* test a third-order heightened rational review approach, discussed at § 7.2.1 nn.23-25, similar to the third-order rational review test used today for facial discrimination against interstate commerce under the *Maine v. Taylor* test, discussed at § 20.3.2.1 nn.194-208. Similar to *Maine v. Taylor*, only strong governmental interests could justify government regulation burdening the free flow of commercial activity under the *Lochner* doctrine.

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. The court viewed the baker’s industry as no more unhealthy than many other industries. The Court noted:

> 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

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149 198 U.S. 45, 52-60 (1905).

150 *Id.* at 54-56 (Holmes, J., dissenting); *id.* at 68-69 (Harlan, J., joined by White & Day, JJ., dissenting).
more healthy than still others. . . . 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.\footnote{\textit{Id.} at 59.}

In contrast, Justice Harlan’s dissent concluded that the health reasons were sufficient. He noted:

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.” . . . Nearly all bakers are palefaced 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.\footnote{\textit{Id} at 70-71 (Harlan, J., joined by White & Day, JJ., dissenting).}

Part of the difference in the result between majority and dissent in \textit{Lochner} is no doubt the fact that the majority put the burden on the government to defend its statute, similar to \textit{Maine v. Taylor}, 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 \textit{Pike v. Bruce Church} test under dormant commerce clause review. This difference in terms of who has the burden of proof in \textit{Taylor} versus \textit{Pike} is discussed at § 20.3.2.1 nn.194-208. 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.”\footnote{\textit{Id.} at 68.}
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.

Further, as discussed at § 9.3.2 nn.71-74, for extreme formalists, 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.” In such cases, there is no competitive free market to discipline business behavior, and thus government regulation is justified. In contrast, for moderate formalists, 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.”

After *Lochner*, many cases during the formalist era applied the *Lochner* kind of heightened rational review analysis to invalidate federal or state economic regulation. This included invalidating laws regulating or banning employers from using yellow dog contracts (*i.e.*, employee agreements not to join a union); minimum wage laws for women and children, as in *Adkins v. Children’s Hospital*; and laws regulating materials used in production, prices, or entry into business.

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154 *Id.* at 75 (Holmes, J., dissenting).

155 *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.

156 See, *e.g.*, *Adair v. United States*, 208 U.S. 161 (1908) (invalidated state and federal legislation forbidding employers to require employees to agree not to become or remain members of a labor organization during their employment); *Adkins v. Children’s Hospital*, 261 U.S. 525 (1923) (struck down federal law prescribing minimum wages for women and children, the Court saying that laws abridging the freedom of contract can be justified only by the existence of exceptional circumstances); *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).
On the other hand, where the government interests were perceived as being strong enough, as for health concerns with miners and black lung disease,158 or laws requiring vaccinations,159 or health concerns with women working more than 10 hours a day in a factory, as in Muller v. Oregon,160 legislation was upheld. As discussed at § 26.3.1.1 nn.351-53, 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.

As the formalist era came to a close, a shadow was cast over the Lochner form of review in 1934 by Nebbia v. New York.161 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. Instead, the question in all cases is whether the challenged regulation has a reasonable relation to a proper legislative purpose. Building on the Lochner dissents, and echoing Justice Holmes, the Court said that a state is free to adopt whatever economic policy may reasonably be deemed to promote the public welfare. Four extreme formalists, Justices McReynolds, Van Devanter, Sutherland, and Butler, dissented in the case.

Even so, Nebbia did not spell the end of Lochner reasonableness review. In 1936, Justice Roberts, author of the Nebbia opinion, joined with the four Nebbia dissenters. Citing Adkins, which the Court had not been asked to reconsider, the Court held invalid a law providing minimum wages for women employees in Morehead v. New York ex rel. Tipaldo.162

Despite Tipaldo, in 1937, when faced with the question whether to overrule Adkins, Justice Roberts joined the same 5-4 majority in Nebbia to overrule Adkins in West Coast Hotel Co. v. Parrish.163 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." The Court then held that the health of women is a legitimate goal and a legislature could reasonably determine that minimum wages were a means toward that goal. During the 1940s, the Court overruled other cases that had followed Lochner, and upheld laws fixing maximum hours

160 208 U.S. 412, 418-23 (1908).
161 291 U.S. 502, 529-33 (1934); id. at 552-59 (McReynolds, J., joined by Van Devanter, Sutherland & Butler, JJ., dissenting).
162 298 U.S. 587 (1936).
163 300 U.S. 379, 391 (1937).
and minimum wages for men and women, laws protecting union members, and laws on entry conditions on business. Since 1937, there has been no fundamental right to liberty of contract, and standard economic regulations trigger only minimum rational review, as discussed at § 27.1.2.1.

§ 27.3.2.2 Fundamental Right to Acquire Useful Knowledge

As noted at § 27.3.2 nn.140-41, in Meyer v. Nebraska the Court struck down a state ban on teaching German. The Court said the ban denied due process because it was not reasonably related to any legitimate end, and denied the individual a fundamental right “to acquire useful knowledge.” The Court noted in Meyer that the “American people have always regarded education and acquisition of knowledge as matters of supreme importance which should be diligently promoted.”

This right can also be seen as related to the First Amendment freedom of speech. If one has a right of free speech, one should have a right to acquire useful knowledge about which to speak. Indeed, the Court noted in Meyer, “No 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.”

§ 27.3.2.3 Fundamental Right to Marry, Establish a Home, and Raise Children

As noted at § 27.3.2 n.141, 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 customs and traditions, this constellation of rights would only include the right of one man and one woman to marry (not polygamy 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 not phrased 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.”

A formalist-era case where the state law interfered with this bundle of rights was Pierce v. Society of Sisters. There an Oregon statute required parents to send their children, aged 8-16, to a public school. The challenger was a Catholic society whose school would be put out of business by the

164 United States v. Darby, 312 U.S. 100 (1941).
167 262 U.S. 390, 400, 403 (1923).
law. 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. As 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.” Once again, however, the Court did not indicate that it was applying any higher standard than it would have applied to interference with an economic right.

In another formalist-era case, Buck v. Bell, the Court upheld a law permitting sterilization of a person deemed mentally infirm, with the Court noting, per Justice Holmes, “Three generations of imbeciles are enough.” Although the Court did not specifically address the issue, the case is consistent with the view that during the formalist era there 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.

§ 27.3.2.4 Fundamental Right to Worship God and the Orderly Pursuit of Happiness

The Court’s language in Meyer, cited at § 27.3.2 n.141, indicated that part of the liberty of the 14th Amendment was a liberty “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.” The first of these additional rights, the liberty to worship God, is reflected in the First Amendment provision regarding the “free exercise” of religion, discussed at § 32.2. The second of these two provisions, regarding the “orderly pursuit of happiness,” is reflective of the Declaration of Independence’s language regarding inalienable rights to “life, liberty, and the pursuit of happiness.” This right is discussed at § 27.3.4.2 nn.259-70, as part of the developing right of privacy, particularly the right to make decisions regarding sexual practices in which to engage.

§ 27.3.3 Modern Unenumerated Fundamental Rights Doctrine: Distinctions Drawn Between Economic and Personal Rights

The main thrust of due process decisions during the Holmesian era, first outlined by the Court in 1938 in United States v. Carolene Products Co., was to abandon the heightened reasonableness review of Lochner and substitute the minimum rational review presumption of constitutionality for economic regulations. Thus, the Court would ask whether any state of facts either known or which


could reasonably be assumed afforded support for the legislature's choice of means to accomplish a legitimate goal. In his famous footnote 4, discussed at § 26.1.2.2, Justice Stone said that a narrower scope for presuming constitutionality might exist in certain cases. The examples provided, however, did not include fundamental rights not found in constitutional prohibitions. They were instead legislation within a specific constitutional prohibition, or legislation that restricts political processes, or which is directed at particular religions or discrete and insular minorities.

Since 1938, the list of fundamental personal liberty rights has grown to include not only the right to marry, establish a home, and raise children, as in Meyer, but also a right to procreate, a right not to procreate through access to contraception and abortion, and other personal liberty rights identified by the Court. In addition to the consideration of “history and traditions” and “collective conscience” of the people, discussed at § 27.1.1 nn.9-31, these rights have been elaborated in two kinds of ways.

One kind of analysis involves reasoning from enumerated fundamental rights in the Bill of Rights to other kinds of unenumerated rights viewed as related to those rights by being within the “penumbras” or “emanations” of those rights. For example, as noted at § 27.3.2.2 n.167, the Court’s conclusion in Meyer that there exists a right “to acquire useful knowledge” can be understood as a corollary to the First Amendment right to “freedom of speech.” Similarly, as discussed at § 27.3.2.4, the right “to worship God” mentioned in Meyer was likely closely related in the Court’s mind, and perhaps even identical, to the First Amendment provision regarding the “free exercise” of religion. Justice Douglas’ 1965 opinion in Griswold v. Connecticut provides another example. In Griswold, Justice Douglas said that a case involving access to contraception by a married couple for use in their home concerned an unenumerated right of privacy related to several fundamental constitutional guarantees dealing with privacy. He referred to the right of association contained in the “penumbra” of the First Amendment, 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 had held in Meyer that there exists fundamental rights to marry, establish a home, and raise children. A right flowing naturally from these rights would be a right of a married person to procreate a child that the individual has a right to raise. Thus, the Court held in Skinner v. Oklahoma that both “marriage and procreation” are fundamental rights. So stated, these rights deal with the right of an individual to make decisions regarding marriage, procreation, and raising children. The Court has indicated that these cases involve what is called “decisional privacy,” that is, an “interest in independence in making certain kinds of important decisions.” Following the principle of “reasoned elaboration of the law,” this means the individual should have a right to make a decision either to procreate or not procreate, or marry or not marry.

172 316 U.S. 535, 541-42 (1942).
The Court has elaborated the unenumerated fundamental rights analysis in this way. Thus, a second justification for the decision in *Griswold*, noted above, is that if a married couple has a right to procreate, they also have a right not to procreate, and thus a right of access to contraception. Similarly, based on “analogical” reasoning, an individual has a right not to marry, in addition to a right to marry. Thus, in *Eisenstadt v. Baird*, the Court held that an individual does not have to be married to have equal rights to procreate or not to procreate. The Court said, “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.” Through such “penumbral” and “analogical” reasoning, fundamental rights can be identified that were not part of societies’ original customs and traditions. Given the role of customs and traditions in their analysis of fundamental rights, as noted at §§ 9.2.2.1 n.40 & 27.1.1 n.10, formalist Justices reject such “reasoned elaboration” of the law, as noted at § 9.2.2.2 n.56.

One additional aspect of this modern unenumerated fundamental right doctrine deserves mention. Usually any burden on an enumerated fundamental right will trigger the same kind of scrutiny, typically strict scrutiny. However, in recent times, as noted at § 21.2.3, the Court has begun to draw a distinction between undue or substantial burdens on unenumerated fundamental rights, which trigger strict scrutiny, versus less than undue or substantial burdens, which trigger only some form of rational review. This has been done both for unenumerated fundamental rights under Due Process Clause analysis, and unenumerated fundamental rights under the Equal Protection Clause.

For example, the Court has applied strict scrutiny in cases involving substantial burdens on the fundamental right to marry, as in *Zablocki v. Redhail*, but rational review for less substantial burdens, as in *Turner v. Safley*, discussed § 27.3.3.1. The Court also clearly adopted this distinction between undue burdens and less than undue burdens regarding the right of abortion in *Planned Parenthood v. Casey*, discussed at § 27.3.4.1. The Court has applied strict scrutiny for significant burdens on the right to travel in *Shapiro v. Thompson* and *Memorial Hospital v. Maricopa County*, but in cases involving less than substantial burdens on the right to travel, the Court has applied some version of rational review, but seemingly without the usual deference to the legislative branch typical of minimum rational review, as in *Sosna v. Iowa*, discussed at § 26.5.1. The Court has also applied strict scrutiny for substantial burdens on access to courts, as in *Boddie v. Connecticut*, but only rational review for less than substantial burdens, as in *United States v. Kras*, discussed at § 26.5.2. Similarly, in the access to ballot cases, the Court has applied strict scrutiny regarding the poll tax in *Harper v. Virginia State Board of Elections*, but only rational review for less burdensome restrictions on access to the ballot in cases like *Timmons v. Twin Cities*

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Area New Party,\textsuperscript{179} discussed at § 26.5.3. As noted at § 21.2.3, the rational review in these cases typically reflects not minimum rational review, but second-order rational review. As part of “reasoned elaboration of the law,” this distinction between undue or substantial burdens triggering heightened scrutiny versus lesser burdens triggering second-order rational review will likely be extended to each aspect of unenumerated fundamental rights analysis.

\textbf{§ 27.3.3.1 Right to Marry, Establish a Home, and Raise Children During the Modern Era}

\textbf{A. Right to Marry}

In 1978, in \textit{Zablocki v. Redhail},\textsuperscript{180} the Court reaffirmed that the right to marry is part of the fundamental right of privacy implicit in the 14\textsuperscript{th} Amendment's Due Process Clause. The case involved a Wisconsin statute that prevented a person with a pre-existing child support order from getting married unless the person could submit proof of compliance with the order and could demonstrate that the children covered by the order “are not then and not likely thereafter to become public charges.” Because this statute was held to “substantially interfere” with the right to marry, the Court applied “rigorous scrutiny” – in today’s terminology, strict scrutiny.\textsuperscript{181}

However, the Court did note that strict scrutiny was not required for less than substantial burdens on the right to marry. The Court stated, “[W]e 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.”\textsuperscript{182}

Later cases have followed this distinction. For example, in \textit{Turner v. Safley},\textsuperscript{183} 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 declared unconstitutional as “unreasonably” broad.

The Court has never been clear whether this “reasonableness” test is a more vigorous kind of

\textsuperscript{179} Harper, 383 U.S. 663 (1966); Timmons, 520 U.S. 351 (1997).

\textsuperscript{180} 434 U.S. 374 (1978).

\textsuperscript{181} \textit{Id.} at 388. Specifically, the Court stated, “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.” While the language in this phrasing of “important” state interests may suggest intermediate scrutiny, later cases have made it clear that substantial infringements on the right to marry trigger strict scrutiny. \textit{See, e.g.}, Turner v. Safley, 482 U.S. 78, 94-95 (1987).

\textsuperscript{182} 434 U.S. at 388.

\textsuperscript{183} 482 U.S. 78, 96-99 (1987).
rational review or the minimum rational review test of modern economic regulation cases. Results of the cases, as in Turner v. Safley, suggest it is the more vigorous kind of second-order rational review, as noted at § 21.2.3. Since substantial deference is not given to the government, the government will lose these cases if substantial burdens are imposed that only advance minor interests, but the challenger bears the burden of establishing the “unreasonableness” of the government action in this second-order cost-benefit analysis.

As noted at § 27.3.3 n.174, in Eisenstadt v. Baird, the Court observed, “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.” This decision suggests the Court views the right to marry as including a right not to marry, and still be treated equally, at least for purposes of the right of privacy.

B. Right to Establish a Home

The right to establish a home was initially stated in Meyer as part of a constellation of three rights: the right “to marry, establish a home and bring up children.” However, just as the right to marry has been extended past its core to encompass the right not to marry and be treated equally before the law, at least with respect to the right to privacy, the right to marry and establish a home has been extended in the modern era past its core right of a married couple to establish a home. For example, in 1977, in Moore v. City of East Cleveland, the right to establish a home was expanded to include the right of related individuals to choose their living arrangements – specifically, the right of a grandmother to live with her two grandsons who were first cousins rather than brothers.

Writing for the Court, Justice Powell said that the Constitution protects the sanctity of the family because the institution of the family is “deeply rooted in the Nation's history and traditions.” This tradition is not confined to members of the nuclear family. Justice Powell noted, “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.” The Court thus used “history and traditions” as the justification for broadening the extent of the unenumerated right. As a second justification for broadening the right to establish a home, Justice Marshall, concurring, cited Pierce in support of a principle that the state can no more standardize families than it can standardize children by forcing them to accept instruction from public teachers only. This is an example of “analogical” reasoning used to broaden the extent of a fundamental right.

Holmesians Justices Stewart and Rehnquist, in one dissent, and Justice White, in another dissent, said that there are a wide array of liberty interests, but the usual test should be whether the law is a rational means of achieving a legitimate purpose. Only interests that are implicit in the concept of ordered liberty, defined in Palko terms of “neither liberty nor justice would exist if (it) were

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186 Id. at 537-40 (Stewart, J., joined by Rehnquist, J., dissenting); id. at 548-50 (White, J., dissenting).
sacrificed,” should be given a heightened level of scrutiny. In their view, Justice Powell’s test of what is deeply rooted in the country’s traditions gives far too extensive a charter to the Court and is a far less confining guiding principle. By 1986, however, in *Bowers v. Hardwick*, Justice White, joined by Justice Rehnquist, wrote an opinion resigned to traditions as one way to determine ordered liberty.

C. **Right to Raise Children**

The core right identified in *Meyer* was the right of a married couple to raise their child. This was the right vindicated in *Pierce v. Society of Sisters*, where an Oregon statute that required parents to send their children, aged 8-16, to a public school was struck down as interfering with the rights of parents to direct the education of children under their control. Even in *Pierce*, however, the Court phrased the doctrine as the rights of “parents or guardians” to direct the education of children under their control, thus extending the right past married couples to guardians. In modern times, the Court has phrased the doctrine as follows: “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.’”

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 an 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 rational basis scrutiny.

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 trigger any fundamental “child-rearing” analysis at all, and thus only minimum rational review applies, or by holding that any burden is only minor, and the program is constitutional under generic rational basis

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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. The plaintiffs remain free to exercise their traditional care, custody and control over their unemancipated children.” More recently, in 2005, a federal district court upheld as constitutional the provision of morning after pills by a municipal health center to an unemancipated minor without parental notice or consent. 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.
Modern cases have also struggled with the rights of unmarried persons to raise their children. These cases typically involve unwed fathers. The critical fact in these cases, as noted below, 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 was usually held to exist. Where no such relationship existed, the courts typically apply rational review.

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, 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.\textsuperscript{196} If the father has lived with the child, equal protection is denied if the mother can block adoption, but the father can not.\textsuperscript{197} 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.\textsuperscript{198} 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.\textsuperscript{199}

Other cases have involved more of a straightforward Due Process Clause review. For example, it was not a denial of due process to grant an adoption without notice to the father, even though his whereabouts were known, if the father had not established any relationship with the child, despite a statutorily required notice to him that he was identified as the father on the child’s birth certificate.\textsuperscript{200}

In the most noteworthy post-instrumentalist case, \textit{Michael H. v. Gerald D.},\textsuperscript{201} 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. Also, the child had no due process right to multiple fathers.

\begin{itemize}
\item \textsuperscript{196} Stanley v. Illinois, 405 U.S. 645, 651-58 (1972).
\item \textsuperscript{197} Caban v. Mohammed, 441 U.S. 380, 389-94 (1979).
\item \textsuperscript{198} Quillioin v. Walcott, 434 U.S. 246, 255-56 (1978).
\item \textsuperscript{199} Parham v. Hughes, 441 U.S. 347, 355-58 (1979).
\item \textsuperscript{200} Lehr v. Robertson, 463 U.S. 248, 261-68 (1983).
\item \textsuperscript{201} 491 U.S. 110, 123-32 (1989).
\end{itemize}
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. Such traditions as protecting parenthood should not be looked at with specificity, as by asking whether protection has traditionally been afforded a natural father's relationship with a child whose mother is married to another man. Justice Scalia replied in footnote 6 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.” 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.202

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. 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.203

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.204 As a matter of statutory law in state Family Codes, a majority of states today would give the father in circumstances like Michael H. statutory rights, as well as responsibilities for support.

§ 27.3.3.2 Right to Procreate and Right Not to Procreate

The first case identifying a fundamental right to procreate was Skinner v. Oklahoma.205 There the Court held that equal protection is denied by a statute which required sterilization of persons twice convicted of grand larceny, but not embezzlement. After noting that irrevocable injury to a basic civil right was involved, Justice Douglas said, "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." In deciding the case, the Court noted, “We are dealing here with legislation that involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race.”

202 Id. at 127 n.6; id. at 132 (O'Connor, J., joined by Kennedy, J., concurring in part); id. at 137-47 (Brennan, J., joined by Marshall & Blackmun, JJ., dissenting);

203 Id. at 135-36 (Stevens, J., concurring in the judgment); id. at 157-58, 163 (White, J., joined by Brennan, J., dissenting).

204 See, e.g., In Interest of J.W.T., 872 S.W.2d 189, 194-97 (Tex. 1994) (visitation case like Michael H.); In re Adoption of B.G.S., 556 So. 2d 545, 549-50 n.2 (La. 1990) (adoption case).

205 316 U.S. 535, 541 (1942).
The issue of a right not to procreate was raised in Poe v. Ullman. In Poe, a majority of the Court avoided a decision on the merits. 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. . . . Neither counsel nor our own researches have discovered any other attempt to enforce the prohibition of distribution or use of contraceptive devices by criminal process. The unreality of these law suits is illumined by another circumstance. 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 mere 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.” For these reasons, the majority of the Court dismissed the case under the ripeness doctrine, noted at § 17.3.2 n.490.

In a famous dissent, Justice Harlan found the case sufficiently ripe and addressed the substance of a due process claim. He stated:

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.

. . . . 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.

Despite this natural law sounding rhetoric, Justice Harlan’s ultimate conclusion reflected his Holmesian predisposition for normal legislative and executive decisionmaking to be central in


\[207\] Id. at 542-43 (Harlan, J., dissenting) (citations omitted).
determining the content of constitutional rights. He noted:

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. Indeed, a diligent search has revealed that no nation, including several which quite evidently share Connecticut's moral policy, has seen fit to effectuate that policy by the means presented here. 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, 316 U.S. 535, [546 (1941) (Jackson, J., concurring)]. In this instance these limits are, in my view, reached and passed.208

The 1965 opinion in Griswold v. Connecticut209 formally extended the fundamental right to procreate to create a fundamental right not to procreate. The Court there reversed a conviction for violating the Connecticut statute, where, in order to overcome ripeness concerns, the Executive Director of the Planned Parenthood League of Connecticut, Estelle Griswold, and Dr. Lee Buxton, a licensed physician who served as Medical Director for the League in New Haven, had been arrested and convicted for giving contraceptive advice to married persons, and fined $100 each, as part of a test case. Justice Douglas said that the case concerned a relationship lying within a zone of privacy created by several fundamental constitutional guarantees. Using “penumbral” reasoning, discussed at § 27.3.3 n.171, he referred to the right of association contained in the penumbra of the First Amendment, the Third Amendment's ban on the quartering of soldiers in homes, the Fourth Amendment right to be secure from unreasonable searches and seizures, the Fifth Amendment self-incrimination clause, and the Ninth Amendment. By banning information about contraceptives, and their use, the law had used means which swept unnecessarily broadly.

Justice Douglas indicated that he was not using Lochner as his guide, as it dealt with laws touching economic problems, business affairs, or social conditions. Here, however, was the intimate relationship of husband and wife, and their physician's role in one aspect of that relationship. In order to show that the association of persons in the marriage relationship is a penumbral right, protected by the Constitution, Justice Douglas argued that several cases had recognized peripheral rights around the specific rights mentioned in the First Amendment which help make the specific rights more secure – such as the right to read and freedom of inquiry. Justice Douglas cited the Meyer case as standing for the proposition that a state may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. Left open in Justice Douglas’ opinion were questions such as what would be the exact test for when law would be viewed as sweeping too broadly, and what state interests could justify interference with marital rights.

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208  Id. at 554-55.

Justice Goldberg, concurring with fellow instrumentalists Warren and Brennan, said that the right of privacy in marriage was deep-rooted in our society. He explained that rights to marital privacy and to make decisions on the size of a family to raise are of similar order and magnitude as the fundamental rights specifically protected by the Constitution. Therefore, they were rights that a state could not abridge. This method of creating constitutional rights by analogy has often been used by the Court, as discussed at § 27.3.3 nn.172-74. Justice Goldberg also supported this result by reference to the Ninth Amendment, as discussed at § 16.3 nn.71-75.210

Justices Black dissented, with Justice Stewart. Justice Black’s formalist-sounding dissent pointed out that there was no constitutional text which forbade laws abridging the "privacy" of individuals. He said that interpreting the Due Process Clause in terms of natural justice, as the Court had done, is no less dangerous when used to enforce the Court's views on personal rights than when enforcing economic rights – a method that had been repudiated since *Lochner* was rejected in 1937.211

Seven years later, in 1972, the Court held in *Eisenstadt v. Baird*212 that *Griswold* could be extended to cover the 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.”213

In 2002, the Ninth Circuit Court of Appeals considered in *Gerber v. Hickman*214 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*, discussed at § 27.3.3.2 n.205, and a fundamental right to marry, as in *Turner v. Safley*, discussed at § 27.3.3.1.A n.183, 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 *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.

210 *Id.* at 486-96 (Goldberg, J., with Warren, C.J., and Brennan, J., concurring).

211 *Id.* at 507-18 (Black, J., joined by Stewart, J., dissenting). This view has been supported by Justice Thomas, who stated in *Lawrence v. Texas*, 539 U.S. 558, 605-06 (2003) (Thomas, J., dissenting), “[J]ust like Justice Stewart [dissenting in *Griswold v. Connecticut*], I ‘can find [neither in the Bill of Rights nor any other part of the Constitution a] general right of privacy.’”

212 405 U.S. 438 (1972).

213 *Id.* at 453.

214 291 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, JJ., dissenting).

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§ 27.3.3.3  Right Not to Procreate Through Access to Abortion

As noted at § 27.3.3.2 nn.212-13, the Court held in 1972 in *Eisenstadt v. Baird* that the right of privacy includes the right of an individual, married or single, to be free from governmental intrusion into the decision “whether to bear or beget a child.” One year later, the Court decided *Roe v. Wade*. 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. Thus, if the state were to burden that right, the state regulation would have to pass strict scrutiny review.

The decision in *Roe* was supported by reference to arguments of history, practice, precedent, and prudential considerations. As an historical matter, Justice Blackmun noted that in many ancient civilizations, such as Greece and Rome, abortions were legal, and that at the common law in England and most American colonies, abortions performed before “quickening” – “the first recognizable movement of the fetus *in utero*, appearing usually from the 16th to the 18th week or pregnancy – was not an indictable offense.” This history supported recognizing a right to have an abortion early in the 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, discussed at §§ 27.1.1 nn.10, 12-14 & 27.3 n.137, has supported formalists Justice Scalia and Thomas rejecting *Roe* and calling for it to be overruled, discussed at § 27.3.4.1 nn.239-41.

Regarding practice, Blackmun observed that subsequent to the 14th Amendment, states regulated abortion more strictly, with many states banning abortion from conception on. He noted: “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. . . . 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.” Justice Blackmun also considered arguments of social practice, noting that while the American Medical Association had historically been anti-abortion, a new AMA resolution in 1970 “emphasized 'the best interests of the patient,' 'sound clinical judgment,' and 'informed patient consent.'” Justice Blackmun also cited the position of the American Public Health Association, which advocated, “Rapid and simple abortion referral must be readily available through state and local public health departments, medical societies, or other non-profit organizations.”

216  *Id.* at 130-39.
217  *Id.* at 139-40.
218  *Id.* at 141-44.
219  *Id.* at 144-45.
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 Justice White’s and Justice Rehnquist’s Holmesian dissents in the case, given the Holmesian great deference to legislative and executive practice. Justice Rehnquist noted in his dissent, “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.’” 220 Justice White noted in his dissent, “The upshot [of Roe] 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. . . . This issue, for the most part, should be left with the people and to the political processes the people have devised to govern their affairs.” 221

Justice Blackmun then turned the attention of his opinion to arguments of precedent and prudential considerations. Regarding precedent, Blackmun noted, “[T]he Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. . . . [These decisions] make it clear that the right has some extension to activities relating to marriage, procreation, contraception, family relationships, and child rearing and education. This right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.” 222 Justice Blackmun also discussed prudential arguments of social policy, consistent with an instrumentalist approach to interpretation. He noted:

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. 223

Given this discussion, it was relatively easy for liberal instrumentalists to support Roe, since arguments of history, social practice, precedents, and prudential arguments of liberal social policy 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 and practice and precedent alone, as discussed at § 27.3.4.1 nn.243-48.

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220 Id. at 174-77 (Rehnquist, J., dissenting).

221 Id. at 222 (White, J., joined by Rehnquist, J., dissenting).

222 Id. at 152-53 (citations omitted).

223 Id. at 153.
Once the individual’s decision to have an abortion was viewed as a fundamental right, the Court then applied a strict scrutiny approach. 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. During the first trimester (first three months of pregnancy), the Court concluded that none of the state's interests were compelling. After the first trimester, roughly after the 12th week of pregnancy, the state had a compelling interest in the health of the mother because at that point the medical risk of having the abortion became greater than the risk in continuing the pregnancy. Under strict scrutiny, this permits regulations “directly related” to protecting the woman’s health, as long as such regulations are the least burdensome effective alternative.224

The Court also concluded that after viability the state has a compelling interest in protecting potential life. The Court stated, “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.” At viability, which at the time was roughly the 28th week of pregnancy, the fetus is truly an independent life, since it is capable of life apart from its mother, either by natural or artificial support. Regulations directly related to protecting the fetal life are then permissible, including banning abortion, except when necessary to preserve the life or substantial health of the mother. The interest in maternal health, which becomes compelling at an earlier part of the pregnancy, remains more compelling than protecting pre-natal life throughout the pregnancy, according to the Court’s analysis. Thus, in a case of a conflict between the two, the interest is protecting maternal health is primary.225 The Court also ruled in Roe that the fetus is not a person under the Due Process Clause with its own due process rights, an issue discussed at § 27.4.2.1.

In his concurrence in the case, Justice Stewart, who had dissented in Griswold, acknowledged that based upon Court precedents, Roe was correctly decided. He said:

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; Griswold v. Connecticut; Pierce v. Society of Sisters; Meyer v. Nebraska. . . . As recently as last Term, in Eisenstadt v. Baird, 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, or the right to teach a foreign language protected in Meyer v. Nebraska.” . . . Clearly, therefore, the

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224 Id. at 163-64.

225 Id. at 160, 164-65.
Court today is correct in holding that the right asserted by [Roe is protected by the 14th Amendment].226

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.227

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.228

Regarding related matters of abortion regulation, the Court held it was 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

226 Id. at 169-70 (Stewart, J., concurring) (citations omitted).


228 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 the abortion procedure saline amniocentesis 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 that abortions after 12 weeks of pregnancy be performed in a licensed hospital); Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 434-36 (1983) (all abortions after the first trimester must be in a full-service hospital unconstitutional); Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 768-69 (1986) (striking down statute requiring physician to employ abortion 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).
physicians to file information in public records from which patients might be identified.\textsuperscript{229}

Laws permitted by rational basis 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.\textsuperscript{230}

With respect to minors, the Court appeared to apply an intermediate scrutiny approach, 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 child rearing.” Thus, abortion laws that would be unconstitutional if applied to adults, like requiring notification or consent of another person, may be constitutional if applied to minors if there is a “significant justification” – in intermediate review terms, an “important or substantial reason” – for the difference in treatment.\textsuperscript{231}

\textsuperscript{229} 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).

\textsuperscript{230} Connecticut v. Menillo, 423 U.S. 9, 11 (1975) (constitutional to require abortions to 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) (constitutional to withhold 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, 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).

\textsuperscript{231} 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”).
Under this analysis, a parental consent law was held valid as long as it assured a prompt judicial hearing where the minor could demonstrate “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 parent is notified or a court approves through a judicial bypass alternative. Requiring notice to both parents is equally valid, as long as a judicial bypass alternative exists.232

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.233 Also too vague was a criminal statute which required physicians to dispose of fetal remains in a "humane and sanitary manner."234

§ 27.3.3.4 Disclosure Privacy versus Decisional Privacy Rights

A collateral development of the privacy doctrine was suggested in 1977 when the Court said in \textit{Whalen v. Roe}235 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 cases in §§ 27.3.3.1-27.3.3.3 have all involved this second kind of interest – independence in making certain kinds of important decisions. \textit{Whalen} involved the first kind of interest – an interest in avoiding disclosure of personal matters. The constitutional question presented in \textit{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 rational review, concluding, “There surely was nothing unreasonable in the assumption that the patient identification

\begin{itemize}
  \item[232] Planned Parenthood Ass'n v. Ashcroft, 462 U.S. 476, 490-93 (1983) (requirement that a minor secure parental consent is constitutional, as long as option provided for consent from a court if minor sufficiently mature to make the abortion decision herself or that, despite her immaturity, an abortion would be in her best interests); Belloti v. Baird, 443 U.S. 622, 639-44 (1977). On parental consent and notification laws, \textit{see generally} 77 A.L.R. 5th 1 (originally published 2000).
  \item[233] 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).
\end{itemize}
requirement might aid in the enforcement of laws designed to minimize the misuse of dangerous drugs.”

A similar case of rational review being applied in a “disclosure privacy” case occurred in C.N. v. Ridgewood Board of Education. 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 rational review 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.

§ 27.3.4 Modern Natural Law Era Decisions Regarding Fundamental Rights Analysis

In 1986 and thereafter, the post-instrumentalist Court has not overruled Griswold or Roe. But it has trimmed back Roe, overruled several of its progeny, and has only rarely recognized any extension of unenumerated fundamental rights. This has been based on the natural law balancing of text, context, history, legislative and executive practice, precedents, and reasoned elaboration of constitutional concepts, as discussed at § 12.3.3 nn.119-28. But some additional exceptions do exist. Most of these cases have involved some aspect of the decisional privacy line of cases.

§ 27.3.4.1 Decisional Privacy Regarding Abortion Rights

In 1989, the Court was faced with an opportunity to overrule or dramatically limit Roe v. Wade in Webster v. Reproductive Health Services. In Webster, a 3-Justice plurality opinion of Chief Justice 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.

236 430 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).

237 492 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).
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 § 27.3.3.3 n.230. 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 as of 2006. 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. Justices Scalia, with Justices Rehnquist, 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 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


\[240\] Id. at 980 (Scalia, J., joined by Rehnquist, C.J., and White & Thomas, JJ., dissenting).

\[241\] Id. at 952 (Rehnquist, C.J., joined by White, Scalia & Thomas, JJ., dissenting).
freedom to decide matters of the highest privacy and most personal nature.\textsuperscript{242}

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 \textit{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 14\textsuperscript{th} 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. Attempting to describe the central core of privacy doctrine, the joint opinion said:

\begin{quote}
Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. . . . 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.\textsuperscript{243}
\end{quote}

As to whether, with respect to abortion, a state can have an interest sufficient to proscribe it entirely, the joint opinion said that a woman's suffering is too intimate and personal for the state to insist, without more, upon its own vision of a woman's role. With respect to reservations about reaffirming the central holding of \textit{Roe}, the authors said they were outweighed by their analysis of individual liberty combined with the force of \textit{stare decisis}. Here, \textit{stare decisis} was not outweighed by any concern about whether \textit{Roe v. Wade} was wrongly decided because the case has not proved unworkable, people have relied on the decision, no evolution of legal principle had weakened its doctrinal footings, its factual underpinnings remain intact, it has been expressly reaffirmed several times, and overruling might be perceived as a surrender to political pressure.\textsuperscript{244} These are the factors typically used by natural law judges in deciding whether to overrule precedent, as discussed at §§ 7.3.2, 7.3.3 & 7.3.4.

Having refused to overrule the central principle that a woman has a right to terminate her pregnancy before viability, the joint opinion substituted an "undue burden" test for determining when the fundamental right had been violated – the question being whether a state regulation has “the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a non-viable fetus.” The opinion then applied that test to the state law in question, striking down a requirement of spousal notification, but upholding, under rational review, requirements of written informed

\begin{footnotes}
\item \textsuperscript{242} \textit{Id.} at 911-13 (Stevens, J., concurring in part and dissenting in part); \textit{id.} at 923-25 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).
\item \textsuperscript{243} \textit{Id.} at 851 (joint opinion of Justices O’Connor, Kennedy, and Souter).
\item \textsuperscript{244} \textit{Id.} at 854-64.
\end{footnotes}
consent, providing certain information to the patient, a 24-hour waiting period, required record keeping, and a parental consent provision for women under 18, with a judicial bypass.245

Some of these provisions, like a 24-hour waiting period or informed consent requirement, had been viewed as unconstitutional under the strict scrutiny approach of Roe, as noted at § 27.3.3 n.229. Now they were upheld under the rational review approach toward less than undue burdens on abortion rights of Casey. Although the Court did not phrase the analysis in precisely this way, the best way to understand the Court’s detailed discussion of each of these provisions for their impact on abortion choice, rather than simple minimum rational review deference, is a standard second-order rational review factor balancing test. In the Court’s view, each of the provisions advanced what Roe acknowledged was a legitimate interest in informed decisionmaking regarding protecting potential life from the moment of conception, and did not impose an “undue burden,” similar to the second-order concern with the existence of a “clearly excessive” burden, as in Pike v. Bruce Church under dormant commerce clause analysis, discussed at § 20.3.2.1.D n.196; or “grossly excessive” burden, as in the punitive damages award case of BMW v. Gore, discussed at § 27.1.2.4 nn.84-85; or “unreasonable” burden, as in Turner v. Safley, discussed at § 27.3.3.1.A n.183.

The instrumentalist opinions of Justices Stevens and Blackmun in Planned Parenthood v. Casey followed Roe v. Wade in its entirety, making every burden on abortion rights subject to strict scrutiny. This constitutionalized under strict scrutiny all regulations on abortion, following Roe’s concern about specific harm if a pro-choice position were not adopted.246 This approach differed from the natural law approach of the joint opinion in Casey, where the Court did not sit as a super-legislature regarding all aspects of abortion regulation. Thus, the specific harm paragraph in Roe was not present in Justices O’Connor, Kennedy, and Souter’s joint opinion in Casey, and not every regulation of abortion was constitutionalized under a strict scrutiny approach.247

More generally, 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

245 Id. at 874-901. See also Hodgson v. Minnesota, 497 U.S. 417 (1990); Women’s Medical Professional Corp. v. Baird, 438 F.3d 595, 604-09 (6th Cir. 2006) (requiring abortion clinic to have emergency transfer agreement with local hospital, which may require clinic to close and thus force patients to travel to an alternative clinic roughly 50 miles away, not an undue burden).

246 505 U.S. 833, 917 (1992) (Stevens, J., concurring in part and dissenting in part); id. at 929-34 (Blackmun, J., concurring in part and dissenting in part). See Casey, id. at 927-28 (Blackmun, J., concurring in part and dissenting in part) (“[C]ompelled continuation of a pregnancy . . . impos[es] substantial physical intrusions and significant risks of physical harm. . . . [M]otherhood has a dramatic impact on a woman’s educational prospects, employment opportunities, and self-determination . . . .”); Roe v. Wade, 410 U.S. 113, 153 (1973) (Blackmun, J., for the Court) (“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.”).

247 Compare 505 U.S. at 934-40 (Blackmun, J., opinion) (strict scrutiny applied to all of the legislative regulations in Casey) with id. at 879-901 (joint opinion in Casey) (rational review applied to less than undue burdens on abortion choice; strict scrutiny applied only to undue burdens).
super-legislature second-guessing every aspect of abortion regulation.Rather, strict scrutiny analysis was restricted in *Casey* to protecting the core principle of personal liberty from undue burdens. It could be argued, given the literal text in *Casey*, which stated that “[i]n our considered judgment, an undue burden is an unconstitutional burden,” that the joint opinion in *Casey* summarily concluded that the spousal notification provision was unconstitutional once it was held to be an undue burden. 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, or to protect pre-natal life after viability, 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*.

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 court ruling supports the proposition that a mental health exception is required as a matter of federal constitutional law.

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 even post-viability, partial-birth abortions, where normally states can ban abortions to advance the compelling interest of protecting the life of a viable fetus, was unconstitutional as not having a sufficient exception for the life or substantial health interests of the mother, as required in *Roe*, discussed at § 27.3.3 n.225, and modified by the “undue burden” analysis in *Casey*. In dissent, Justice Kennedy, joined by Chief Justice Rehnquist, concluded that the law’s medical emergency exception, as a less than undue burden on choice, was sufficient to meet a maternal health exception requirement. Justice Thomas, joined by Chief Justice

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248 *Id.* at 877.


250 530 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 the RU-486 pill to uses approved by the Food and Drug Administration, and not providing for medical emergency use to abort a fetus where surgical abortion would pose significantly greater health risks to the mother, because the law did not provide adequate medical emergency exception).
Rehnquist and Justice Scalia, wrote a dissent calling for Roe and Casey to be overruled.

Following Carhart, Congress passed its own version of a partial-birth abortion ban, with a similar limited medical emergency exception for the life of the mother, as in the Nebraska statute, but Congress took the view that no health emergencies short of life-threatening conditions could ever exist to justify a partial-birth abortion. Lower courts have predictably granted injunctions against the statute being applied, viewing it as inconsistent with Carhart. The Supreme Court has granted certiorari to hear the issues involved in one of these cases, Gonzales v. Carhart. Justice O’Connor’s critical fifth vote in the earlier Carhart decision has now been replaced by Justice Alito, but given the precedent of Carhart, Justice Kennedy’s vote is uncertain in this case.

From a natural law perspective, Justice Kennedy’s vote will likely be based on whether he views Congress’ judgment regarding the lack of a need for a health emergency exception as rational or not. Under the analysis of Casey presented here, if the lack of the emergency exception is viewed as placing a substantial obstacle in the path of the woman seeking an abortion, strict scrutiny should be triggered and the government would bear the burden of proving the accuracy of their judgment. If the ban is viewed as not placing a substantial obstacle in the path of a woman seeking an abortion, then under second-order rational review, the burden would be on the challenger to establish that Congress’ judgment was wrong. This understanding is consistent with Justice Kennedy’s dissent in Carhart, where he viewed Nebraska’s partial-birth abortion ban as not constituting a substantial obstacle, and thus he exercised second-order rational review deference toward the state’s medical judgments, although not the substantial deference of minimum rational review. Justice Kennedy phrased the question as whether “there was substantial and objective medical evidence to demonstrate the State had considerable support for its conclusion that the ban created a substantial risk to no woman's health. . . . [T]he State is entitled to make judgments where high medical authority is in disagreement.” The difference in the kind of deference given under minimum rational review and second-order rational review is referenced at § 7.2.1 text following n.42.

As Justice Kennedy’s language suggests, in an “as applied” challenge, the focus of the “substantial obstacle” test is on whether the regulation places, in the language of Casey, “a substantial obstacle in the path of a woman [the litigant]” seeking an abortion or instead places “substantial risk to no woman’s health.” In a facial challenge, the Court will consider whether the statute places a substantial obstacle in the path of a “large fraction of the cases in which [the law] is relevant.”


Enough precedent is now on the books that even those who disagree with Justice Douglas' reasoning in *Griswold* must concede, as all the Justices did in *Casey*, that the Due Process Clause offers some protection to a right of privacy. The debate between the various decisionmaking styles regards whether the extension of that right—past the well-established rights to marry, establish a home, raise children, procreate, and have access to contraception, to the right of access to abortion pre-viability held in *Roe* and *Casey*—should be maintained. Formalist and Holmesian judges tend to answer that question in the negative. Natural law and liberal instrumentalist judges tend to answer that question in the affirmative. There seems to be little support, even among formalist or Holmesian judges, for overruling *Griswold v. Connecticut*, with the possible exception of Justice Thomas, as noted at § 27.3.3.2 n.211. Given current social practices, of course, it is unlikely many states would try to limit access to contraception today, although, as discussed next at § 27.3.4.2, regulations concerning other aspects of sexual practices can still trigger litigation.

§ 27.3.4.2 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, in terms of access to contraception or abortion, 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. Justice White said, "Nor are we inclined to take a more expansive view of our authority to discover new fundamental rights imbedded in the Due Process Clause. The Court is 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 design of the Constitution."

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 discussed at § 12.4.2. 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


256 *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.
Bowers, the existence of criminal sodomy laws were used in family law, public employment law, and immigration law, among others, to the detriment of gay and lesbian individuals. 257

Justice Blackmun, dissenting with the three other instrumentalists, Justices Brennan, Marshall, and Stevens, said 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." 258

In 2003, the Court overruled Bowers in Lawrence v. Texas. 259 For a majority of instrumentalist Justices Stevens, Ginsburg, and Breyer, and natural law Justices Kennedy and Souter, Justice Kennedy wrote that a reasoned elaboration of the Court’s precedents “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. . . . 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 private spheres. . . . [T]his demeans the lives of homosexual persons.” In reaching this conclusion, Justice Kennedy did not hold that individuals have a fundamental right to engage in such consensual sexual practices, as Justice Blackmun had concluded in his Bowers dissent. Rather, the precise holding in Lawrence was that even under rational basis review, the state had no legitimate interest in regulating their consensual sexual practices, and that any state regulation reflected mere “animus” toward them. In reaching this conclusion, 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,” as well as noting that by 2003 the legislative practice had changed, with only 9 states banned sodomy generally, and 4 states, including Texas, banned only homosexual sodomy.

Adopting a greater focus on the customs and traditions, typical for a formalist or Holmesian, as discussed at § 27.1.1 nn.10, 12-14, 16-20, Justice Scalia stated in his dissent, joined by formalist Justice Thomas and Holmesian Chief Justice Rehnquist, “[A]n ‘emerging awareness’ is by definition not ‘deeply rooted in this Nation’s history and tradition[s].’ . . . Many Americans [still] 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 a boarders in their home. They view this as protecting themselves and their families from a lifestyle that they believe to be immoral.” 260

This disagreement between Justices Kennedy and Scalia in Lawrence v. Texas may have application far beyond the facts of this particular case. On behalf of the Court, and echoing a dissent by Justice


258 478 U.S. at 208 (Blackmun, J., joined by Brennan, Marshall & Stevens, JJ, dissenting).

259 539 U.S. 558, 566-72, 575 (2003) (Kennedy, J., opinion for the Court).

260 Id. at 598, 602 (Scalia, J., joined by Rehnquist, C.J. and Thomas, J., dissenting).
Stevens in Bowers, Justice Kennedy said 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.” Justice Scalia pointed out in his dissent that this reasoning “effectively decrees the end of all morals legislation” and that this includes laws against “bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity.” Justice Kennedy indicated that the case was more limited, saying, “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 relationships that homosexual persons seek to enter.”

Kennedy’s passage is consistent with the limits on human behavior appropriate from a Stage 6 perspective, once Stage 4 formalist or Stage 4 ½ Holmesian reliance on tradition and legislative and executive practice as predominant sources of legitimate action is rejected, as discussed at § 16.2.4 nn.63-68. In addition, as noted at § 16.2.4 nn.69-70, the natural law principle concerning giving other persons equal concern and respect, and not engaging in arbitrary coercion, makes it possible to draw distinctions among Justice Scalia’s “parade of horribles.” As discussed there, bigamy, adult incest, prostitution, bestiality, and obscenity can still likely be criminalized after Lawrence; masturbation certainly, and fornication and adultery probably, cannot. As Justice Kennedy stated in Lawrence, noted at 27.3.4.2 n.259, the Court’s precedents “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.” The lack of prosecutions for fornication or adultery for those statutes still on the books underscores this point, although such conduct can make a difference in some divorce cases regarding custody and financial arrangements, or other civil litigation contexts, such as barring a tort case involving herpes transmission, or refusing to extend to cohabitators protection under laws prohibiting housing discrimination, if adultery or fornication has taken place. Same-
sex marriage will likely eventually become a constitutional right, but only after a period of increasing legislative acceptance in a number of states – that is, the Court balancing arguments of equal concern and respect against legislative and executive traditions – as discussed at § 26.4.6 nn.477-88.

The struggle in the courts over the full extent of Lawrence has begun. In January 2005, a district court judge dismissed in United States v. Extreme Associates Inc. a 10-count indictment in an obscenity prosecution. The judge said that, after Lawrence, the advancement of public morality is no longer a legitimate, let alone compelling, state interest. He reasoned that if there is now a constitutional right of sexual privacy that protects the sexual conduct of consenting adults in their own homes, then there is a constitutional right of privacy that protects those same adults’ ability to receive and to look at pictures. On appeal, the Third Circuit Court of Appeals noted that under Supreme Court’s approach toward precedents, as reflected in Rodriguez de Quijas v. Shearson/American Express Inc., the Supreme Court has admonished lower courts that “[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.” Applying that principle here, the Court of Appeals noted that direct Supreme Court precedents permit the regulation of the distribution of obscene material, and thus the prosecution could go forward, leaving it up to the Supreme Court to determine if Lawrence has changed the constitutional law in this area.

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. The defendant also contended that under Ashcroft v. Free Speech Coalition, discussed at § 30.1.4.1 n.11, his conviction was unconstitutional because the government did not prove that a real minor was used to produce the image, which showed a boy’s body with an inserted head shot of a rock star. The court replied that the phonograph depicted an identifiable minor, and that was sufficient to distinguish the case from Ashcroft, which involved computer-generated images and not real minors.

Although Justice Kennedy’s opinion dodged the broader issue of whether the dissent was right in Bowers to conclude that a fundamental right to sexual privacy exists, 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

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266 400 F.3d 622, 628-32 (8th Cir. 2005).

of statutes that proscribe consensual sexual activity.” Based on this conclusion, 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, of course, 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.” The phrase, “orderly pursuit of happiness,” was linked in Meyer, cited at §§ 27.3.2 n.141 & 27.3.2.4, to traditions “long recognized at common law,” reflecting a formalist emphasis on tradition, but would be viewed more broadly today as part of an “emerging awareness” based on “reasoned elaboration” of the law.

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 rational basis 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 rational 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.” The court noted that the statute prohibited only the sale – but not the use, possession, or gratuitous distribution – of sexual devices. The law did not affect the distribution of a number of other sexual products such as ribbed condoms or virility drugs. Nor did it prohibit Alabama residents from purchasing sexual devices from out-of-state suppliers, either on their own or through the Internet, and bringing them back or having them mailed in-state. Moreover, the statute permitted the sale of vibrators and body massagers that, although useful as sexual aids, are not "designed or marketed . . . primarily" for that purpose. Finally, the statute exempted sales of sexual devices "for a bona fide medical, scientific, educational, legislative, judicial, or law enforcement purpose." Even given these limitations, how the statute is rationally related to restricting the “sale of sex,” rather than “sex toys,” was left unexplained, particularly since persons engaged in prostitution would be able to buy any sex toys they used in their trade in other states or through the Internet and use them in Alabama.

On the other hand, although not argued in the litigation, it is conceivable that the statute is rationally related to neighborhood planning concerns, such as decreasing the number of “adult sex stores” operating in Alabama. That interest would be similar to laws banning nude dancing establishments on grounds that they tend to serve as magnets for prostitution and increased drug trafficking, discussed at 29.4.4.1 n.125. To the extent there exists no fundamental right regarding sexual practices, the statute therefore perhaps survives minimum rational review. Under a second-order rational basis review, the minor burden imposed by this statute would probably still be “excessive” given any limited benefit regarding prostitution or neighborhood planning concerns. Thus, to the extent this case involves a less than substantial burden on a fundamental right of privacy regarding sexual practices, it would be unconstitutional.

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268 378 F.3d 1232, 1233-26 (11th Cir. 2004); id. at 1250-52 (Barkett, J., dissenting).
This difference underscores that it does make some difference whether no fundamental right exists, and thus minimum rational review is triggered, discussed at § 27.1.2.1, or there is a less than substantial burden on a fundamental right, in which case second-order rational review appears to be triggered, discussed at §§ 21.2.3 & 27.3.3 nn.175-79. Courts in Colorado, Kansas, and Louisiana have struck down similar laws on right of privacy grounds, while courts in Georgia, Mississippi, and Texas, like Alabama, have upheld them.269

There is also a collateral issue of the extent to which the “animus” analysis in Lawrence could be extended to the “disclosure” aspect of the right of privacy, discussed at § 27.3.3.4 nn.235-36. These cases would involve issues such as the extent to which an individual may have a right against forced disclosure by the government of sexual orientation, as could occur in the context of background checks for employment or police investigations.270

§ 27.3.4.3 Decisional Privacy Regarding Rights to Refuse Medical Treatment or To Die

Another area where the Justices have struggled with the question of whether to find a fundamental right occurred in Cruzan v. Director, Missouri Department of Health.271 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 personal element of choice against potential abuses and asserting its unqualified interest in preserving human life. The Court held that these state interests were permissibly advanced by applying a clear and convincing standard of proof to determine the patient's wishes. 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


recognize 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 on this point, this perhaps 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 high-profile case of Terry Schiavo, with the courts ruling in that case that the legal surrogate, Ms. Schiavo’s husband, did present clear and convincing evidence that Ms. Schiavo would have wanted the 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 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.

The Court returned to the discussion of these matters in 1997 in *Washington v. Glucksberg*. There Chief Justice Rehnquist wrote for the Court that an asserted right to assistance in committing suicide is not a fundamental liberty interest. Distinguishing the *Cruzan* case, he drew a line between letting a patient die and making that patient die. He said, “Throughout the nation, Americans are engaged in an earnest and profound debate about the morality, legality and practicality of physician-assisted suicide. Our holding permits this debate to continue, as it should in a democratic society.”

In *Compassion in Dying v. State of Washington*, the Ninth Circuit Court of Appeals had held that there was a constitutional right to physician-assisted suicide, reasoning that such a right was “similar” to the fundamental rights discussed in *Planned Parenthood v. Casey*, based on *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, stating that any such “similarity” was not sufficient to recognize such a new constitutional right in this case.

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272 *Id.* at 292-94 (Scalia, J., concurring); *id.* at 287-90 (O’Connor, J., concurring).


274 *Id.* at 301-02 (Brennan, J., joined by Marshall & Blackmun, JJ., dissenting); *id.* at 330-32 (Stevens, J., dissenting).


The Court noted in *Glucksberg* that no text, context, or history of the 14th Amendment supported a right to physician-assisted suicide, and that legislative and executive practice in 49 of the 50 States, with the exception of Oregon, rejected such a right. Even general social practices in other Western industrialized countries, with rare exceptions, refused to grant such a right. As Justice Stevens noted in his concurrence in the case, prudential considerations also do not clearly support such a right because the “value to others of a person’s life is far too precious to allow the individual to claim a constitutional entitlement to complete autonomy in making a decision to end that life.” With respect to *Casey’s* definition of liberty, which could be used as a springboard to expand the list of fundamental privacy rights, Chief Justice Rehnquist said of the *Casey* definition of liberty:

> 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... 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.

Thus, in *Glucksberg*, the other sources of constitutional interpretation – text, context, history, practice, and prudential considerations, as well as the core holdings of precedent which had never supported such a right to physician-assisted suicide – were more weighty than any general reasoning about moral rights based upon the *Casey* precedent’s “heart of liberty” language. Despite this conclusion, the Chief Justice indicated in a footnote in *Glucksberg* that the decision does not foreclose the possibility that dying patients will be granted additional rights. Five Justices in the case noted in concurring opinions that physicians can relieve terminal patients' pain by providing more and more potent drugs, even if the treatment accelerates death, and Justices O'Connor and Breyer suggested that the Court might have to revisit the issue of physician-assisted suicide if a state law exposed dying patients to serious and otherwise unavoidable physical pain. The Court did not directly address the question of whether states have the right to allow physician-assisted suicide. In 1994, Oregon voters approved such an initiative. In view of Chief Justice Rehnquist's comments about debate in a democracy, it would seem the Due Process Clause would not prohibit such a law.

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277 521 U.S. at 710-18.
278 *Id.* at 718 n.16, 734-35.
279 *Id.* at 741 (Stevens, J., concurring in the judgment).
280 *Id.* at 727.
281 *Id.* at 735 n.24; *id.* at 736-38 (O'Connor, J., concurring; Justice Ginsburg concurring in the Court's judgments substantially for the reasons stated in this opinion; Justice Breyer joining this opinion except insofar as it joins the opinions of the Court); *id.* at 744-50 (Stevens, J., concurring in the judgment); *id.* at 752-53 (Souter, J., concurring in the judgment); *id.* at 789 (Ginsburg, J., concurring in the judgment); *id.* at 789-92 (Breyer, J., concurring in the judgment).
Consistent with the view that due process would not prevent such a law, in 2006, in *Gonzales v. Oregon*, the Court held that the physician-assisted suicide provisions for terminally ill patients under the Oregon Death With Dignity Act were not preempted by provisions of the federal Controlled Substances Act (CSA). The CSA requires that the drugs actually used for assisted suicide be available only from a written prescription from a registered physician. A November 9, 2001 Interpretive Rule issued by the Attorney General of the United States had concluded that using these controlled substances to assist suicide is not a legitimate medical practice and that dispensing or prescribing them for this purpose is unlawful under the CSA. The Court rejected that interpretation in *Gonzales*, with Chief Justice Roberts, and Justices Scalia and Thomas, dissenting.

A difficult issue of a clash between state interests in protecting life and personal decisions regarding medical care can arise in circumstances in which a pregnant woman refuses to consent to medical treatment beneficial to her fetus. Although the Supreme Court has never addressed this issue, to the extent a woman has a fundamental right to refuse unwarranted medical treatment, this could only be overcome by compelling government interests, which exists, under *Roe* and *Casey*, only after the fetus is viable. In such cases, the Court would then have to balance the compelling interest in protecting life after viability against the necessary exception, in *Carhart* and *Voinovich*, discussed at § 27.3.4.1 nn.249-53, for the woman’s substantial physical or mental health interests.

§ 27.3.4.4 Decisional Privacy and Curfew Statutes

Another privacy issue concerns whether parents, under their fundamental right to child-rearing, discussed at § 27.3.3.1.C, or minors, as part of a fundamental “freedom from bodily restraint,” noted at § 27.2.5.2, can challenge successfully curfew statutes applied to minors. Typically, rational basis is applied, consistent with viewing such statutes as less than substantial burdens on a fundamental right. Occasionally, a court will apply strict scrutiny, or intermediate review, similar to the post-*Roe* cases involving abortion rights for minors, discussed at § 27.3.3.3 n.231, based on the vulnerability of children and their lesser ability to make informed decisions. Curfew statutes burdening adult’s “freedom from bodily restraint” would presumably trigger strict scrutiny.

§ 27.4 Procedural Due Process: Deprivations of Life, Liberty or Property Interests, and Determining What Process is Due

The Due Process Clauses of the Fifth and 14th Amendments indicate 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

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283 See generally Julie B. Murphy, Competing Interests: When a Pregnant Woman Refuses to Consent to Medical Treatment Beneficial to Her Fetus, 35 Suffolk U.L. Rev. 189 (2001).

“deprivation” has occurred as the result of state or federal action, discussed at § 27.4.1. The second question is who counts as a “person” and what “life,” “liberty,” or “property” rights are protected under “due process,” discussed at § 27.4.2. The third question is what “due process of law” requires before the deprivation can be constitutional, discussed at § 27.4.3. A number of specific examples of procedural due process doctrine are discussed at § 27.4.4.

§ 27.4.1 Determining When a Deprivation Has Occurred

Although there was 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,” defined at § 21.1.1 nn.1-4, that is intentional, or the product of deliberate indifference, but not merely negligent. 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. 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.

In 1981, toward the end of the instrumentalist era, the Court held in Parratt v. Taylor 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 that the word "deprive" in the Due Process Clause connotes more than a mere negligent act. In a case involving a prisoner injured by falling on a prison stairway due to official negligence in leaving a pillow there, the Court 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.

Justice Rehnquist gave several reasons for overruling Parratt. First, he noted that historically the guarantee of due process was applied to deliberate decisions of government officials. No case before Parratt had held otherwise. He explained that the Due Process Clause, like the Magna Carta, was intended to secure individuals from the arbitrary power of government to oppress. Lack of due care, however, suggests only a failure to measure up to the standard of a reasonable person. Second, although the Constitution deals with large concerns of governors and governed, it does not purport

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to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend to living together in society, and that includes lack of due care by prison officials. Justice Rehnquist cited two cases as analogies, i.e., *Estelle v. Gamble*, where it was said that "medical malpractice does not become a constitutional violation merely because the victim is a prisoner," and *Baker v. McCollan*, saying the same about false imprisonment due to state action.

In a companion case to *Daniels*, the Court held in *Davidson v. Cannon* that there was no deprivation when prison officials forgot a prisoner's note that reported a threat from another prisoner, who later assaulted the writer. Justice Brennan, dissenting, said he would find a deprivation if official conduct causing personal injury is due to recklessness or deliberate indifference. Justice Blackmun, dissenting with Justice Marshall, said that governmental negligence is an abuse of power and a deprivation if a state has assumed sole responsibility for physical security and then ignores a call for help. Justice Stevens, concurring, said that "deprivation" identifies victim loss, not actor's mentality, but state tort procedures here were adequate.

Consistent with *Daniels v. Williams* and *Davidson v. Cannon*, 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 complaints that a young child was being beaten by his father, and had reason to believe that this was true, but did not act to remove the child from his father's custody. The Court did note in *Deshaney*, however, 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 may have 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.” In practice, the level of protection provided in custody or in foster care is spotty at best, and suits against foster parents directly for mistreatment under 42 U.S.C. § 1983 usually fail as foster parents are not state actors.

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294 474 U.S. 344, 346-48 (1986); *id.* at 340-43 (Stevens, J., concurring in the judgment); *id.* at 349 (Brennan, J., dissenting); *id.* 349-50 (Blackmun, J., joined by Marshall, J., dissenting).


Even more spotty are rights recognized for state-created dangers outside the custody or foster care context.\textsuperscript{297}

The Court did note in \textit{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 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 of the Fourteenth Amendment.”\textsuperscript{298}

Under current doctrine, proof of intent to harm or deliberate indifference to harm will count as a deprivation of due process. However, as held in \textit{County of Sacramento v. Lewis},\textsuperscript{299} the deliberate indifference standard is employed only when actual deliberation is practical. Questions can thus arise as to whether the government official faced an emergency situation precluding the ability to deliberate, since only the intent-to-harm standard applies “in rapidly evolving, fluid, and dangerous situations which preclude the luxury of calm and reflective deliberation.”\textsuperscript{300} Regarding when such a situation may arise, a lower federal court held that the issue may turn on whether the actors subjectively believed they were responding to an emergency,\textsuperscript{301} although an objective reasonable actor standard would be more consistent with governmental immunity law, noted at § 20.1.4.2.B.

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.”\textsuperscript{302} 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

\textit{Why Do Plaintiffs Sue Private Parties Under Section 1983, 26 Cardozo L. Rev. 9 (2004)}


\textsuperscript{299} County of Sacramento v. Lewis, 523 U.S. 833, 847 n.8 (1998).

\textsuperscript{300} Neal v. St. Louis County Bd. of Police Commissioners, 217 F.3d 955, 958 (8th Cir. 2000).

\textsuperscript{301} Terrell v. Larson, 396 F.3d 975, 980 (8th Cir. 2005).

\textsuperscript{302} Hale v. Tallapoosa County, 50 F.3d 1579, 1582 (11th Cir. 1995).
medical needs.\footnote{303} The protections of the Eighth Amendment do not apply to pre-trial detainees, but the Due Process Clause of the Fourteenth Amendment does provide them with a right to adequate medical treatment that is analogous to a prisoner’s rights under the Eighth Amendment.\footnote{304}

\section*{§ 27.4.2 Determining Life, Liberty, or Property Interests of Persons}

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 § 27.4.2.1. The second issue is how to define “life,” discussed at § 27.4.2.2. The third issue is how to define “liberty,” discussed at § 27.4.2.3. The fourth issue is how to define “property,” discussed at § 27.4.2.4.

\subsection*{§ 27.4.2.1 Defining Persons under Due Process Analysis}

As with the term “person” in the Equal Protection Clause of the 14th Amendment, discussed at § 26.1 n.7, 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.\footnote{305} As noted at § 30.3.4.2 n.273, in one corporate campaign finance 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 such a distinction has some support from history and early legislative and executive practice, and does reflect an aside made, as Justice Rehnquist noted, in an old 1906 case.\footnote{306}

In \textit{Roe v. Wade}, the Court concluded that the term “person” in the 14th Amendment refers only to postnatal individuals, \textit{i.e.}, only after birth. The Court noted:

\begin{quote}
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
\end{quote}

\footnote{303} Toguchi v. Chung, 391 F.3d 1051 (9th Cir. 2004).

\footnote{304} City of Revere v. Mass. Gen. Hospital, 463 U.S. 239, 244 (1983); Gray v. City of Detroit, 399 F.3d 612 (6th Cir. 2005).

\footnote{305} \textit{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.

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 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. This is in accord with the results reached in those few cases where the issue has been squarely presented.307

Separate from this analysis under the 14th Amendment, as of 2006, 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 humans 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 existing under federal law.308

§ 27.4.2.2 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. As noted at § 23.2.1.4, 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.” Even more rigidly, 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 his person cannot be brought under the Due Process Clause, but must be brought under the Fourth Amendment as impermissible seizures.309 For example, in Tennessee v. Garner,310 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 significant threat of death or serious physical injury to the officer or others.

310 471 U.S. 1, 9-12 (1985).
§ 27.4.2.3  Liberty Interests Under Due Process Analysis

Constitutionally protected “liberty” interests include those “fundamental” aspects of the Bill of Rights incorporated into the 14th Amendment Due Process Clause, summarized at §§ 27.2.4-27.2.5.1; the “freedom from bodily restraint” and “shock the conscience” rights, discussed at § 27.2.5.2; and those unenumerated fundamental rights “implicit in the concept of ordered liberty,” discussed at §§ 26.5 & 27.3.3. This includes the rights, as stated in Meyer v. Nebraska, discussed at § 27.3.2 nn.140-41, 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.”

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,311 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.312 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.

In 1976, in Paul v. Davis,313 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. 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 regarding a liberty interest in reputation, and on policy grounds, but it remains the law today.314

311 408 U.S. 564, 572-75 (1972).

312 See Sadallah v. City of Utica, 383 F.3d 34, 38 (2nd Cir. 2004).


Protected liberty interests also arise from certain expectations of freedom, e.g., freedom from unjustified intrusions on personal security. For example, as noted at § 27.4.1 nn.295-97, where a person had been deprived of liberty by being placed in jail, a mental institution, or foster care, 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 its 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. The court noted that to “shackle” an accused before a jury requires satisfying the strict scrutiny standard of a “compelling interest” in security and “no less restrictive alternatives” are available.

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. Where this was so, prisoners are entitled to notice and a hearing on whether the guidelines have been met.

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316 463 F.3d 999, 1005-07 (9th Cir. 2006), citing Bell v. Wolfish, 441 U.S. 520, 539 (1979) (reasonable relation standard); Jones v. Meyer, 899 F.2d 883, 884-85 (9th Cir. 1990) (strict scrutiny).
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 Rehnquist explained that *Hewitt* 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.

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 change in conditions. In addition, the state had created a liberty interest because its disciplinary rules severely cabined the authority of prison officials. Justice Breyer said the Court should not abandon the mandatory language rule because it helps the Court determine what restrictions are most likely to call for constitutional protection.

§ 27.4.2.4 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

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324 *Id.* at 488-90 (Ginsburg, J., joined by Stevens, J., dissenting); *id.* at 491-502 (Breyer, J., joined by Souter, J., dissenting).

325 Board of Regents of State Colleges v. Roth, 408 U.S. 564, 576-78 (1972).

the employment is at-will, no property right would be created. 327

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." 328 A substantial transformation occurred in the instrumentalist era. In Goldberg v. Kelly, 329 decided in 1970, 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 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. 330 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.

A year after Goldberg v. Kelly was decided, the Court another big step in Bell v. Burson. 331 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 toward 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. 332 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 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\(^{333}\) was held entitled to notice of reasons for not being re-hired if he could show that 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 in many cases, although a few cases have been found based on mutual understandings, oral contracts, or a right to avoid being stigmatized by a premature firing.\(^{334}\)

Regarding other kinds of government action, the Court held in Town of Castle Rock, Colorado v. Gonzales\(^{335}\) 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.

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.\(^{336}\)

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

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333 408 U.S. 593, 602 (1972).


335 125 S. Ct. 2798, 2803-06 (2005); id. at 2811-13 (Souter, J., joined by Breyer, J., concurring).

336 Id. at 2814-16, 2822-24 (Stevens, J., joined by Ginsburg, J., dissenting).
natural law principle that “where there is a right, there should be a remedy.”

§ 27.4.3 Determining What Process is Due

§ 27.4.3.1 Void for Vagueness Challenges

As the Supreme 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 explained the reason behind this doctrine as follows:

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 of the forbidden 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 discussed at § 29.6.1.4. 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


339 Id. at 108-09 (citations omitted).


Courts have been relatively tolerant of the difficulties of legislative drafting, and rarely have held statutes unconstitutionally vague outside the First Amendment context. The major exception to this deference has involved statutes making “loitering” a crime, which were held unconstitutionally vague in both the Holmesian and modern natural law eras.342

§ 27.4.3.2  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, 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.343

As noted at §§ 4.2.2 nn.28-30 & 7.2.1 nn. 21-23, the Mathews test is a classic example of second-order rational review factor 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, and the individual’s interest in not being improperly burdened to determine if any set of procedures represent an unreasonable accommodation of these interests. Consistent with the second-order rational review approach to deference, noted at § 21.2.4.3 nn.110-12, the challenger has the burden to overcome deference to “good-faith judgments” of the government that “the procedures they have provided assure fair consideration” in order to establish that the government’s procedures violate due process.344

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342  Lanzetta v. New Jersey, 306 U.S. 451 (1939) (statute punished persons “known to be a member of any gang consisting of two or more persons”; the statute was struck down on vagueness grounds); City of Chicago v. Morales, 527 U.S. 41 (1999) (statute provided “[w]henever a police officer observes a person whom he reasonably believes to be a criminal street gang member loitering in any public place with one or more other persons, he shall order all such persons to disperse and remove themselves from the area”; held unconstitutionally vague (1) in failing to provide fair notice of prohibited conduct; and (2) in failing to establish minimal guidelines for enforcement).


344  Id. at 348-49.
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, as in the case of a tort,345 or there is no likelihood of serious loss and informal procedures are sufficiently reliable to minimize the risk of error.346 State tort remedies usually are adequate post-deprivation procedures for deprivations resulting from intentional torts.347 But those remedies are not sufficient for losses caused by state policy,348 such as not using involuntary confinement procedures before confining a mentally ill person who manifests consent, where the government did not take any steps to ascertain whether the individual was mentally competent to sign the admission forms.349

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).

With respect to the need for a pre-deprivation hearing, a 5-4 Court decided in United States v. James Daniel Good Real Property350 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


350 510 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).
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 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 plurality opinion in Arnett v. Kennedy, 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." However, six Justices joined in opinions that suggested 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 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.

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351 416 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).


353 Id. at 350-53 (Brennan, J., joined by Marshall, J., dissenting); id. at 355-61 (White, J., joined by Brennan, Marshall & Blackmun, J.J., dissenting).
In *Codd v. Velger*, Justice Stevens, dissenting, explained that the *Bishop* opinion did not depart from the majority view 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 Justice White expressed in *Bishop* 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 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."

§ 27.4.4 Case Examples of Procedural Due Process Analysis

As the Court noted in *Zinermon v. Burch*, under the *Mathews v. Eldridge* balancing text, discussed at § 27.4.3.2 nn.343-49, 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, discussed at § 23.2.1.1; to Fifth Amendment due process, double jeopardy, and privilege against self-incrimination protections, discussed at § 23.2.1.2; to the Sixth Amendment right to a fair trial, to confront witnesses, and to have the assistance of counsel, including a right to counsel for indigent defendants in any felony case or misdemeanor case in which incarceration is imposed, discussed at § 23.2.1.3; to the Eighth Amendment ban on excessive bail, excessive fines, and cruel and unusual punishment, discussed at § 23.2.1.4. Prisoners also have protected liberty interests during incarceration, as discussed at § 27.4.2.3 nn.315-24, as well as rights of access to courts, discussed at § 26.5.2 nn.502-06 & 513, and rights to vote, discussed at § 26.5.3 nn.522-24.

For serious liberty deprivations outside the context of the criminal justice system, such as for involuntary commitment to a mental hospital, discussed at § 27.4.4.1, or termination of parental rights, discussed at § 27.4.4.2, 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 § 27.4.4.3, less procedures may be required than in the context of serious liberty deprivations, but more procedures are required than for other kinds of property deprivations. Less procedures tend to be required for deprivations of property in standard

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355 470 U.S. 532, 540-43 (1985); *id.* at 561-63 (Rehnquist, J., dissenting).

workplace cases, discussed at § 27.4.4.4; license termination or utility service termination cases, discussed at § 27.4.4.5; or creditor-debtor cases, discussed at § 27.4.4.6. Even fewer procedures tend to be required when dealing with the due process rights of children at school, discussed at § 27.4.4.7, or for “enemy combatants” or other persons detained during military action, the “war on terrorism,” or as part of immigration enforcement, discussed at § 27.4.4.8. Minimal due process arguments apply to government delegation of public functions to private parties, discussed at § 27.4.4.9, or the government adopting rules drafted by private parties, discussed at § 27.4.4.10.

As noted at § 27.4.3.2 text following n.349, 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.

§ 27.4.4.1 Mental Hospital Commitment Cases

In *Addington v. Texas*, 357 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 § 27.2.5.2 n.131, did not apply to involuntary commitment proceedings.

In *Parham v. J.R.*, 358 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 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


358 442 U.S. 584, 606-16 (1979); id. at 625-33 (Brennan, J., joined by Marshall & Stevens, JJ., concurring in part and dissenting in part).
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.

§ 27.4.4.2 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 discussed at § 23.2.1.3.C nn.187-95. 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 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

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360 455 U.S. 745, 764, 769-70 (1982) (citation omitted); id. at 770-73 (Rehnquist, J., joined by Burger, C.J., and White & O’Connor, JJ., dissenting). For discussion that Justice O’Connor voted more often with Holmesian Justices Rehnquist and White during her first few years on the Court, between 1981-84, before finding her natural law voice later, see § 12.4.2. n.191.
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.”

§ 27.4.4.3 Government Entitlement Cases

In Goldberg v. Kelly, 361 decided in 1970, the Court held that a pre-termination evidentiary hearing was required for termination of Aid to Families with Dependent Children (AFDC) welfare benefits. Such a hearing may not be required for other kinds of governmental benefits programs (e.g., blacklisted government contractor, discharged employee, or taxpayer denied a tax exemption), but was required here because AFDC benefits may be the very means by which the individual lives. Thus, an erroneous decision denying benefits in AFDC cases would constitute a particularly burdensome mistake. Because the issues involved in AFDC termination cases often involve factual matters about whether the individual is eligible for welfare, particularly the issue whether the individual is receiving support from another individual who disappears when the social worker comes for a visit, the Court determined that there needed to be an oral hearing in such cases and the right to cross-examine witnesses, but only an informal record of the hearing need be kept. The welfare recipient must be allowed to retain an attorney if desired, but counsel need not be provided for indigent parties. Formalist Chief Justice Burger and Justice Black, and Holmesian Justice Stewart, dissented from this second-guessing procedures used to terminate AFDC benefits.

In Mathews v. Eldridge, 362 decided in 1976, 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 Court noted that disability benefits are not based upon financial need, and thus an individual receiving disability benefit may have other sources of income on which to survive in the event the initial decision to terminate benefits was in error. The risk of making an error in the termination decision was low, since it was based upon medical evidence. Finally, the ultimate cost of a pre-termination hearing would be great. In addition, given the medical nature of the evidence used to support the decision, no oral hearing or right to cross-examine witness was required. The individual merely must be given the opportunity in a post-termination hearing to submit evidence to the individual’s file regarding continued disability. In dissent, instrumentalist Justices Brennan and Marshall concluded that a pre-termination hearing of the kind mandated in Goldberg should be required because in individual cases the financial burden on the individual could be great, as in this case. The issue of a pre-termination or post-termination hearing is often important, since the post-termination hearing often takes place 6 months, a year, or more after the initial termination decision has been made, and only rarely is such a delay itself held to violate due process. 363

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363 On the problem of delays in social security disability cases, see generally Shu Fan Lee, Note, Administrative Delays Involving Social Security Disability Claims: Heckler v. Day Revisited,
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 rights, and subject to Mathews analysis, rather than an economic or social regulation regarding receipt of welfare benefits, triggering only minimum rational review under the Due Process Clause, discussed at § 27.1.2.1.

§ 27.4.4.4 Workplace Cases

In Cleveland Board of Education v. Loudermill,\textsuperscript{364} 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 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.

Some 11 years earlier, in Arnett v. Kennedy,\textsuperscript{365} the Court had sustained the validity of procedures by which a federal employee could be dismissed for cause without any pre-termination hearing. They included 30 days' advance written notice of the reasons for the proposed discharge and the materials on which the dismissal was based. The individual was accorded the right to respond to the charges both orally and in writing, including the submission of affidavits, and, upon request, was entitled to appear personally before the official having the authority to make or recommend the final decision. Although a pre-termination evidentiary hearing was not held, the employee could make representations relevant to the case. After removal, the employee received a full evidentiary hearing, and was awarded backpay if reinstated. As Justices Powell and Blackmun noted in their concurring opinion, which provided the crucial fifth votes for the Court's judgment, “These procedures minimize the risk of error in the initial removal decision and provide for compensation for the affected employee should that decision eventually prove wrongful.” Further, as they noted, “Prolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the workplace, foster disharmony, and ultimately impair the efficiency of an office or agency. Moreover, a requirement of a prior evidentiary hearing would impose additional administrative costs, create delay, and deter warranted discharges. Thus, the Government's interest in being able to act expeditiously to remove an unsatisfactory employee is

\textsuperscript{364} 470 U.S. 532, 542-48 (1985); \textit{id.} at 548 (Marshall, J., concurring in part and concurring in the judgment); \textit{id.} at 552-53 (Brennan, J., concurring in part and dissenting in part).

substantial.” In dissent, instrumentalist Justices Douglas, Brennan, and Marshall would have required a full evidentiary hearing to be conducted prior to termination.

§ 27.4.4.5 License Termination or Utility Termination Cases

In *Bell v. Burson*,366 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*,367 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*,368 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.

§ 27.4.4.6 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.

Regarding garnishment of wages, the Court held in *Sniadach v. Family Finance Corp.*369 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.*[^370] 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*[^371] 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.*,[^372] 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*,[^373] 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* 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

[^370]: 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).

[^371]: 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).

[^372]: 416 U.S. 600, 617-20 (1974); *id.* at 630-36 (Stewart, joined by Douglas & Marshall, JJ., dissenting); *id.* at 636 (Brennan, J., dissenting).

and judicial review of Internal Revenue Service decisions to levy property or file a notice of a federal tax lien on property.\textsuperscript{374} In addition, sometimes the government seizes property in the context of a criminal investigation. The Court held in \textit{City of West Covina v. Perkins},\textsuperscript{375} 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 that was 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.

\textbf{§ 27.4.4.7} \textbf{School Cases} \hfill  \\

Students are entitled to only limited due process rights regarding disciplinary proceedings at public schools. In \textit{Goss v. Lopez},\textsuperscript{376} 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 that school suspensions of 10 days or less raised no due process issues requiring a constitutional remedy\textsuperscript{376}.

Reflecting even greater deference to schools, the Court held in \textit{Ingraham v. Wright}\textsuperscript{377} 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.

Of course, 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


\textsuperscript{377} 430 U.S. 651, 682-83 (1977); \textit{id.} at 693-700 (White, J., joined by Brennan, Marshall & Stevens, JJ., dissenting).
to be created by state or federal statutory law, or through contract or tort doctrine.\textsuperscript{378}

\section*{§ 27.4.4.8 Rights of Detained Persons}

Cases concerning the due process rights of persons detained outside the regular criminal justice system, such as alleged terrorists captured after 9-11 (September 11, 2001) as part of the “war on terrorism,” enemy combatants held as a result of military action, or aliens detained because of alleged violations of immigration laws, have raised issues confronted only rarely by the Supreme Court. However, certain principles seem reasonably clear. To the extent alleged terrorists, or enemy combatants, were granted rights similar to military personnel in court-martial proceedings under the Uniform Code of Military Justice, due process concerns would easily be met.\textsuperscript{379} Similarly, to the extent alleged terrorists, or enemy combatants, were treated as captured prisoners of war under the Geneva Conventions, due process would be met.\textsuperscript{380}

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 \textit{Demore v Kim},\textsuperscript{381} the Court concluded detention was “reasonable” given a general concern that such aliens who are not detained may continue to engage in crime or fail to appear for their hearings. Regarding longer detentions, the Court held in \textit{Zadvydas v. Davis}\textsuperscript{382} 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.

\begin{footnotesize}

\textsuperscript{379} 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).


\textsuperscript{382} 533 U.S. 678, 682-84 (2001).
\end{footnotesize}
With regard to aliens outside the United States seeking admission to the United States, the Court stated in *Shaughnessy v. United States ex rel. Mezei* "It is true that aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law. 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. Although they are physically and lawfully within the country's territorial boundaries, they are not treated by the law as "within the United States." As such, parolees may not be entitled to the Fifth Amendment due process protections available to all "persons within the United States." Indeed, although the Supreme Court recently held in *Zadvydas v. Davis* that legal permanent residents have a due process right to be free from indefinite detention based on their status as "persons within the United States," it suggested that the right does not extend to those outside the country. Thus, *Zadvydas* implies that the government may continue to strike a "statutory bargain" with potential parolees – conditioning the benefit of physical entry into the United States on the relinquishment of the right to be free from indefinite detention that would otherwise apply once they are inside the country. Deeming parolees noncitizens who still stand outside the border, then, effectively means the government may treat them as arriving aliens with virtually no due process rights.

In 2004, the Supreme Court considered the rights of people detained in connection with the “war on terrorism” in three cases, *Rasul v. Bush*, *Hamdi v. Rumsfeld*, and *Rumsfeld v. Padilla*. Some of these detainees were United States citizens, and some were not. The decisions in these cases were influenced by cases from the Civil War and World War II eras. In *Ex parte Milligan*, *Ex parte Mitsuye Endo*, and *Duncan v. Kahanamoku*, 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." In contrast, in *Ex parte*...
Quirin, the Court held that enemy combatants could constitutionally be tried in military courts. In Johnson v. Eisentrager, the Court denied certain foreign nationals, held outside the United States, the right to petition for habeas corpus in American federal courts.

In Rasul v. Bush, 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 concluded 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.”

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.”

In a concurrence, 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:

387 317 U.S. 1, 20-21 (1942).
390 Id. at 478-79, citing Braden, 410 U.S. 484, 494-95 (1973).
391 Id. at 488-89 (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., dissenting).
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.392

Once the Court has jurisdiction to hear the case, the question then arises what procedures must the government follow to vindicate a detainee’s rights. The Court addressed this issue in 2006 in Hamdan v. Rumsfeld, discussed at § 27.4.4.8 nn.409-16. The two other 2004 cases, Hamdi v. Rumsfeld and Rumsfeld v. Padilla, dealt with the rights of United States citizens held as suspected terrorists. In Hamdi v. Rumsfeld,393 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.” In determining what procedures must be followed, the plurality noted, “Without doubt, our Constitution recognizes that core strategic matters of war making belong in the hands of those who are best positioned and most politically accountable for making them. The Government also argues [that] 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. To the extent that these burdens are triggered by heightened procedures, they are properly taken into account in our due process analysis.”

Four Justices in 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 9-11. Justice Scalia read the Suspension Clause, Article I, § 9, cl. 2, discussed at § 23.2.2.3, to give the Congress no independent power to authorize military detentions of citizens absent suspension

392 Id. at 487 (Kennedy, J., concurring in the judgment).

of the Writ of Habeas Corpus, a position joined by Justice Stevens. 394 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. 395 Their concurrence continued:

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 (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. 396

Justice Thomas agreed in Hamdi with the plurality that Congress had authorized military detention in these circumstances. 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 concluded, “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 . . . . Arguably, Congress could provide for additional procedural protections, but until it does, we have no right to insist upon them.” 397

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

394 Id. at 554 (Scalia, J., joined by Stevens, J., dissenting).
395 Id. at 540 (Souter, J., joined by Ginsburg, J., concurring in part, dissenting in part, and concurring in the judgment).
396 Id. at 553-54 (citations omitted).
397 Id. at 579 (Thomas, J., dissenting).
Afghanistan, Iran, Iraq or Syria, where he could be presumably be recruited for terrorist activity.398

The third case decided in 2004 was *Rumsfeld v. Padilla*.399 In *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 as a material witness, 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. But we also all agree with Judge Bork that “special circumstances” can justify exceptions from the general rule. Demjanjuk v. Meese, 784 F.2d 1114, 1116 (C.A.D.C. 1986). 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).

It is reasonable to assume that if the Government had given Newman, who was then representing [Padilla] in an adversary proceeding, notice of its intent to ask the District Court to vacate the outstanding material witness warrant and transfer custody to the Department of Defense [for transfer to South Carolina], Newman would have filed the habeas petition then and there, rather than waiting two days.400

As suggested by this passage, 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.401 Following the Supreme Court’s decision in *Padilla* in 2004, the government indicted Padilla in November 2005 for travelling “overseas to train as a terrorist with the intention of fighting a violent jihad,” although any allegations involving attacks in America, including plotting to carry out a "dirty bomb" attack in this country, for which Padilla was originally detained, were not included in the indictment. As of October, 2006, trial had not begun in the case.402


400 *Id.* at 458 (Stevens, J., joined by Souter, Ginsburg & Breyer, JJ., dissenting).

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. Similar challenges will likely be made in America to various provisions of the USA Patriot Act, among other pieces of anti-terrorist legislation.

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. In cases of private individuals, regular criminal laws, such as assault and battery, 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 precise definition of what constitutes torture is subject to some dispute. The issue has received greater attention since 9-11 following two Department of Justice memos adopting exceedingly 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.” The Bybee memo also adopted a narrow view of the intent component of defining torture, requiring the torturer to act with the “precise and express objective” of inflicting severe pain.

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 inflict 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.”

The existence of these memos, and the belief that American practices regarding torturing suspects in detention have changed since 9-11, has caused the United States government public relations problems. For example, in holding that three British residents being held at Guantanamo Bay may take legal action to try to force the British Government to facilitate their release, a British judge observed that 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.” The continued detention at Guantanamo Bay of large numbers of detainees for more than 4 years without hearings has also prompted international concern. Secretary General of the United Nations, Kofi Annan, has indicated his belief that the United States should shut the Guantanamo Bay camp "without further delay" and either try the roughly 500 detainees held there or release them.

The issue of what rights Guantanamo Bay detainees should have in their trials was the focus of Hamdan v. Rumsfeld, decided in 2006. In Hamdan, 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 such 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. In reaching this conclusion, both Justice Stevens’ majority opinion, and Justice Kennedy’s concurrence, joined by Justices Souter, Ginsburg and Breyer, paid considerable attention to general principles of separation of powers. As Justice Kennedy pointed out in his concurrence, 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

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406 Id. at 26-28. See generally Auguste v. Ridge, 395 F.3d 123, 138-47 (3rd Cir. 2005) (deplorable prison conditions that an alien faces in Haiti after being deported for criminal activity do not constitute torture, because acts of torture require a specific intent to cause severe physical or mental pain and suffering, and generally intolerable prison conditions in Haiti do not meet that requirement).

407 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).

408 CNN, Annan: Shut Guantanamo Prison Camp (February 17, 2006) (cnn.com news, search by using words in the title of the article).

409 126 S. Ct. 2749, 2759-60, 2772-75, 2795-96 (2006); id. at 2799-2708 (Kennedy, J., joined by Souter, Ginsburg & Breyer, JJ., as to Parts I & II, concurring in part).
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 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. 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.

Given the conclusion that the military commission at issue in Hamdan was unauthorized under the UCMJ, Justice Kennedy saw “no need to consider several further issues addressed” and the subject of dispute between Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer, on the one hand, and the dissent by Justice Thomas, joined by Justice Scalia, and by Justice Alito, in part, on the other hand. These issues involved whether Article 3 of the Geneva Conventions’ standard of a "regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples" necessarily requires that the accused have the right to be present at all stages of a criminal trial; whether, as the plurality seemed to conclude, Article 75 of Protocol I to the Geneva Conventions is binding law, particularly on the right to be present at trial, absent disruptive behavior, and to be privy to the evidence used against the accused, absent a compelling interest in denying access to sensitive security information, notwithstanding the decision by the United States not to accede to the Protocol, although that refusal was not because of an objection to Article 75; whether the conspiracy charge against Hamdan could be addressed in a military tribunal as part of the law of war, or only in regular civilian courts, as the plurality concluded; and other limitations on military tribunals described as elements of the common law of war in Part V of Justice Stevens’ opinion, such as any acts prosecuted must have occurred “during, not before, the relevant conflict.” Thus, Justice Kennedy concluded, “With these observations I join the Court's opinion with the exception of Parts V and VI-D-iv.”

Justice Breyer wrote a short concurring opinion, joined by Justices Kennedy, Souter, and Ginsburg. That concurrence underscored that while the Court’s decision made it clear that 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. Because statutes and treatises stand on the same footing for purposes of domestic law, discussed at § 18.3.9 n.189, Congress could authorize

410 Id. at 2808-09 (Kennedy, J., concurring in part).

411 Id. at 2799 (Breyer, J., joined by Kennedy, Souter & Ginsburg, JJ., concurring).
military commissions with less rights than granted in the current UCMJ and Article 3 of the Geneva
Conventions, and such a statute would be valid for purposes of domestic law. Under international
law, as noted at § 18.3.9 nn.193-199, the Geneva Conventions would still be viewed as controlling
absent United States withdrawal from that treaty, a step politically unlikely for any United States
government to take.

A conservative formalist 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 judgment that
because the war on terrorism was of “international scope” it was a conflict “of an international
character” for purposes of the Geneva Conventions.412

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 or that evidence may be
admitted which has probative value to a reasonable person.413 Justice Alito’s dissent, as well as
Justice Thomas’ dissent, are consistent with the conservative predisposition in separation of powers
cases to favor broader grants of executive power, discussed at § 6.2.2.4.

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.414 This conclusion is consistent with
the Court’s predisposition, discussed at § 17.2.3.1 n.152, to read limitations on the Court’s
jurisdiction narrowly. In his dissent, Justice Scalia, joined by Justices Thomas and Alito, concluded

412 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).

413 Id. at 2850-55 (Alito, J., joined by Scalia & Thomas, JJ., as to Parts I, II, & III, dissenting).

414 Id. at 2762-72 (Stevens, J., opinion for the Court).

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that the statutory exception was clear, and that the Court should not have heard the case at all.\textsuperscript{415} Chief Justice Roberts did not participate in \textit{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 \textit{Hamdan}.\textsuperscript{416}

As of October, 2006, Congress passed, and President Bush indicated an intent to sign, a bill, the Military Commissions Act of 2006, setting out procedures to govern trial of 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 \textit{ad hoc} nature of the existing process before this statute was passed had naturally caused due process problems.\textsuperscript{417} In the Act, Congress expanded the evidence that could be used at trial from traditional 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.” This change, along with 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, will likely be held to satisfy due process concerns. United States citizens deemed unlawful enemy combatants will end up with greater rights, consistent with \textit{Hamdi} and \textit{Padilla}, discussed at § 27.4.4.8 nn.393-401. This difference between treatment of United States citizens and aliens does raise an equal protection issue, but only under minimum rationality review for federal regulation of aliens, discussed at § 26.2.2.2.

The one provision likely to raise the greatest concern with constitutionality is the ban on any habeas corpus petition being filed by a detainee. As discussed at §§ 17.2.2.1.A n.98 & 17.2.3.1 nn.150-58, prior cases have upheld Congress’ right to strip federal courts of habeas jurisdiction, but no prior statute has stripped federal court review of such a potentially large number of criminal cases, which in practice provides that foreign national unlawful enemy combatants could be indefinitely detained without any access to the judicial system for review of their status as enemy combatants. While conservative formalist and Holmesian Justices would likely defer to the government in this case, a combination of natural law and liberal instrumentalist Justices could cause the Court to strike down that part of the statute on structural separation of powers grounds,\textsuperscript{418} perhaps based on \textit{Felker v. Turpin}, discussed at § 17.2.3.1 n.158, on whether Congress “has deprived [the Court] of

\textsuperscript{415} Id. at 2810-23 (Scalia, J., joined by Thomas & Alito, JJ., dissenting).

\textsuperscript{416} 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).


\textsuperscript{418} 581 U.S. 651, 661-62 (1996).
jurisdiction in violation of Article III, § 2.” 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 will have to be decided regards the right of public access, if any, to any tribunals which are ultimately created.419

Another issue that has arisen in the context of the war on terrorism involves the issue whether a United States citizen, who alleges being arrested, tortured, and detained indefinitely 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. Ashcroft420 a federal district court held that such an individual could seek habeas relief.

§ 27.4.4.9 Delegation of Government Functions to Private Parties

In Texas Boll Weevil Eradication Foundation v. Lewellyn,421 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?

419 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).


421 952 S.W.2d 454, 469-72 (Tex. 1997).
6. Is the delegation narrow in duration, extent, and subject matter?
7. Does the private delegate possess special qualifications or training for the task delegated to it?
8. Has the Legislature provided sufficient standards to guide the private delegate in its work?

Similarly concerned with delegation of government power to private parties, the Second Circuit reviewed in *General Electric Co. v. New York Department of Labor* 422 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*, 423 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 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.”

§ 27.4.4.10 Legislative Adoption of Rules Drafted by Private Parties

Related due process issues arise when a particularized body of law has developed around the practice of 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*, 425 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

422 936 F.2d 1448, 1459 (2nd Cir. 1991).
423 208 F.3d 615, 622 (7th Cir. 2000).

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the public are concerned.” Similarly, in *Quality Oil Company v. E.I. du Pont de Nemours & Co.*\(^{426}\) 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, discussed at § 26.4.1, and Due Process Clauses analysis, discussed at § 27.1.2.1.

CHAPTER 28: CONGRESSIONAL POWER UNDER THE CIVIL WAR AMENDMENTS

Seven constitutional amendments provide that “Congress shall have power to enforce” the amendment “by appropriate legislation.” These are the 13th, 14th, 15th, 19th, 23rd, 24th, and 26th Amendments. The last four of these amendments deal with voting rights for women (19th), three electoral college votes for the District of Columbia in elections for President and Vice-President (23rd), no imposition of a poll tax or any other tax to be permitted to vote in elections to federal office (24th), and voting rights for persons 18 years or older (26th). These provisions are relatively self-explanatory, and no significant issues have been raised over their meaning or congressional statutes implementing them, such as congressional statutes providing procedures for selection of the District of Columbia’s electors in presidential elections. However, a significant number of cases have addressed Congress’ power to enforce the first three of these amendments – the 13th, 14th, and 15th Amendments – collectively called the Civil War Amendments.

§ 28.1 Introduction to Congressional Power Under the Civil War Amendments

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.” 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 Court had held in 1803 in Marbury v. Madison1 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, discussed at § 25.1 nn.9-16, 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.2

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1 5 U.S. (1 Cranch) 137, 176-80 (1803).

2 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,
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. Section 1981 attempts to secure equal contracting rights without regard to race. Section 1982 attempts to secure equal rights regarding property. Section 1983 provides for a federal cause of action for any deprivation of constitutional or federal statutory rights done under color of state law, custom, or usage. The vast majority of constitutional cases in the federal courts have been brought under this statute. Section 1985(1) provides for a damage action when two or more persons conspire to impede a federal officer from discharging official duties. Section 1985(2) proscribes the intimidation of federal court witnesses and parties. Section 1985(3) provides for a federal cause of action for damages for conspiracies that have the purpose and result of depriving any person of equal protection of the laws, or of equal privileges and immunities. Section 1986 creates a damage action against persons for negligent failure to prevent a violation of Section 1985 if the person had the power to prevent a violation, as would be true for law enforcement officials. 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.

Regarding one such piece of legislation, the Civil Rights Act of 1866, it has been noted:

> In the wake of Congress' enactment of the Civil Rights Act of 1866, concern arose among congressmen over the constitutionality of such nationalized civil rights legislation. Specifically, it was thought that "the power to prohibit slavery, peonage, or any interference with strict personal liberty was one thing, while the power to regulate the domestic relations of life, liberty, and property within the states was something very different." As Senator Eli Saulsbury

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3 On all of these civil rights statutes, see generally Harold S. Lewis, Jr. & Elizabeth J. Norman, Civil Rights Law and Practice 2-28 (2001); Alan W. Clarke, The Ku Klux Klan Act and the Civil Rights Revolution: How Civil Rights Litigation Came to Regulate Police and Correctional Officer Misconduct, 7 The Scholar: St. Mary’s L. Rev. on Minority Issues 151 (2005).

suggested in a statement directed to the proponents of the Civil Rights Bill, "[i]f you had intended to bestow upon the freed slave all the rights of a free citizen, you ought to have gone further in your constitutional amendment, and provided that . . . there should be no inequality in civil rights." Concerns such as these were precisely what led Congress to take the next, and most significant, legislative step of the Reconstruction period – the adoption of the Fourteenth Amendment.5

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,6 “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.” 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 under a minimum rational review test, as noted at §§ 18.1.2 nn.31-40 & 18.2.5 n.125. 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.

As noted at §§ 25.1 nn.20-28, 25.3 nn.59-64 & 26.2.1.1 nn.108-18, during the formalist era the Court gave a limited reading to the Civil War Amendments in the Slaughter-House Cases,7 The Civil Rights Cases,8 and Plessy v. Ferguson.9 The Court also 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 viewed by its supporters as consistent with the Court’s decision in the Slaughter-House Cases in 1873. Nevertheless, that Act was struck down in 1883 in The Civil Right Cases as violating the Court’s understanding of the state action limits of the 14th Amendment.10 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


6 17 U.S. (4 Wheat.) 316, 421 (1819).

7 83 U.S. 16 (Wall.) 36 (1873).

8 109 U.S. 3 (1883).

9 163 U.S. 537 (1896).

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*, discussed at § 28.3 nn.31-35, the Court embraced the view, consistent with the practices of the Radical Republican Congresses in passing various civil rights law between 1866-1875, discussed at § 28.1 nn.2-12, that Congress had independent power to determine for itself violations of the Civil War Amendments. As has been noted, “The Framers saw Congress, and 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.” 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*.

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*, discussed at § 28.3 nn.47-59, 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

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congressional action given the mischief to be remedied. As discussed at § 28.3 nn.56-58, this “congruence and proportionality” test appears to be a version of “third-order” rational review, as defined at § 7.2.1 text following n.42, similar to the “rough proportionality” test of Dolan under the Takings Clause, discussed at § 22.2.5.1 nn.97-103, with the burden on Congress to justify its action, rather than the minimum rational review of McCulloch v. Maryland.

§ 28.2 Congressional Power To Enforce the 13th Amendment

As noted at § 25.1 nn.20-24, 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 minimum rationality test of McCulloch v. Maryland, and to translate its understanding

16 83 U.S. (16 Wall.) 36, 69 (1873).
17 109 U.S. 3 (1883).
18 Id. at 20.
19 Id. at 22-25.
21 Id. at 473-76 (Harlan, J., dissenting).
Building on *Jones*, in 1971 the Court overruled prior doctrine and held in *Griffin v. Breckenridge*\(^\text{23}\) 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*\(^\text{24}\) to § 1981 and the right to make and enforce contracts. As with race discrimination under the Equal Protection Clause, discussed at § 26.2.1.2, 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.\(^\text{25}\)

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*,\(^\text{26}\) 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*,\(^\text{27}\) 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

\(^{22}\) Id. at 443-44.

\(^{23}\) 403 U.S. 88, 102 (1971).


\(^{27}\) 481 U.S. 604, 610 n.4, 613 (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, discussed at § 7.3.3. For example, in 1989, the Court unanimously reaffirmed Runyon v. McCrary 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.

§ 28.3 Congressional Power To Enforce the 14th Amendment

In 1966, per Justice Brennan, the Court held in Katzenbach v. Morgan that laws enacted under § 5 of the 14th Amendment would be upheld so long as they met the "Necessary and Proper Clause" test of McCulloch v. Maryland regarding legislation “appropriate” and “proper” and “plainly adapted to its end.” The Court then applied that minimum rational review approach to uphold a provision in the Voting Rights Act of 1965 that abolished state literacy tests for persons who had completed the sixth grade in a Puerto Rican school that instructed in other than English. Justice

30 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).
Brennan's opinion said it was enough that the Court perceive a basis on which Congress could have concluded that abolishing a literacy test in these circumstances would be helpful in gaining nondiscriminatory treatment in public services or could have found that the literacy test was an invidious discrimination against Puerto Ricans. The opinion thus gave Congress the power to address conditions that the Court might not consider to have been violations of the Constitution, as with this literacy test, given the Court's holding in *Lassiter*, discussed at § 28.1 n.13, as long as Congress had a rational basis for its conclusion that the activity did violate the Constitution.

Dissenting in *Katzenbach v. Morgan*, Justice Harlan, joined by Justice Stewart, said that there was no factual record by which Congress could have found that Spanish-speaking citizens are as capable of making informed decisions as English-speaking citizens, and there was no legislative record supporting the Court's hypothesized possibility of discrimination. Thus, the Court was improperly allowing Congress to decide what was a violation of the Equal Protection Clause. If Congress had such a power it might be used to dilute equal protection and due process.

In response, Justice Brennan replied that Congress' power was limited to adopting measures that enforce the 14th Amendment. Congress could not restrict or dilute its guarantees. On this last point, there seems to be little disagreement. As the Court stated in *Mississippi University for Women v. Hogan*, per Justice O'Connor, § 5 of the 14th Amendment gives Congress a broad power but Congress' power is "limited to adopting measures to enforce the guarantees of the Amendment; § 5 grants Congress no power to restrict, abrogate, or dilute those guarantees. . . Although we give deference to congressional decisions and classifications, neither Congress nor a State can validate a law that denies the rights guaranteed by the 14th Amendment."

The principle that Congress can determine for itself what are constitutional violations strikes at the very heart of separation of powers concepts regarding the role of the legislative and judicial branches as laid out in *Marbury v. Madison*. At issue is the "cardinal rule of constitutional law," restated in *United States v. Morrison*, that "ever since *Marbury* this Court has remained the ultimate expositor of the constitutional text." It is thus not surprising that the *Morgan* theory of congressional power has been cut back since the demise in 1969 of the Warren Court’s clear 5-Justice liberal instrumentalist majority. The demise of that 5-Justice majority after 1969 is noted at § 11.2.2.2.

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32 *Id.* at 652-58.

33 *Id.* at 669-71 (Harlan, J., joined by Stewart, J., dissenting).

34 *Id.* at 657-58.


36 529 U.S. 598, 616 n.7 (2000).
For example, in *Oregon v. Mitchell*, a 5-4 Court held in 1970 that Congress had no power to establish a minimum age of 18 for voters in state and local elections. Justice Stewart, with Justices Burger and Blackmun, said they interpreted *Katzenbach v. Morgan* as approving a remedy for past discriminatory treatment in public services or for the impermissible purpose of denying the right to vote to Puerto Ricans. Justice Stewart did not read the *Morgan* case as giving Congress the right to nullify a state law whenever Congress could rationally conclude that the law was not supported by a compelling state interest. He said that Congress has power under the 14th Amendment to "provide the means of eradicating situations that amount to a violation of [equal protection]" but not to "determine as a matter of substantive constitutional law that situations fall within the ambit of the clause." Justice Harlan repeated his view that only the Court, and not Congress, has the authority to determine when states have exceeded constitutional limits on their powers. Concerning the *stare decisis* aspect of *Morgan*, Harlan noted his "deep conviction" that it was wrongly decided, and also noted the evident malaise among the other members of the Court with those decisions. Justice Black provided the critical fifth vote in *Mitchell*. He said that the 18-year-old vote provision was not related to discrimination by race, and Congress had thus invaded an area reserved to the states.

Justice Brennan, joined by Justices White and Marshall, dissenting in part, concluded that Congress can make its own determination on questions of fact, and here could have found that excluding citizens 18-21 from voting was wholly unnecessary to promote any legitimate interest in assuring intelligent and responsible voting. Justice Douglas also dissented from the Court's conclusion that Congress could not prescribe that 18-year-olds could vote in state and local elections. The issue of voting rights by 18-year-olds was resolved by ratification of the 26th Amendment in 1971, which provides that 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."

Later cases have further limited *Morgan*. In 1981, writing for the Court in *Pennhurst State School & Hospital v. Halderman*, Justice Rehnquist said that because legislation enforcing the 14th Amendment intrudes on traditional state authority, "we should not quickly attribute to Congress an unstated intent to act under its authority to enforce the Fourteenth Amendment... The case for inferring intent is at its weakest where, as here, the rights asserted impose affirmative obligations on the States to fund certain services, since we may assume that Congress will not implicitly attempt to impose massive financial obligations on the States." Because they viewed the Act as


38 *Id.* at 152-54, 217-18 (Harlan, J., concurring in part and dissenting in part).

39 *Id.* at 130 (Black, J., announcing the judgments of the Court).

40 *Id.* at 278-81 (Brennan, J., joined by White & Marshall, JJ., concurring in part and dissenting in part); *id.* at 135 (Douglas, J., concurring in part and dissenting in part).

41 451 U.S. 1, 16-17 (1981).
constitutional under a Spending Clause analysis, Justices Brennan, White, and Marshall did not have to consider Justice Rehnquist’s views on interpreting Congress’ 14th Amendment enforcement power, which in any event were limited, as a matter of the core holding in Pennhurst, to cases involving obligations to fund.

In 1983, in his majority opinion in EEOC v. Wyoming, Justice Brennan sought to limit the “implied interpretation” theory of Justice Rehnquist. Justice Brennan said that to trigger its enforcement power under § 5 of the 14th Amendment, Congress need not recite explicitly the words “§ 5” or “14th Amendment” (or “Equal Protection” or “Due Process”). The question is one of discerning legislative intent. Despite this aspect of EEOC v. Wyoming, the narrower remedial theory of congressional power under the 14th Amendment picked up the vote of Justice O’Connor, who joined Chief Justice Burger, along with Justices Powell and Rehnquist, dissenting in EEOC v. Wyoming. The Chief Justice wrote that Congress can invalidate state laws by using its power to enforce the Civil War Amendments, but only if Congress considers it necessary to remedy past violations in terms of what the Court says are violations, or to guard against future violations. He said that Congress could not impose restrictions on the mandatory retirement laws of the states where Congress did not find it necessary to guard against encroachment of guaranteed rights or to rectify past discrimination. He noted that there had been no finding that a state law infringed on rights identified by the Court. And he added, "[Allowing] Congress to protect constitutional rights statutorily that it has independently defined fundamentally alters our scheme of government." In 1991, Justice Rehnquist’s remarks in Pennhurst were strengthened by Justice O’Connor’s majority opinion in Gregory v. Ashcroft. She wrote that in determining whether Congress has intended to restrict state political functions, the Court, in accord with Pennhurst, will apply a "plain statement" rule. She continued, "[We] will not attribute to Congress [without a plain statement] an intent to intrude on state governmental functions regardless of whether Congress acted pursuant to its Commerce Clause powers or Section 5 of the Fourteenth Amendment." Justices White, Marshall, Blackmun, and Stevens all dissented from this “plain statement” rule.

In 1997, six Justices adopted the narrower remedial interpretation theory of congressional power. For Chief Justice Rehnquist, and Justices O’Connor, Scalia, Thomas, and Ginsburg, Justice Kennedy

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42 Id. at 54-55 (White, J., joined by Brennan & Marshall, JJ., dissenting in part).


44 Id. at 259-63 (Burger, C.J., joined by Rehnquist, Powell & O’Connor, JJ., dissenting).


46 Id. at 474-81 (White, J., joined by Stevens, J., concurring in part, dissenting in part, and concurring in the judgment); id. at 486 (Blackmun, J., joined by Marshall, J., dissenting).
explained in *City of Boerne v. Flores* that Congress' enforcement power under the 14th Amendment is a power to correct or prevent violations of the Amendment by the states. It is not a power to define what conduct is a violation of the Amendment. Justices Stevens, Souter, and Breyer avoided this issue based on their resolution of the case, discussed below at § 28.3 n.51. For the foreseeable future, it seems likely the Court will adhere to the views expressed in *Pennhurst State School & Hospital v. Halderman, Gregory v. Ashcroft, and City of Boerne v. Flores*, since the views in all three of these cases are likely shared on the Court, at the least, by Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, and Alito.

*City of Boerne v. Flores* also involved a limitation on Congress power regarding what are “appropriate” remedies for constitutional violations. In *Flores*, Justice Kennedy said that the line between congressional measures that remedy or prevent unconstitutional actions and measures that make a substantive change is not easy to discern and that Congress must have a wide latitude in determining where it lies. However, "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."48

Applying this test, the Court held that the Religious Freedom Restoration Act of 1993 (RFRA) exceeded Congress' power. The Act had been designed to overturn the 1990 ruling of *Employment Division v. Smith*,49 discussed at § 32.2.2.5 nn.253-56, that neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling government interest. RFRA provided that governments should not substantially burden religious exercise without compelling justification. This law, said Justice Kennedy, cannot be considered remedial, preventive legislation because it is so out of proportion to any supposed remedial or preventive object designed to prevent unconstitutional behavior. The compelling interest test it demands of state laws reflects a lack of proportionality or congruence between the means adopted and the end to be achieved. Justice Kennedy supported his conclusions by pointing out that RFRA's restrictions apply to every agency and official of the federal, state, and local governments and to all federal and state laws, statutory or otherwise, whether adopted before or after its enactment, and RFRA has no termination date or termination mechanism. Laws valid under *Smith* would fall under RFRA without regard to whether they had the object of stifling or punishing free exercise. Thus, RFRA is not designed to identify and counteract laws likely to be unconstitutional because of their treatment of religion.50

Without regard to any § 5 enforcement analysis, Justice Stevens concurred on the ground that RFRA provides churches with a legal weapon that no atheist or agnostic can obtain and thus is a

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47 521 U.S. 507, 516-29 (1997); id. at 545-46 (O’Connor, J., dissenting on other grounds, but agreeing with the Court’s analysis of the Congress’ § 5 enforcement power).

48 Id. at 519-20.


50 521 U.S. at 529-36.
governmental preference for religion that violates the Establishment Clause. Also independent of any § 5 enforcement analysis, Justices O’Connor, Souter, and Breyer, dissenting, would have set the case for reargument on the question of whether Smith was properly decided.51

Applying the “congruence and proportionality test,” the Court has held subsequently that the Age Discrimination in Employment Act (ADEA) was not “appropriate” legislation under § 5 of the 14th Amendment because there was no evidence of a sufficient pattern of state discrimination on the basis of age to which the statute would be a “congruent and proportionate” response. Thus, Congress could not abrogate state sovereign immunity in the case, because Congress has no power to abrogate state sovereign immunity if the statute were viewed as only authorized under the Commerce Clause, as opposed to the 14th Amendment, as discussed at § 17.2.4.2 nn.209-32. Similar results have been reached in other cases involving the power of Congress to abrogate state sovereign immunity under Congress’ § 5 enforcement power, where the underlying regulatory legislation is based on the Commerce Clause power or other Article I authority.52 In each of these cases, Justices Stevens, Souter, Ginsburg, and Breyer were in dissent. On the § 5 enforcement issue, they determined whether the legislation was “appropriate” from the perspective of Katzenbach’s and McCulloch’s minimum rational review approach, discussed at § 28.3 nn.31-32, rather than the Boerne v. Flores heightened “congruence and proportionality” approach, discussed at § 28.3 nn.48-50, 56-58.53

In two cases Congress was able to establish that the remedial schemes were “congruent and proportional.” These cases dealt with the Family and Medical Leave Act, and a portion of the American with Disabilities Act regulating access of disabled persons to state courthouses. In determining whether sufficient evidence exists to establish a pattern of state constitutional violations that would justify a congressional response under § 5 of the 14th Amendment, Chief Justice Rehnquist noted in Nevada Department of Human Resources v. Hibbs,54 the Family and Medical Leave Act case, that where “the standard for demonstrating the constitutionality of [government action] is more difficult to meet than our rational-basis test,” such as the intermediate scrutiny used to test cases of gender discrimination, it is “easier for Congress to show a pattern of state constitutional violations.” Even with regard to the mentally or physically disabled under the

51 Id. at 536-37 (Stevens, J., concurring); id. at 545-46 (O’Connor, J., joined by Breyer, J., dissenting); id. at 565-66 (Souter, J., dissenting); id. at 566 (Breyer, J., dissenting).


53 See, e.g., Board of Trustees of the University of Ala. v. Garrett, 531 U.S. 356, 386-89 (2001) (Breyer, J., joined by Stevens, Souter, & Ginsburg, J., dissenting) (citing Katzenbach and McCulloch as the proper approach to determining “appropriate” legislation under § 5).

Americans with Disabilities Act, an area of rational basis scrutiny, as discussed at § 26.4.5, the Court concluded in *Tennessee v. Lane*\textsuperscript{55} that there was sufficient evidence of state lack of compliance with the equal protection rights of disabled persons to equal access to state courthouses that the Americans with Disabilities Act was a “congruent and proportionate” response to state failures to build ramps to their numerous, but often old, county courthouses or otherwise make appropriate accommodations for physically disabled persons. Because *Lane* specifically involved the right of access to courthouses, which is related to the fundamental right of access to courts, discussed at § 26.5.2, *Lane* could be read as a case also involving heightened scrutiny, as in *Hibbs*. While Justice Stevens noted this point in his majority opinion for the Court, the precise holding in *Lane* was not based squarely on this fact, but rather on the “extensive record of disability discrimination” before Congress that made the congressional statute “clear beyond peradventure” an appropriate response to state constitutional violations, no matter what the underlying standard of review would have been.

Although the Court has not definitively resolved the issue, it appears the burden is on Congress to establish the requisite “congruence and proportionality” in these cases, as discussed at § 21.2.4.3 105-12. If so, that would make the *Boerne v. Flores* test a species of third-order rational review, rather than the minimum rational basis standard of *McCulloch* used in *Katzenbach v. Morgan*. This aspect of *Flores* is constitutionally suspect, since it is unclear which of the various nine factors typically used to justify heightened scrutiny, discussed at § 26.1.2.1 nn.57-67, support imposing heightened scrutiny on Congress exercising what all Justices have always recognized as Congress’ constitutional remedial authority under its § 5 enforcement power. It is, however, consistent with the background natural law principle of proportionality, which is used, for example, in the Eighth Amendment “cruel and unusual punishment” analysis, discussed at § 23.2.1.4 nn.207-08.

Numerous commentators have criticized this aspect of *Flores*.\textsuperscript{56} One author has acknowledged that *Flores* represents a higher standard of scrutiny than minimum rational review, and has related it to the “rough proportionality” adopted in *Dolan v. Tigard*, discussed at § 22.2.5.1 nn.97-103, but has argued that this heightened rational review is consistent with *McCulloch*.\textsuperscript{57} One commentator has called the *Flores* approach a species of “strict scrutiny,”\textsuperscript{58} but this understanding is likely the product of a similar misunderstanding among those who call the *Maine v. Taylor* under dormant commerce clause review a “strict scrutiny” approach, discussed at 20.3.2.2.A nn.209-16.


\textsuperscript{58} Melissa Hart, *Conflating Scope of Right with Standard of Review: The Supreme Court’s “Strict Scrutiny” of Congressional Efforts to Enforce the Fourteenth Amendment*, 46 Vill. L. Rev. 1091 (2001).
Without regard to the unconstitutionality of the Religious Freedom Restoration Act (RFRA) as applied to states through § 5 of the 14th Amendment, courts have upheld the RFRA as applied to federal laws as a valid congressional amendment to federal statutes passed under Congress’ Article I, § 8 legislative powers, discussed at § 18.2 and §§ 18.3.1-18.3.10. For example, in Hankins v. Lyght,\(^{59}\) the Second Circuit Court of Appeals considered a suit against a church and its bishop for violating the federal Age Discrimination in Employment Act (ADEA). The suit was brought by a former clergy member who was forced to retire at age 70, pursuant to church policy. The defendants’ argument was that to apply the ADEA would impose a substantial burden on the exercise of their religion and, under the RFRA, this required a trial on whether application of the ADEA could be justified as the least restrictive means to advance a compelling governmental interest. The Second Circuit agreed, holding that since Congress had power to enact the ADEA pursuant to its Commerce Clause powers, it also had the power to amend that statute by passing the RFRA. The RFRA was authorized by the Necessary and Proper Clause because its purpose – to protect First Amendment rights – was legitimate under standard rational basis review. The court also explained that Congress has power to carve out a religious exemption from otherwise neutral, generally applicable laws, and this does not violate the Establishment Clause. This aspect of the case is discussed at § 32.1.2.4 n.79.

\(\text{§ 28.4 \ Congressional Power To Enforce the 15th Amendment}\)

Soon after the 15th Amendment was ratified, Congress provided in the Enforcement Act of 1870 some statutory protection to enforce the 15th Amendment's provisions regarding banning the denial of voting rights on account of race. This Act was an attempt to regulate the violence and intimidation by the Ku Klux Klan regarding voting by blacks in 1868 and 1870. As discussed at § 28.1 nn. 4, 12, this congressional attempt to enforce the 15th Amendment's voting provisions in the face of Ku Klux Klan activity were substantially frustrated at the time. Most of the Act’s provisions were repealed in 1894.\(^{60}\)

Following this period, Congress did little to enforce the provisions of the 15th Amendment banning race discrimination in voting until the instrumentalist era. At that time, a few, modest steps were taken with the Civil Rights Act of 1957, which authorized injunctive relief against public and private interference with the right to vote on the basis of race, and the Civil Rights Act of 1960, which allowed the joinder of states as defendants and gave the federal government more control over voting in areas of systematic discrimination. Title I of the Civil Rights Act of 1964 expedited the hearing of voting cases before three-judge courts and outlawed some of the tactics used to disqualify African-Americans from voting in federal elections, such as discriminatory use of literacy tests. Despite these steps, as the Court noted in South Carolina v. Katzenbach,\(^{61}\) litigation to correct racial discrimination in voting proved ineffective due to the amount of preparation required, and the

\(^{59}\) 441 F.3d 96, 105-07 (2nd Cir. 2006).

\(^{60}\) See generally South Carolina v. Katzenbach, 383 U.S. 301, 310 n.8 (1966).

\(^{61}\) Id. at 310-14.
opportunities for voting officials to delay the proceedings. Even when litigation on these issues succeeded, some states would change to other discriminatory methods not covered by the federal decrees, or in the alternative, local officials would defy or evade the court orders. Other tactics included the closing of registration offices to freeze the voting rolls.

In 1965, the Voting Rights Act of 1965 created several devices to remedy race discrimination in voting and to prevent its reoccurrence, among them preclearance of changes respecting voting in states that had been found guilty of race discrimination in voting practices. In South Carolina v. Katzenbach, 62 the Court upheld this law as appropriate under § 2 of the 15th Amendment, including its ban on literacy tests and a requirement that new voting rules need preclearance and must lack both discriminatory purpose and effect. The Court did not overrule Lassiter v. Northampton County Board, discussed at § 28.1 n.13, which had held in 1959 that a literacy test fair on its face and not used in a discriminatory fashion was constitutional. Instead, the Court said that, despite Lassiter, congressional enforcement can bar state action that perpetuates the effects of past discrimination, even if that action has not been held by the Court to violate the Constitution.

At the same time the Court was also finding greater congressional power to enforce the provisions of the 13th Amendment in Jones v. Alfred H. Mayer Co., discussed at § 28.2 nn.20-25, and the 14th Amendment in Katzenbach v. Morgan, discussed at § 28.3 nn.31-35. In general, these broader views on Congress' enforcement power under the 13th, 14th & 15th Amendments are based on a desire to further policies underlying the Civil War Amendments, i.e., protection of individual rights from state deprivations. Narrower views on Congress' power, more acceptable to non-instrumentalist Justices, give greater weight to concerns regarding the separation of power (that the Court and not Congress ought to decide what the Constitution means), federalism (that local autonomy ought to be respected), and judicial restraint (remedies should be tailored to violations).

For example, in 1980 in City of Rome v. United States, 63 a 6-3 Court upheld application of preclearance provisions and denied bail-out to a city that sought to create several at-large districts although it had not, for at least 17 years, engaged in voter discrimination. Justice Marshall said that when exercising authority under § 2 of the 15th Amendment, as when acting under the Necessary and Proper Clause, Congress can do whatever tends to enforce submission to the prohibitions they contain. Thus, Congress may prohibit state action which, though not itself a violation of the 15th Amendment, perpetuates the effects of prior discrimination in voting or, in jurisdictions which have intentionally discriminated, creates a risk of purposeful discrimination in the future.

Justice Powell, dissenting, said that Congress could abridge the voting rights of citizens only if remedying violations of voting rights. Since the city of Rome had not violated any voting rights, Congress had no authority to continue preclearance requirements until the entire state satisfied bailout standards. Justice Rehnquist, dissenting with Justice Stewart, would have narrowed Morgan

62 Id. at 323-37.

63 446 U.S. 156, 174-78 (1980).
even further. Justice Rehnquist said that Congress can act remedially only to enforce judicially established substantive prohibitions. Here, however, the congressional bar to local action could not genuinely be characterized as a remedial exercise because the proposed electoral changes, unlike literacy bans, do not have a disparate effect traceable to discrimination by government bodies.  

Not surprisingly, as with the cases involving Congress’ enforcement power under the 14th Amendment, discussed at § 28.3 nn.36-59, the line of cases under the 15th Amendment giving Congress broader power to “enforce” have also been cut back in the modern natural law era. For example, recent Supreme Court cases dealing with redistricting have cut back on the instrumentalist-era interpretation of the 15th Amendment. As with the 14th Amendment, where a majority of the Justices have responded to fundamental separation of powers concerns, the Court has reasserted its primary role in determining constitutional violations. It now seems unwilling to allow Congress, through the Voting Rights Act, to determine the constitutional limits of discrimination or affirmative action with respect to voting rights. These cases, which involve whether congressionally mandated redistricting under the Voting Rights Act has violated or threatened to violate the Equal Protection Clause by being based predominantly on racial considerations, are discussed at § 26.2.1.5.

On the other hand, five Justices have been willing to conclude that where the Voting Rights Act is constitutional, as for remedying cases of race discrimination in voting rights by certain states in the past, complying with the Voting Rights Act is a compelling government interest that can be used to justify a race-based affirmation action remedy, which is tested under a strict scrutiny approach.

A new front regarding voting rights is a movement in some states to require some form of voter identification cards for all persons to be eligible to vote. While typically phrased as a concern with preventing fraud in voting, the practical application of such a requirement may be to depress voting turnout by poor or minority voters, the latter concern raising clear 14th and 15th Amendment issues.

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64 Id. at 196-200 (Powell, J., dissenting); id. at 209-21 (Rehnquist, J., joined by Stewart, J., dissenting).


66 See Bush v. Vera, 517 U.S. 952, 990-95 (1996) (O’Connor, J., concurring); id. at 1004-05 (Stevens, J., joined by Ginsburg & Breyer, JJ., dissenting); id. at 1065 (Souter, J., joined by Ginsburg & Breyer, JJ., dissenting).

The First Amendment to the Constitution provides: “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.” This text encompasses three basic protections.

One protection involves the “freedom of speech, or of the press.” The basic doctrine regarding free speech is discussed in Chapter 29. In these cases, the Court applies a different level of scrutiny depending upon whether the speech being regulated: (1) occurs in (a) a public forum or (b) a non-public forum; and (2) whether the regulation is (a) a content-based regulation of speech, focusing on (i) the viewpoint of the speech or (ii) the subject-matter or topic of the speech, or (b) a content-neutral regulation of speech based upon the (i) the secondary effects of the speech or (ii) a concern with only the time, place, or manner of the speech. In a public forum, content-based regulations of speech trigger strict scrutiny, while content-neutral regulations trigger intermediate review. In a non-public forum, viewpoint regulations of speech trigger strict scrutiny, while content-based regulations of subject-matter and content-neutral regulations trigger only minimum rational review.

A number of special categories of speech get their own kind of First Amendment review that is less than standard First Amendment protection. These categories are discussed in Chapter 30. In some of these cases, like for speech advocating unlawful conduct, or for fighting words, obscenity, or indecency involving children, the speech receives no First Amendment protection, except for the prescription of viewpoint discrimination that always triggers strict scrutiny review, as discussed at § 29.4.3.1. For other kinds of speech, like defamatory speech or governmental regulation of the speech of government employees on matters of public concern, a version of heightened rational review is applied. For regulations of broadcast television or radio, or regulations of commercial speech, a version of intermediate scrutiny is applied. In campaign finance cases or speech regulating the choice and election of candidates, a version of strict scrutiny is typically applied.

A second protection of the First Amendment involves the right “to assemble” and “petition the Government for a redress of grievances,” which has been held include a “freedom of association.” These cases involve application of strict scrutiny to substantial burdens on these rights, with less than substantial burdens triggering a version of rational review, as discussed in Chapter 31.

The third protection of the First Amendment involves two clauses dealing with religion: the Establishment Clause and the Free Exercise Clause. These two clauses are discussed in Chapter 32. Under the Establishment Clause, four different tests have been used to determine an “establishment of religion.” They are: (1) whether the government action has as its purpose to advance religion, or a principal or primary effect to advance religion, or creates an excessive entanglement between church and state, the so-called Lemon test; (2) whether an objective observer would think the government action was an endorsement of religion; (3) whether the government action is coercing or proselytizing religion; or (4) whether the government action is an unreasonable accommodation of religion given our Nation’s history and traditions. Under the Free Exercise Clause, government action discriminating against religion triggers strict scrutiny. Non-discriminatory, neutral government regulations burdening religious practices trigger only minimum rational review.
CHAPTER 29: FREEDOM OF SPEECH AND OF THE PRESS

As with the other constitutional doctrines discussed in this book, the First Amendment doctrine regarding “freedom of speech, or of the press,” has undergone a number of transformations in our Nation’s history. In each of these eras, however, the standards of review regarding “freedom of speech” and “of the press” have been the same. Thus, the term “freedom of speech” will be used in this book to encompass the judicial standards relating to both clauses of the First Amendment.

Some general observations about the nature of free speech doctrine prior to the modern era appear at § 29.1. An introduction to free speech doctrine as it exists today appears at § 29.2. Next, detailed discussion of modern free speech doctrine appears at §§ 29.3-29.6. At the end of this discussion, specific examples of cases involving the freedom of the press, as one kind of free speech case, appear at §§ 29.6.2.4-29.6.2.5. As noted in the introduction to Sub-Part Four, cases involving exceptions to modern free speech doctrine for categories of speech that get their own kind of First Amendment review, less than standard First Amendment protection, are discussed in Chapter 30.

§ 29.1 Observations About First Amendment Doctrine Prior to the Modern Era

§ 29.1.1 The Original Natural Law Era

In the original natural law era there were no major Supreme Court decisions granting protection to the freedom of speech. The issue regarding freedom of speech was raised, however, with the passage in 1798 of the Alien and Sedition Acts. Among other things, the Sedition Act criminalized certain forms of politically partisan speech, which the Act termed “sedition.” Compared with existing English law the Act was progressive, in that it did make “truth” a defense to the Act, which was not true of the English sedition laws of the time.1 The notion that truth should be a defense to criminal libel was reflected in colonial attitudes, such as the famous libel trial of John Peter Zenger in 1735 for publishing criticisms of the Governor of New York. In that case, Zenger’s defense counsel, Andrew Hamilton, argued to the jury that they had the power to determine both law and facts, resulting in Zenger’s acquittal based upon jury nullification of the English law where truth was not a defense.2

During the campaign of 1800, a number of Jefferson partisans were arrested under the Act, and Jefferson and his allies used the passage and enforcement of the Act to brand President Adams and his administration as hostile to the rights of free speech. After Jefferson’s election in 1800, the Alien and Sedition Acts were repealed, in part because of the understanding of Jefferson and his supporters that the Act constituted an infringement on the rights of free speech, even though truth was a defense

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1 England did not establish a defense of truth until 1843. See Robert Nowak & Ronald Rotunda, Constitutional Law 1145 n.3 (7th ed. 2004).

2 See generally Michael J. Saks, Judicial Nullification, 68 Ind. L.J. 1281, 1284-89 (1993). The role of juries in determining law, as well as facts, in colonial and post-revolutionary America, a power lost in theory during the first half of the 19th century, but still occasionally done in practice, particularly jury nullification in criminal trials, is discussed at § 21.2.4.4.
under the Act. As the Supreme Court noted many years later in *New York Times Co. v. Sullivan*:

Although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history. Fines levied in its prosecution were repaid by Act of Congress on the ground that it was unconstitutional. . . . Calhoun, reporting to the Senate on February 4, 1836, assumed that its invalidity was a matter “which no one now doubts.” . . . Jefferson, as President, pardoned those who had been convicted and sentenced under the Act. . . . The invalidity of the Act has also been assumed by Justices of this Court. . . . These views reflect a broad consensus that the Act, because of the restraint it imposed upon criticism of government and public officials, was inconsistent with the First Amendment.3

§ 29.1.2 The Formalist Era

Despite this general understanding of the First Amendment during the original natural law era, the first “freedom of speech” cases of the formalist era downplayed this legislative and executive practice surrounding the Alien and Sedition Acts. Instead, following the formalist predisposition toward literal interpretation, the cases concluded that the First Amendment was directed primarily at the literal meaning of “free” speech, that is, the right to speak freely and not be limited by prior restraints.

For example, in *Patterson v. Colorado*,4 a 1907 case, the Court focused on literal text, as well as 18th century historical sources specifically addressing the freedom of speech, such as Blackstone, to conclude that protection against prior restraints was the full extent of the Free Speech Clause of the First Amendment. Leaving undecided whether the 14th Amendment Due Process Clause incorporated the First Amendment, thus making it applicable against the states, Justice Holmes wrote for the Court in *Patterson* that such incorporation would make no difference in the power of a state trial court to impose punishment for contempt on a publisher who had questioned the judge’s reasoning in a pending case, so long as the judge’s determination that the statements tended to obstruct the administration of justice was not an arbitrary pretense or an arbitrary punishment.5 Justifying that conclusion, Justice Holmes began by saying, “In the first place, the main purpose of such constitutional provisions is ‘to prevent all such previous restraints upon publications as had been practiced by other governments,’ and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare.”6

Even in applying this doctrine, the initial formalist-era cases gave First Amendment protection against prior restraints a limited reading. For example, the first Supreme Court case dealing with government power to regulate speech on public grounds was *Davis v. Commonwealth of*

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4 205 U.S. 454 (1907).

5 *Id.* at 461-62.

6 *Id.* at 462.
Massachusetts,\textsuperscript{7} decided in 1897. The Court held that forbidding speech absolutely, or on condition of obtaining a license, was no more an infringement of the rights of a member of the public “than for the owner of a private house to forbid it in his house.”\textsuperscript{8} Thus, the Davis Court refused to strike down a permit requirement for speaking on a highway or public park. Further, the Court in Davis was unconcerned that the law imposed a prior restraint in terms that gave the mayor unbounded discretion to grant or deny applications.

Between 1909 and 1917, various social groups, and most prominently unions, and in particular the International Workers of the World, the Wobblies, pressed for greater free speech rights than mere limitation on prior restraints. As noted by Professor Bradley Bobertz:

In this turbulent atmosphere, efforts to understand the meaning and function of free speech took on greater urgency. The proceedings of the U.S. Commission on Industrial Relations provide one illuminating source of discussion about free speech. . . . The hearings of the Commission, published in eleven volumes in 1916, contain tens of thousands of pages of testimony from an extraordinarily wide range of witnesses, including Clarence Darrow, Louis Brandeis, Mother Jones, Theodore Schroeder, William "Big Bill" Haywood, scores of ordinary workers, and the celebrated icons of capitalism, including Daniel Guggenheim, George Walbridge Perkins (of U.S. Steel), Henry Ford, and Andrew Carnegie. . . .

One witness above all others impressed the Commission with his approach to controlling protests. Arthur Woods, a longtime friend of Theodore Roosevelt, had taken over as New York City Police Commissioner in April 1914, following weeks of violent confrontations between police and protesters. Shortly before Woods took office, more than a thousand protesters had clashed with police after a march up Fifth Avenue, during which several innocent bystanders were injured. Woods testified that, immediately upon taking office, he "quite changed the policy, the methods, and the orders given to the police" in dealing with protesters. Anticipating another large meeting in Union Square the next Saturday, Woods ordered the police "to afford to the assemblage its full rights; [and] to interfere only if the traffic was seriously impeded, and if incitement to immediate violence was present." As a result of the new hands-off policy, the demonstration did not lead to bloodshed and the police made no arrests. . . .

In the Commission's final report to Congress, it praised Woods's methods for dealing with public dissent and criticized those of other police authorities. "One of the greatest sources of social unrest and bitterness has been the attitude of the police toward public speaking," the Commission reported. Public officials commonly reacted to radical speech by attempting to suppress it. "There could be no greater error" than using force in this manner, the Commission concluded, not only because it clashed with the principles of a democratic society, but also because it was ultimately self-defeating. As the Commission expressed this idea, "it is the lesson of history that attempts to suppress ideas [result] only in their more rapid propagation." In short, the Commission concluded that authorities could restrain radical action more easily

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\textsuperscript{7} 167 U.S. 43 (1897).
\textsuperscript{8} Id. at 47.
\end{flushleft}
by allowing free speech.

The idea that suppression of radical speech tended to intensify popular dissent continued to receive attention in the years leading up to America's entry into the European war. As much as any other person, Arthur Woods was a national "expert" on the subject. But Woods's tolerant approach to dissent was by no means the dominant one in the mid-1910s. The specter of an increasingly fanatical left gathering strength under the banner of "free speech" prompted many to argue that a firm hand should silence radical views for the sake of domestic security. This attitude manifested itself with special force against European immigrants, who were disparagingly but commonly referred to as "hyphenated Americans." In his annual address to Congress in 1915, President Woodrow Wilson warned that there were some immigrants "born under other flags but welcomed under our generous naturalization laws to the full freedom and opportunity of America, who have poured the poison of disloyalty into the very arteries of our national life." "Such creatures of passion, disloyalty, and anarchy," Wilson declared, "must be crushed out."

America's entry into the European conflict in April 1917 further inflamed these nativistic impulses.9

By 1919, the formalist Court reflected this mix of social attitudes by granting greater protection to freedom of speech than a mere concern with prior restraints, but adopting a limited doctrine deferential to government attempts to deal with perceived threats to national security. In 1919, the formalist Court invented the clear and present danger test in *Schenck v. United States*.10 In the first of a series of cases in which defendants were prosecuted for having advocated unlawful actions, Justice Holmes wrote for a unanimous Court that upheld a federal conviction for publications intended to encourage draft evasion. Holmes admitted that in ordinary times the defendant could have said all that was said in his circular, but he added that the character of every act depends upon the circumstances. At this time, the Nation was at war. Justice Holmes said:

> The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance would not be endured so long as men fight and that no Court could regard them as protected by any constitutional right.11

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10 249 U.S. 47 (1919).

11 Id. at 52.
Justice Holmes and Brandeis first moved away from the majority later that year in Abrams v. United States,12 where the Court affirmed a conviction for publishing an attempt to defeat the war plans of the United States. Justice Holmes, dissenting, joined by Justice Brandeis, said that the expression of opinions we loath should not be checked unless there is an emergency because they imminently threaten immediate interference with the law. Turning to the facts, he added that the publication in question was intended to stop American intervention in Russia, rather than to impede a war.13 This opinion reflected an evolution in Holmes’ thinking about free speech from his more restrictive interpretation in Schenck to his broader view in Abrams, a change typically attributed to Holmes’ interactions in the intervening months with Justice Louis Brandies, Judge Learned Hand, and Harvard Law School Professor Zechariah Chafee, including Holmes’ rejection of Blackstone’s views as an authoritative account of the Framers’ intent regarding free speech.14 Turning to considering the purpose behind the free speech clause, Holmes observed:

When man have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas – that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.15

The classic statements of this view appear in 17th century John Milton’s Areopagitica, wherein it is stated, “let her [truth] and falsehood grapple; whoever knew truth put to the worse in a free and open encounter,” and in 19th century philosopher John Stuart Mill’s On Liberty, wherein it is stated, “[If] any opinion is compelled to silence, that opinion for aught we can certainly know, be true. To deny this is to assume our own infallibility.” Of course, reflecting the concrete limitation of his thinking in the 17th century, like the concrete limitations of the framing and ratifying generation on issues such as slavery and women’s rights, discussed at § 15.4.1 nn.51-56, Milton was not prepared to grant free speech rights for “popery, open superstition, impiety, or evil.”16

In Gitlow v. People of New York,17 the Court “assumed” for the first time, and it has continued to hold ever since, that the rights of free speech protected by the First Amendment are part of the fundamental personal rights and liberties protected by the Due Process Clause of the 14th Amendment from impairment by the states. However, the majority applied only rational basis

12 250 U.S. 616 (1919).
13 Id. at 626-28 (Holmes, J., joined by Brandeis, J., dissenting).
15 250 U.S. at 630.
16 These passages from Milton and Mill are cited in Nowak & Rotunda, supra note 1, at 1148.
17 268 U.S. 652, 666 (1925).
scrutiny in upholding New York’s criminal anarchy statute because the legislature had reasonably
decided that there was a danger in advocating overthrow of the government by force and violence.
Justices Holmes and Brandeis dissented, saying that the clear and present danger test should be
applied in all cases and it was manifest that there was no present danger of an attempt to overthrow
the government in sixteen thousand copies of a “Manifesto” published in a magazine entitled “The
Revolutionary Age,” there being no evidence of any “present conflagration” resulting from the
publication and circulation of the Manifesto. The majority responded by saying that a single
revolutionary spark may kindle a fire that may sweep into a destructive conflagration.

The debate on the Court continued in Whitney v. California,\textsuperscript{18} decided in 1927. The majority
affirmed a conviction for organizing a group dedicated to teaching and abetting criminal
syndicalism. The majority said that the power to punish such behavior was beyond question, once
the state legislature had made a determination that it created a danger to the public peace. Justice
Brandeis, joined by Holmes, said that the Court should set a standard for determining when a danger
should be deemed clear, and added that there should be a reasonable ground to fear that a serious
evil is imminent and would occur if free speech is practiced. Although Brandeis and Holmes thus
disagreed with the reasoning of the majority, they concurred because the defendant, Charlotte Anita
Whitney, had not contended that there was no clear and present danger.\textsuperscript{19}

In his concurrence, Justice Brandeis grounded free speech doctrine even more explicitly than
Holmes in a concern with ensuring robust political debate. This reflects the Holmesian position
of deference to a well-functioning government, but Court scrutiny to ensure a well-functioning
democratic process, a position made popular later by John Hart Ely, as discussed at § 10.2.1.2 n.18.
Justice Brandeis stated in Whitney:

Those who won our independence believed that the final end of the state was to make men free
to develop their faculties, and that in its government the deliberative forces should prevail over
the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be
the secret of happiness and courage to be the secret of liberty. They believed that freedom to
think as you will and to speak as you think are means indispensable to the discovery and spread
of political truth; that without free speech and assembly discussion would be futile; that with
them, discussion affords ordinarily adequate protection against the dissemination of noxious
document; that the greatest menace to freedom is an inert people; that public discussion is a
political duty; and that this should be a fundamental principle of the American government.\textsuperscript{20}

The most elaborate theory to ground free speech doctrine in this concern with political speech and
protecting the “democratic process” is that advanced by Alexander Meiklejohn.\textsuperscript{21} This theory also
supports a view that a “central value of free press, speech, and assembly lies in checking the abuse

\textsuperscript{18} 274 U.S. 357 (1927).

\textsuperscript{19} Id. at 379-80 (Brandeis, J., joined by Holmes, J., concurring).

\textsuperscript{20} Id. at 375.

\textsuperscript{21} Alexander Meiklejohn, Free Speech and Its Relation to Self-Government (1948).
of power by government officials.”

Brandeis also noted a third reason for protection of free speech. Reflecting the views of the 1916 Commission on Industrial Relations, Brandeis observed:

order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. . . . Compare Thomas Jefferson: “We have nothing to fear from the demoralizing reasonings of some, if others are left free to demonstrate their errors and especially when the law stands ready to punish the first criminal act produced by the false reasonings; these are safer corrections than the conscience of the judge.” Quoted by Charles A. Beard, The Nation, July 7, 1926, Vol. 123, P. 8.

The upshot of this series of cases is that a majority of the Court during the formalist era allowed both state and federal governments great freedom to rein in speech and association. At the same time, the Court was confining federal power by a narrow interpretation of the Commerce Clause, discussed at § 18.2.2, and a broad interpretation of Substantive Due Process to include liberty of contract, discussed at § 27.3.2.1. In addition, the Court was confining state regulatory power by use of the Dormant Commerce Clause doctrine, discussed at § 20.3.2, and the broad interpretation of Substantive Due Process, discussed at § 27.3.2.1. Freedom of speech was thus given far less weight by the conservative formalist Court than implementing what was thought to be fundamental economic principles, i.e., that prosperity results from freedom to contract in the market, with federal and state governments having their own independent, but limited, spheres of regulation. Of course, Holmes disagreed that this theory was hard-wired into the Constitution. Dissenting in *Lochner v. New York*, Holmes stated, “The 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*.”

§ 29.1.3  The Holmesian Era

When the Court in 1937 began to repudiate its previous holdings on Substantive Due Process, discussed at § 27.3.3, and the Commerce Clause, discussed at § 18.2.3, it also began to revisit its previous perspectives on the importance of free speech. For example, in 1937, a unanimous Court reversed a conviction under Oregon’s criminal syndicalism law in *DeJonge v. Oregon* where the charge was that the defendant had assisted in the conduct of a public meeting held under auspices of the Communist Party. Describing what was protected by the First Amendment, Chief Justice


23  *Whitney*, 274 U.S. at 375 & n.3.

24  198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

Hughes wrote that “the right is one that cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all civil and political institutions – principles which the Fourteenth Amendment embodies in the general terms of its due process clause.”

A change in determining the power of government as property owner began in 1939 with *Hague v. Committee for Industrial Organization.*26 The Court there held that the right of individual citizens to use city streets and parks for communication of views on national questions is part of the privileges and immunities of citizens of the United States that are protected by the Privileges or Immunities Clause of the 14th Amendment. The Court held that an ordinance requiring a permit to use city streets and parks for these purposes was void on its face. The reason was that “wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.” Justice Stone, concurring, would have placed the decision on the Due Process Clause of the 14th Amendment, so that the relevant rights would be those of all persons and not just citizens.27 Subsequent cases have adopted this viewpoint.

Shortly after *Hague*, the Court decided *Schneider v. State.*28 In *Schneider*, the Court moderated the 1897 holding in *Davis v. Commonwealth* by requiring sufficient justification for barring speech in traditional public forums, such as streets and parks. Speech regulations applicable to a non-public forum, whether content-based or content-neutral, were given a form of rational basis scrutiny, i.e., they must be reasonable, and they may not involve viewpoint discrimination. Thus, the *Davis* form of discretion was no longer allowed. Specifically, the Court held that four ordinances were invalid on their face that did not allow any person to distribute a handbill or advertisement to pedestrians on the street or on their cars, or to circulate any handbill on any sidewalk, wharf, boat landing, or dock. The courts below had held that the motive of the legislature was to prevent littering on the streets. The Court replied that "the purpose to keep the streets clean and of good appearance is insufficient to justify an ordinance which prohibits a person rightfully on a public street from handing literature to one willing to receive it." This was so even if the persons who receive the literature throw it on the street. The Court suggested that cities could punish those who actually throw papers on the street. The case suggested that whenever the government seeks to bar speech on government-owned public property it must bear the burden of justifying what it has done.

The impact on the Court of Justice Holmes and Brandeis’ ideas was most apparent in the 1941 case of *Bridges v. California.*29 Justice Black there wrote for the Court, “What finally emerges from the ‘clear and present’ danger cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished.” Applying this principle, the Court reversed a conviction for contempt of court where the defendants had published opinions about a pending case that arguably had a reasonable tendency to interfere with

26 307 U.S. 496, 515 (1939).

27 *Id.* at 527-29 (Stone, J., concurring in the judgment).


29 314 U.S. 252, 263, 278 (1941).
the orderly administration of justice. The facts were that the Los Angeles Times had written that
the judge in a pending case would be making a serious mistake if he granted probation to the
defendants. Harry Bridges, another defendant, had sent a telegram, while a motion for a new trial
was pending, in which Bridges said that enforcement of the judge’s decision would tie up the Pacific
Coast with strikes. Justice Black said that the judge would have already been aware of these
possibilities. If he was not intimidated by the facts themselves, the most explicit statement of them
could not have sidetracked the course of justice. Justice Black said that this was not enough to
justify a restriction of free expression, although he also said that to speak of such a “reasonable
tendency” was an exaggeration in describing the facts of this case.

In 1951, the case of Kunz v. New York\(^30\) held that a content-based law could not grant discretionary
power to withhold a permit to speak on the streets and sidewalks. The Court there invalidated on
its face a New York ordinance that made it unlawful to hold public worship proceedings on the
streets without first obtaining a permit, there being no mention in the ordinance of reasons for which
such a permit application could be refused. Chief Justice Vinson explained that an ordinance which
gives an administrative official discretionary power to control in advance the right of citizens to
speak on the streets of New York, without appropriate standards to guide his action, is
unconstitutional on its face as a prior restraint on the exercise of First Amendment rights. The Chief
Justice did not state any criteria regarding what standards in the ordinance might have made it valid.
Nor did he refer to whether the law should be considered content-based or content-neutral.

Justice Jackson, dissenting, sought to preserve part of the older perspective found in Davis. He
began by stating that the applicant was turned down for the reason that there was no assurance that
he wanted the permit for uses different from what he had done under a previous permit, \(i.e.,\) to make
scurrilous attacks on Catholics and Jews. In his second point, Jackson distinguished the situation
from one in which Kunz wanted to speak in his own pulpit or hall. On the streets, people become,
in a sense, a captive audience, and there is a genuine likelihood that someone will get hurt when
Kunz makes his insults, such as suggesting that all Jews should have been burned in Nazi
incinerasors. Third, Justice Jackson thought that the Court should have considered all the facts in
the case, as did the New York courts, which said that a permit need not be issued when the applicant
claims a constitutional right to incite riots. He added that it was hypocritical for the Court to strike
down a local law on its face for want of standards when the Court itself had no standards. He said
that "the vulnerability of various forms of communication to community control must be
proportioned to their impact upon other community interests."\(^31\)

The Court has never adopted the perspective evidenced in Justice Jackson’s dissent except insofar
as he expressed a concern about not allowing a speaker to incite a riot. The same day Kunz was
decided, the Court held in Feiner v. New York\(^32\) that a speaker had been constitutionally convicted
of disorderly conduct where his speech had created what the majority considered to be an imminence

\(^{30}\) 340 U.S. 290 (1951). A similar case decided the same day was Niemotko v. Maryland, 340
U.S. 268 (1951).

\(^{31}\) Id. at 307-08 (Jackson, J., dissenting).

of disorder, and where he had defied police officers who requested that he stop speaking in order to avoid what Chief Justice Vinson said was “incitement to riot.” To show an imminence of disorder, the Court emphasized that the crowd was restless; there was some pushing, shoving, and milling around; and at least one person threatened violence if the police did not act. Here, the Court said, the speaker had passed the bounds of argument and was undertaking an incitement to riot.

Apparently from concern that content-based regulations might be held to trigger higher than rational basis review, the city contended that there was no intent here to suppress speech because of its content. Instead, the city said that its purposes were to prevent a breach of the peace and prevent injury to pedestrians. Agreeing, the lower courts had found that the arrests were motivated solely by a proper concern for the preservation of order and the protection of the general welfare. The Chief Justice said that these findings were supported by the record and he added that there was no evidence that the police actions were a cover for suppression of petitioner's views and opinions. Petitioner had been arrested for the reaction generated by his speech. Again, the Court did not state any general standards of review for dealing with content-based regulations of speech by government, either as sovereign or as the owner of property.33

Justice Black, dissenting, said the evidence did not show any imminence of riot or uncontrollable disorder. Here there was only the normal behavior of an outdoor crowd. The man who mentioned violence was accompanied by a wife and two children and was never close enough to carry out the threat. If the police can ever interfere with a lawful public speaker to preserve order, they first must make all reasonable efforts to protect the speaker. Justice Black said it was unfortunate that the three cases being decided that day – Kunz, Niemotko, and Feiner – meant when read together that while previous restraints probably cannot be imposed on an unpopular speaker, the police have discretion to silence him as soon as the customary hostility to his views develop. Justices Douglas and Minton also dissented in Feiner on the ground that when “unpopular causes are sponsored from the public platform, there will commonly be mutterings and unrest and heckling from the crowd. When a speaker mounts a platform it is not unusual to find him resorting to exaggeration, to vilification of ideas and men, to the making of false charges. But those extravagances . . . do not justify penalizing the speaker by depriving him of the platform or by punishing him for his conduct.”34

Despite the nation-wide concern with communism that swept through the country in the early 1950s,35 Justices Black and Douglas did not retreat from the views they expressed in Bridges and Feiner. However, a majority of the Court was unwilling to give a similar unqualified endorsement to vigorous application of the “clear and present danger” test when deciding Dennis v. United States.36 In that case the Court upheld an application of the Smith Act which made it unlawful

33  Id. at 317-21.

34  Id. at 328-29 (Black, J., dissenting); id. at 331 (Douglas, J., joined by Minton, J., dissenting).


36  341 U.S. 494, 510 (1951), citing United States v. Dennis, 183 F.2d 201, 212 (2d Cir. 1950) (Hand, C.J., opinion).
knowingly or wilfully to advocate destroying any government in the United States by force or violence. The plurality opinion of Chief Justice Vinson, joined by Justices Reed, Burton, and Minton, said that the situation with which Justices Brandeis and Holmes were concerned in *Gitlow* was a comparatively isolated event. Here, however, the government was dealing with a highly organized conspiracy, with rigidly disciplined members subject to call when leaders felt the time was ripe, all in the context of world crisis after crises. For that situation the plurality accepted the interpretation of clear and present danger adopted in the court below by Chief Judge Learned Hand, namely, “In each case [courts] must ask whether the gravity of the ‘evil,’ discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.” It should be noted that while Judge Hand’s views on criminal libel and free speech were relatively progressive back in 1917, when he first applied this balancing test in *Masses Pub. Co. v. Patten*, they had become timid by 1950.

Although this was a watered-down version of the clear and present danger test, the plurality agreed with Holmes’ position in *Gitlow* that the test must be applied by courts in every First Amendment case. In terms of who decides if a “clear and present danger” exists, the plurality noted, “The doctrine that there must be a clear and present danger of a substantive evil that Congress has a right to prevent is a judicial rule to be applied as a matter of law by the Courts.” Justices Black and Douglas disagreed with this view in dissent, stating that the question should be one for a jury.

Concurring in *Dennis*, Justice Jackson said that he would save the clear and present danger test, unmodified, for application as a “rule of reason” in the kind of case for which it was devised, *i.e.*, street corner speech or a few incendiary pamphlets. Similarly reflecting a Holmesian deference to government view, Justice Frankfurter, concurring in the judgment, noted, “Primary responsibility for adjusting the interests which compete in the situation before us of necessity belongs to the Congress.” This issue was not revisited during the Holmesian era.

### § 29.1.4 The Instrumentalist Era

The instrumentalist Court dramatically changed the legal landscape regarding the freedom of speech. As in other areas, such as Due Process and Equal Protection, the Court from 1954 to 1986 tended to protect non-economic interests from government regulation, in this context by granting broad free speech rights, particularly to the poor and dissenters from majority orthodoxy. As phrased in 1972 in *Police Department of Chicago v. Mosley*, the instrumentalist Court went far beyond the clear and present danger test, and stated, “[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its

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37 244 F. 535 (S.D.N.Y.), rev’d 246 F. 24 (2nd Cir. 1917).

38 341 U.S. at 513-14; *id* at 580 (Black, J., dissenting); *id* at 587 (Douglas, J., dissenting).

39 *Id.* at 897 (Jackson, J., concurring); *id* at 525 (Frankfurter, J., concurring in the judgment).

40 408 U.S. 92, 95 (1972).
content.” As phrased in 1984 in Regan v. Time, Inc., 41 “Regulations which permit the Government to discriminate on the basis of content of the message cannot be tolerated under the First Amendment.”

During this era, Justice Black came to embrace a categorical view of the freedom of speech. Moving beyond a vigorous use of the Holmesian clear and present danger test that he had applied in the 1940s and 1950s, liberal formalist Justice Black came to embrace a liberal formalist view. This view is much more protective of free speech than the conservative formalist view of the formalist era, which was based on a literal reading of Blackstone, with a limited exception for speech that was not a “clear and present danger.” Justice Black concluded that the literal text of the First Amendment, which provides that “Congress shall make no law abridging the freedom of speech,” should be read as an absolute protection for freedom of speech to which no balancing of interests should be applied. As stated by Justice Black in 1961 in Konigsberg v. State Bar of California, 42 in a dissent joined by Chief Justice Warren and Justice Douglas, “[T]he First Amendment’s unequivocal command that there shall be no abridgement of the rights of free speech and assembly shows that the men who drafted our Bill of Rights did all the ‘balancing’ that was to be done in this field.”

In contrast, the position of Holmesian Justice Harlan in Konigsberg, which has commanded a majority of Holmesian, natural law, and instrumentalist Justices on the Supreme Court in the modern era, is that the First Amendment always calls for a balancing test – the differences among the Justices relating to which balancing test should be applied in different circumstances. As Justice Harlan stated for the majority in Konigsberg, “[W]e reject the view that the freedom of speech and association, as protected by the First and Fourteenth Amendments, are ‘absolute.’” 43 Among other cases, Justice Harlan cited Schenck v. United States, 44 where Justice Holmes, for the Court, had noted that “the most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.” Rejecting the absolutist approach of Justice Black, modern First Amendment doctrine has borrowed the Equal Protection and Substantive Due Process standards of review of strict scrutiny, intermediate scrutiny, and rational review to determine in individual cases whether or not a government regulation violates the freedom of speech.

In applying these balancing tests, instrumentalist jurists have noted three additional reasons to support a vigorous First Amendment doctrine, in addition to the Commission on Industrial Relations’ view that radical action is best restrained by granting free speech, discussed at § 29.1.2 nn.9 & 23; the “marketplace of ideas” metaphor of Holmes in Abrams, discussed at § 29.1.2 nn.15-16; and the advancement of political democracy reason of Brandeis in Whitney, discussed at § 29.1.2

43 Id. at 49-51.
44 249 U.S. 47, 52 (1919).


§ 29.2  Introduction to the Structure of Free Speech Doctrine in the Modern Era

Reflecting the modern natural law predisposition to follow precedent, very few instrumentalist-era precedents regarding the First Amendment have been overturned or limited. The doctrine of the modern natural law era reflects the relatively robust protection of the instrumentalist era, embracing all six reasons in favor of protecting free speech, discussed at § 29.1.4, pages 1352-1353. Consistent with Court precedents, the Court continues to apply to same standards of review to free speech and free press cases. Consistent with the more analytic predisposition of natural law interpretation than under Holmesian or instrumentalist interpretation, noted at § 2.4 & Table 2.4, the Court has been more precise about the relevant standards of review applied in free speech cases in the modern era.

As with Equal Protection and Substantive Due Process doctrine, the preliminary decision that must be made in First Amendment cases today is what level of review to apply. In reaching this decision, the first question to ask is whether the case involves a governmental regulation of speech, in which case standard First Amendment doctrine applies, or involves either governmental regulation of conduct,49 discussed at § 29.3.1, or governmental spending on speech,50 discussed at § 29.3.2, in which case standard First Amendment doctrine does not apply.

If resolution of this first question indicates that standard First Amendment doctrine does apply, the next question to ask is whether the speech is regarded as fully protected (e.g., literary, artistic, political or scientific speech, or symbolic speech), or is regarded as not fully protected. Fully protected speech is naturally given full First Amendment protection. Symbolic speech exists where conduct is not “pure speech,” such as talking, writing, or wearing informative clothing, but is nevertheless intended to be expressive and conveys a message, as discussed at § 29.3.1 nn.71-74. Symbolic speech is given the same protection as regular fully-protected speech under the Court’s First Amendment free speech doctrine.

In the case of unprotected speech (e.g., fighting words51 or obscene speech52), or somewhat protected speech (e.g., speech regulations imposed upon government employees,53 or government regulation of commercial speech54), full First Amendment protection is not given. The First Amendment standards for speech that is fully protected are discussed at §§ 29.4-29.6. The doctrines for speech that receive less than full First Amendment protection are discussed in Chapter 30.


51 See, e.g., Cohen v. California, 403 U.S. 15 (1971), discussed at § 30.1.2 n.58.

52 See, e.g., Miller v. California, 413 U.S. 15 (1973), discussed at § 30.1.3 nn.84-94.

53 See, e.g., Pickering v. Board of Educ. of Will County, Illinois, 391 U.S. 563 (1968), discussed at § 30.2.2.1 nn.174-77.

54 See, e.g., Central Hudson Gas & Electric Corp. v. Public Service Comm’n, 447 U.S. 557 (1980), discussed at § 30.3.2 nn.228-30.
The third question asked under First Amendment review is whether the regulation of speech is content-based or content-neutral, and if content-based, whether the regulation involves viewpoint discrimination (i.e., the regulation is triggered depending on which side of a topic the individual supports), or subject-matter discrimination (i.e., the regulation is triggered if a topic or subject-matter is discussed without regard to the person’s views on that subject-matter). This issue is discussed at § 29.4.

The fourth question asked is whether the speech being regulated occurs on private property or in a public forum, or in a non-public forum owned by the government. Naturally, government attempts to regulate speech on individuals’ private property or on public forums are much more difficult to justify, and typically trigger a heightened standard of scrutiny, than government regulations on property owned by the government that is not generally open to the public. This issue is discussed at § 29.5.

In terms of standard First Amendment review today, regulations of fully protected speech that involve viewpoint discrimination are always given strict scrutiny review, no matter where the speech occurs. Similarly, strict scrutiny applies in a public forum or on private property for content-based, subject-matter regulations of speech which do not involve viewpoint discrimination. In contrast, regulations of speech in a public forum or on private property that are content-neutral are given only intermediate review. This intermediate standard was stated in *Ward v. Rock Against Racism*,\(^{55}\) where Justice Kennedy said for the Court, “Our cases make clear, however, that even in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions ‘are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of information.’” In a non-public forum, content-based, subject-matter regulations of speech, or content-neutral regulations of speech, are given only some version of rational review. The Court has not been clear whether this is minimum rationality review, such as under the Equal Protection Clause, as discussed at § 26.1.1.1, or 2nd-order reasonableness balancing, as discussed at § 7.2.1 text following n.42, and summarized in Table 7.2. As a lesser kind of burden on the fundamental right of free speech, it probably should be 2nd-order review, as suggested by the discussion at § 21.2.3 nn.64-73. Application of these standards to areas of First Amendment review appear at § 29.5.1, § 29.5.2, § 29.6.2.2, and § 30.2.1.2. This discussion indicates that the standard language in these cases refers to the regulation having to be “reasonable,” suggesting the 2nd-order level of rational review, rather than mere minimum rationality review.

As with the standard of review under the Equal Protection Clause and Substantive Due Process doctrine, the governmental regulation is presumptively unconstitutional for regulations that involve strict scrutiny or intermediate review, reflecting the fact that the government has the burden of justifying such regulations.\(^{56}\) Under minimum rational review or 2nd-order rational review, the challenger has the burden of proving that the regulation is unconstitutional.


Table 29.2 may help make these levels of review clearer:

<table>
<thead>
<tr>
<th>Public Forum or Private Property</th>
<th>Non-Public Forum Owned by the Government</th>
</tr>
</thead>
<tbody>
<tr>
<td>Content-Based Regulation of Speech</td>
<td></td>
</tr>
<tr>
<td>Viewpoint Discrimination</td>
<td>Strict Scrutiny</td>
</tr>
<tr>
<td></td>
<td>Strict Scrutiny</td>
</tr>
<tr>
<td>Subject-Matter Discrimination</td>
<td>Strict Scrutiny</td>
</tr>
<tr>
<td></td>
<td>Rational Review*</td>
</tr>
<tr>
<td>Content-Neutral Regulation of Speech</td>
<td>Intermediate Review</td>
</tr>
<tr>
<td></td>
<td>Rational Review*</td>
</tr>
</tbody>
</table>

Currently unclear whether this is minimum rationality review, or 2nd-order rational review, as discussed above at § 29.2 text following n.55.

Three cases provide good examples of this modern free speech doctrine in terms of the levels of scrutiny in Equal Protection and Substantive Due Process cases. In 1991, in *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, the Court adopted a strict scrutiny approach to content-based regulations of speech. As the Court stated in *Simon & Schuster*, to justify its “content-based” regulation of speech “the State must show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end.” Concurring in the case, Justice Kennedy noted that this adoption of the Equal Protection strict scrutiny approach in a First Amendment case was not required by prior precedents, and that while “the compelling interest inquiry has found its way into our First Amendment jurisprudence of late . . . the Court appears to have adopted this formulation in First Amendment cases by accident rather than as the result of a considered judgment.” In contrast to this approach, Justice Kennedy preferred Justice Black’s absolutist approach, which would prevent the state from any content-based regulation of fully-protected speech, without regard to a compelling governmental interest analysis. The majority of the Court has consistently rejected Justice Kennedy’s views, however, as indicated by the 2002 case of *Republican Party of Minnesota v. White*, where the other Justices on the Court applied a strict scrutiny analysis to a content-based regulation of speech, again over Justice Kennedy’s objection.

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58 *Id.* at 124-25 (Kennedy, J., concurring).

59 536 U.S. 765, 774-75 (2002); *id.* at 793 (Kennedy, J., concurring) (“I adhere to my view, . . . that content-based speech restrictions that do not fall within any traditional exception should be invalidated without any inquiry into narrow tailoring or compelling governmental interests.”).
The use of intermediate scrutiny for content-neutral regulations of symbolic speech or reasonable time, place, or manner regulations of speech is best illustrated in the 1989 case of *Ward v. Rock Against Racism*.

Previously, in 1968 in *United States v. O'Brien*, the Court had upheld the conviction of a protestor who had violated federal law by burning his draft card on the steps of a courthouse as part of a demonstration against the Vietnam war. The crime defined by statute was destroying a draft certificate. Chief Justice Warren stated: “[A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression, and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.”

The *O'Brien* principle, although framed in the context of a regulation applied by the sovereign to a content-neutral regulation of symbolic speech, was extended in 1984 by *Members of the City Council of Los Angeles v. Taxpayers for Vincent* to time, place, or manner regulations. The Court upheld a Los Angeles ordinance that prohibited the posting of signs on public property. The challengers were supporters of a candidate for the City Council whose posters were removed from utility poles by city employees. To justify the ordinance, the city said the law protected its interests in beauty, the safety of workers who must climb poles, and eliminating traffic hazards. In determining the constitutionality of this restriction on speech, the Court first pointed out that the ordinance was a viewpoint-neutral regulation of a certain manner of communication. Thus, the relevant standard for review was set forth in *United States v. O'Brien*, and Justice Stevens quoted Chief Justice Warren’s words as set out above. In both these cases, however, the *O'Brien* test was not explicitly phrased as an intermediate standard of review between strict scrutiny and rational review.

In *Ward*, the Court defined the *O'Brien* test more explicitly in intermediate terms. The Court held in *Ward* that New York City did not deprive musicians of First Amendment rights by insisting that bandshell performers in Central Park use sound-amplification equipment and a sound technician provided by the city. For the Court, Justice Kennedy first held that the regulation was content-neutral because two of its justifications (controlling noise in the park and avoiding undue intrusion into residential areas) had nothing to do with content. Regarding the third, *i.e.*, the city's interest in ensuring the quality of sound at park events, the challengers argued that the city was seeking to assert artistic control. Justice Kennedy replied that the city requires its technician to defer to the wishes of event sponsors concerning sound mix, and the record indicates that the city's equipment and sound technician could meet all of the standards requested by the performers.

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62 *Id.* at 377.


64 *Ward*, 491 U.S. at 791-96.
Having concluded that the regulation was indeed a content-neutral time, place, or manner regulation rather than a regulation of content, Justice Kennedy applied the O'Brien rule to the facts by concluding that (1) the city's interest was substantial in that inadequate sound application had an adverse effect on the audience, and (2) the city had a substantial interest in limiting the sound emanating from the bandshell. Next, Justice Kennedy held that the Court of Appeals erred in drawing on O'Brien for a least intrusive means requirement, which the Court uses at strict scrutiny, since the Supreme Court had already made clear that there is little, if any, difference between the O'Brien test and the usual rule for time, place, or manner regulations, which does not require the least intrusive means. To underscore the point he said, "A regulation of time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate content-neutral interests but it need not be the least-restrictive or least-intrusive means of doing so." Instead, the narrow tailoring requirement follows the intermediate standard of scrutiny that is satisfied if the regulation promotes a substantial government interest that would be achieved less effectively absent the regulation. Justice Kennedy added that a content-neutral 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.65 It has become a commonplace observation, as stated in the 2002 case of City of Los Angeles v. Alameda Books, Inc.,66 that regulations of speech “require only intermediate scrutiny if they are content neutral.”

In applying strict scrutiny, intermediate scrutiny, or rational review in First Amendment cases, the Court considers both kinds of questions addressed under Equal Protection and Due Process cases. Thus, the Court examines under the relationship to benefits inquiry both the Equal Protection question of the extent to which the government action fails to regulate all individuals who are part of some problem (the underinclusiveness inquiry), discussed at § 26.1.1.1 nn.25-27, and the Due Process question of the way in which the government action serves to achieve its benefits on those whom the action does regulate (the service inquiry), discussed at § 27.1.2 nn.43, 45. Similarly, under the burden inquiry, the Court considers both the Equal Protection question of the extent to which the government action imposes burdens on individuals who are not intended to be regulated (the overinclusiveness inquiry), discussed at § 26.1.1.1 nn.28-31, and the Due Process question of the amount of the burden on individuals who are the focus of the regulation (the restrictiveness inquiry), discussed at § 27.1.2 nn.44-45. For example, regarding burdens on speech, as noted above at § 29.2 n.65, the Court stated in Ward v. Rock Against Racism that the government action cannot burden substantially more speech than necessary (the overinclusiveness inquiry), nor can it place a substantial burden on speech by failing to leave open ample alternatives channels of communication (the restrictiveness inquiry). This aspect of Ward is discussed further at § 29.4.4.3 nn.151-55.

The third case of interest in terms of contemporary levels of scrutiny in free speech doctrine is Hazelwood School District v. Kuhlmeier.67 Kuhlmeier indicates that the proper standard of scrutiny in a non-public forum case which does not involve viewpoint discrimination is some version of

65  Id. at 796-802.


rational review. In *Kuhlmeier*, the Court upheld the exercise of editorial judgment by a high school principal with respect to several articles proposed for inclusion in a school-financed student newspaper. The two main concerns were: (1) the name of a pregnant student might be identifiable from the text, and (2) references to sexual activity and birth control were inappropriate for some of the younger students in the school. Because of the pressures of time, the principal simply eliminated the two pages on which the articles appeared, resulting in several other stories being excluded.

In his majority opinion, Justice White said that the student paper was not a public forum because it was developed within the school curriculum and the evidence did not show a clear intent to create a public forum. The test for being within the curriculum was whether there is supervision by faculty members and whether the activity was designed to impart particular knowledge or skills to student participants and audiences. Since the school had reserved this forum for its purposes (all articles being submitted to the principal prior to publication), school officials were entitled to regulate the contents in a “reasonable” manner. The reasons for using this standard of review, said Justice White, are that educators are entitled to exercise control to assure that participants learn whatever lessons the activity is designed to teach, the audience is not exposed to material inappropriate for their level of maturity, and the views of speakers are not erroneously attributed to the school.68

Note that while courts normally review a lower court's factual findings for clear error and its conclusions of law *de novo*, an appellate court's review is different in the context of a First Amendment claim. As one court has noted, “Following a bench trial involving a First Amendment claim, an independent review of the facts is not necessarily *de novo* review of all the facts relevant to the ultimate judgment entered. Facts irrelevant to the free speech issue remain subject to the clear error standard, but we make a ‘fresh examination’ of those facts that are crucial to the First Amendment inquiry. In doing so, we are not bound by the district court's witness-credibility determinations, yet we remain cognizant that the district court is in the best seat to observe the demeanor of the witnesses.”69 Thus, as indicated in *Planned Parenthood of Columbia/Willamette v. American Coalition of Life Activists*,70 “historical facts” are for juries, but “core constitutional facts” critical to resolving a First Amendment free speech issue are for *de novo* review by the court.

§ 29.3 Governmental Regulations of Speech versus Regulations of Conduct or Spending on Speech to Which Standard First Amendment Doctrine Does Not Apply

§ 29.3.1 Governmental Regulations of Speech versus Regulations of Conduct

By its terms, the First Amendment proscribes only governmental regulations “abridging the freedom of speech,” not conduct. Governmental regulations of conduct, therefore, are outside of the ambit of the First Amendment. In determining whether the regulation is one of speech or conduct, the Court has noted that “symbolic speech” is protected by the First Amendment. “Symbolic speech”

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68 *Id.* at 273-76.


70 290 F.3d 1058, 1066-70 (9th Cir. 2002).
exists where conduct is not “pure speech,” such as talking, writing, or wearing informative clothing, but is nevertheless intended to be expressive and conveys a message reasonably likely to be understood. Classic case examples of symbolic conduct include burning a cross on someone’s lawn, burning a flag, or performers dancing in the nude at an adult entertainment establishment.

For example, in *R.A.V. v. City of St. Paul*, the Court was faced with a statute that made it a hate crime to burn a cross on an individual’s lawn. While criminalizing the expression of hate in the conduct of burning a cross did trigger a First Amendment analysis, a regulation of conduct alone, such as applying a trespass statute to a person who entered on someone else’s property to burn a cross, would pose no First Amendment problems.

Similarly, in *Texas v. Johnson*, the Court majority held that a state flag desecration statute was invalid as applied to defendant who had burned a flag as part of a political protest. Justice Brennan noted that a tired person, not intending to express anything, might desecrate a flag by dragging it through the mud. He said that a different case would be posed by prosecution of a person who had not engaged in political expression. Thus, the Court was not considering defendant’s facial challenge to the statute. Similarly, had the defendant burned someone else’s flag, rather than his own, he could certainly have been prosecuted for the conduct of destruction of property.

Sometimes, whether the regulation is one of speech or conduct may not be so clear. For example, the Court held in *Dallas v. Stanglin* that “recreational dancing” by patrons of a dance hall was not expressive activity under the First Amendment freedom of association. In contrast, in *Barnes v. Glen Theatre, Inc*, the Court held that a statute barring public nudity applied to nude dancing by “performers” at an adult entertainment establishment was expressive activity because part of the purpose of the performance was erotic expression. From a formalist perspective, focused more on literal meaning than purpose, Justice Scalia said that the First Amendment did not apply even in *Barnes*, since the nude dancing by performers literally was not symbolic speech, but conduct.

**§ 29.3.2 Governmental Regulations of Speech versus Spending on Speech**

The federal and state governments subsidize a wide variety of activities. For the federal government, this fits comfortably within the General Welfare Clause as supplemented by the Necessary and Proper Clause. As the Court held in *Helvering v. Davis*, “When money is spent to promote the general welfare, the concept of welfare or the opposite is shaped by Congress, not the

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72 491 U.S. 397, 403 n.3 (1989).
75 301 U.S. 619, 645 (1937).
states. So the concept be not arbitrary, the locality must yield.” When the government has subsidized a particular activity, the Court has typically not reviewed its effects from a heightened level of scrutiny.

For example, the Court has held that government funding of childbirth expenses, but not the cost of abortions, does not violate either the due process or equal protection rights of pregnant women who may want to have an abortion. In an opinion by Justice Stewart, the Court said in *Harris v. McRae* that the law was not predicated on a constitutionally suspect class and left pregnant women no worse off than they were before. Further, the distinction in the federal law bore a rational relationship to a legitimate interest in protecting the potential life of a fetus. Liberal instrumentalist Justices Brennan, Marshall, Blackmun, and Stevens dissented on the grounds that this selective funding served to coerce indigent pregnant women to bear children they would otherwise elect not to have.

The situation is somewhat different if the government subsidizes some speech, but not other speech. There is always the possibility that it is engaged in viewpoint discrimination, which always triggers strict scrutiny in non-funding cases, as discussed at § 29.4.3.1. The cases have all been dealt with by the post-instrumentalist Court. These decisions generally permit the government to subsidize a viewpoint if it is the government that is speaking. The government may also call for speech-related considerations to be included when making a many-factored judgment in a competitive funding process, noted at § 29.4.2 nn.101-03. However, as discussed below, due to Justice Kennedy’s critical fifth vote in a number of cases, the government cannot engage in viewpoint discrimination within a program designed to encourage a diversity of views from private speakers. And it cannot restrict lawyers in a government-funded legal services program from questioning the legality of existing law.

In general, in deciding whether particular speech is government speech or the speech of a private individual, the courts have examined: (1) the central "purpose" of the program in which the speech in question occurs; (2) the degree of "editorial control" exercised by the government or private entities over the content of the speech; (3) the identity of the "literal speaker"; and (4) whether the government or the private entity bears the "ultimate responsibility" for the content of the speech, in analyzing circumstances where both government and a private entity are claimed to be speaking.

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77 *Id.* at 329 (Brennan, J., joined by Marshall & Blackmun, JJ., dissenting); *id.* at 349 (Stevens, J., dissenting).

78 See, e.g., *Wells v. City and County of Denver*, 257 F.3d 1132, 1140-41 (10th Cir. 2001), *cert. denied*, 534 U.S. 997 (2001) (a sign listing private sponsors of a public holiday display constituted government speech); *Knights of the Ku Klux Klan v. Curators of the Univ. of Mo.*, 203 F.3d 1085, 1093-96 (8th Cir. 2000), *cert. denied*, 531 U.S. 814 (2000) (announcements of sponsors' names and brief messages from sponsors on public radio station constituted government speech, and thus the Klan had no viewpoint discrimination complaint when they were denied sponsorship rights); *Downs v. Los Angeles Unified Sch. Dist.*, 228 F.3d 1003, 1011 (9th Cir. 2000), *cert. denied*, 532 U.S. 994 (2001) (postings to school bulletin boards were government speech, not private speech).
The starting point is *Rust v. Sullivan*,\(^7^9\) decided in 1991. *Rust* involved a facial challenge to federal regulations that barred persons working for federally funded health programs from discussing abortion as a lawful option. Chief Justice Rehnquist wrote for a 6-3 Court, “The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way.” In so doing, the government had not unlawfully discriminated on the basis of viewpoint; “it has merely chosen to fund one activity to the exclusion of another.” The challenged regulation was held not to violate First Amendment rights of free speech or Fifth Amendment rights of privacy regarding abortion choice, because it left a pregnant woman with the same choices as if the government had chosen not to operate any public hospitals. Justice Blackmun, dissenting with Justices Marshall and Stevens, said that the regulation constituted a content-based regulation of speech that was also clearly viewpoint-based. Further, the challenged regulation had the practical effect of obliterating the freedom to choose, particularly for the poor, “as surely as if it had banned abortions outright.” Thus, for the dissent, strict scrutiny should have been triggered in the case, and the regulation should have been declared unconstitutional.\(^8^0\)

A result less deferential toward the government and more protective of free speech was reached in *Rosenberger v. Rector and Visitors of the University of Virginia*.\(^8^1\) In *Rosenberger*, the university was paying the printing costs for a variety of publications by certified student organizations, but on Establishment Clause grounds refused to pay for a student paper that promoted a particular belief in or about a deity or an ultimate reality. Writing for a 5-4 Court, Justice Kennedy said that this was viewpoint discrimination, since the university did not exclude religion as a subject matter, but selected for disfavored treatment those student journalistic efforts with religious editorial viewpoints. Justice Kennedy pointed out that the university was not subsidizing a message it favors, as occurred in *Rust*, but instead was spending funds to encourage a diversity of views from private speakers. Justice Souter, dissenting with Justices Stevens, Ginsburg, and Breyer, said that there was no viewpoint discrimination because the university had simply denied funding for speech that primarily promotes or manifests any view on the merits of religion. Thus, it denies funding for the entire subject matter of religious or non-religious apologetics.\(^8^2\)

A result similarly more protective of free speech emerged in *Legal Services Corp. v. Velazquez*,\(^8^3\) where Justice Kennedy wrote for a majority comprised of himself and Justices Stevens, Souter, Ginsburg, and Breyer. The Court held that the First Amendment was violated by a restriction in the

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80 Id. at 217 (Blackmun, J., joined by Marshall & Stevens, JJ., dissenting).


82 Id. at 863-64 (Souter, J., joined by Stevens, Ginsburg & Breyer, JJ., dissenting).

Legal Services Corporation Act that barred lawyers funded through that Act from engaging in an effort to amend or otherwise challenge existing welfare law in effect on the date of the initiation of the representation. Justice Kennedy said that the government can make viewpoint-based funding decisions when the government itself is the speaker or, as in Rust, where the government uses private speakers to transmit information pertaining to government programs. However, an LSC-funded attorney speaks on behalf of the client, not the government. Further, the restriction distorts the legal system by altering the traditional role of attorneys and, thus, is inconsistent with separation-of-powers principles. The Court must be vigilant, he said, when Congress imposes rules and conditions which insulate its laws from legitimate judicial challenge. Justice Scalia dissented, joined by Chief Justice Rehnquist, and Justices O’Connor and Thomas. Justice Scalia wrote that Rust was controlling. The discrimination on the basis of content should not trigger strict scrutiny because a decision not to subsidize the exercise of a fundamental right does not infringe that right. Nor does the law discriminate on the basis of viewpoint since the government funds neither challenges to, nor defenses of, existing welfare law. The LSC subsidy, said Justice Scalia, neither prevents anyone from speaking nor coerces anyone to change speech.84

§ 29.4 Content-Based versus Content-Neutral Regulations of Speech in Public Forums or on Private Property

§ 29.4.1 The Content-Based versus Content-Neutral Distinction

Cases on the power of government to control speech typically discuss both the nature of the forum involved in the regulation (public versus non-public forum), and what kind of regulation of speech is involved (content-based or content-neutral). The applicable standard of review depends on how these two elements interact. The following material concentrates first on the standards of review developed for content-based versus content-neutral regulations of speech. For ease of presentation, all of the cases discussed in this section clearly involve regulation of speech in a public forum, such as on a public street or public park, or on private property. The question of how the Court determines the nature of a forum, public or non-public, when the location of the speech being regulated raises more difficult issues, is discussed at § 29.5.

The distinction between content-based and content-neutral regulations of speech is well illustrated by the famous and leading case of United States v. O’Brien.85 In this 1968 case, the Court upheld the conviction of a protester who had violated federal law by burning his draft card on the steps of a courthouse as part of a demonstration against the Vietnam war. The crime defined by statute was destroying a draft certificate. Chief Justice Warren stated:

[A] regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression, and if the incidental restriction on alleged First

84 Id. at 552-59 (Scalia, J., joined by Rehnquist, C.J., and O’Connor & Thomas, JJ, dissenting).

Amendment freedoms is no greater than is essential to the furtherance of that interest. 86

The government interest in O’Brien that was unrelated to the suppression of free expression was the harm that burning the draft card would have to the effective functioning of the Selective Service System. The Court concluded in O’Brien that the secondary effect of burning the draft card was what concerned the government, not the protest activity itself.

The O’Brien principle, although framed in the context of a regulation of symbolic speech that had a problematic secondary effect, was extended in Members of the City Council of Los Angeles v. Taxpayers for Vincent87 to all time, place, and manner regulations applied in a public forum. This was done with little detailed consideration, but was based on the common-sense observation that a time, place, or manner regulation also involves a case where the government is not concerned about the content of the speech, but only the time, place, or manner of the speech’s delivery. Thus, under current doctrine, either a regulation is content-based or it is content-neutral, with no distinction made between whether the regulation is content-neutral because it is based upon secondary effects or is a time, place, and manner regulation. However, as discussed at § 29.4.4.3 nn.154-59, in the 2002 case of Alameda Books, Justice Souter made an argument for four Justices that a distinction should be made between these two kinds of content-neutral regulations.

Another example of the distinction between content-based and content-neutral regulations appeared in Texas v. Johnson. 88 In this case, the majority held that a state flag desecration statute was invalid as applied to defendant, who had burned a flag as part of a political protest. The majority noted that the state’s interest in banning flag burning to prevent breaches of the peace was a content-neutral reason for the regulation. It thus triggered intermediate review. That justification failed intermediate review, however, because the statute was not substantially related to advancing the interest in preventing a breach of the peace, since no one at the demonstration was injured or threatened with injury and only several witnesses testified that they had been seriously offended by the flag-burning. The state’s second interest was an interest in preserving the flag as a symbol of nationhood and national unity. The majority said that this interest was related to the suppression of expression and, thus, was content-based. Therefore, strict scrutiny was applied to the consideration of that interest, rather than the intermediate review standard of O’Brien. As discussed below at § 29.4.3.2 nn.110-15, this reason failed the strict scrutiny approach.

As the analysis in Texas v. Johnson makes clear, sometimes the government may have both content-based and content-neutral reasons for its action. In such a case, the content-based reasons trigger strict scrutiny, while the content-neutral reasons trigger intermediate review, unless the two reasons are “inextricably intertwined,” in which case the higher content-based standards control. Consistent with those levels of review, discussed at § 26.1.3 nn.83-99, the content-based reasons must be actual government purposes to be considered by the court, while the content-neutral reasons must be actual or plausible government purposes. For restrictions on free speech in a non-public forum that trigger

86 Id. at 377.
basic rational review, discussed at § 29.5, any conceivable content-neutral reasons for the regulation can be used. Naturally, illegitimate pretexts for regulation cannot be used at strict scrutiny, intermediate review, or rational review, consistent with the analysis of illegitimate interests, discussed at § 26.1.1.1 nn.16-21, and illegitimate pretexts in *McCulloch v. Maryland*, discussed at § 18.1.2 nn.31-34. While it has been argued that the Court in “dual motive” cases should determine what is the predominant motive of the regulation considering “content, character, context, nature, and scope,” the better approach is to recognize that the discussion in “dual motive” cases regarding content-neutrality is focused on whether the content-neutral reason is an actual or plausible purpose of the government action, or merely a pretext to justify content-based discrimination. As with all constitutional cases, as noted at the beginning of Part IV, if the government has one reason to act that makes the government action constitutional – in these cases typically the content-neutral reason – the act is constitutional, even if the content-based reason cannot survive constitutional scrutiny.89

Two nude dancing cases help clarify the distinction between content-based and content-neutral regulations of speech. The first is *Barnes v. Glen Theatre, Inc.*90 There the Court, by a 5-4 vote, upheld a ban on nudity in places of public accommodation. Chief Justice Rehnquist announced the judgment and delivered an opinion joined by Justices O’Connor and Kennedy. The Chief Justice said that nude dancing is symbolic speech within the First Amendment. To this symbolic speech he applied the *O’Brien* test, and the ban satisfied that test. The Court concluded that the state’s interest in morality was substantial and unrelated to suppressing free expression, since it was nudity and not dancing that was prohibited. Further, the law was narrowly tailored as its requirement that dancers wear at least “pasties and a G-string” was the “bare minimum needed to achieve the state’s purpose.” Justice Souter, concurring, said that the purpose of the law, as in *Renton*, was combating secondary effects, such as prostitution, sexual assault, and associated crimes, which flow not from the expression inherent in nude dance but, rather, from crowds of predisposed men. Justice Scalia, also concurring, said that since this was a law not targeting expressive activity, but only conduct, the First Amendment did not apply at all, and only rational basis scrutiny under the Due Process Clause was required. Moral opposition to nudity supplied a legitimate basis for the regulation.91

Justice White dissented with Justices Marshall, Blackmun, and Stevens. Justice White said that nudity is an expressive component of nude dancing so that ban was related to expressive conduct. Indeed, the real purpose was a content-based purpose to protect viewers from what the state believed

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91 *Id.* at 572-74, 580-81 (Scalia, J., concurring in the judgment); *id.* at 583-87 (Souter, J., concurring in the judgment), *citing* City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986) (upholding the zoning of adult theaters under an intermediate standard of review).
is a harmful erotic message. Thus, strict scrutiny should be applied, and the law could not survive that level of scrutiny. The majority opinion had anticipated this argument and sought to answer it by saying that “the requirement that the dancers don pasties and a G-string does not deprive the dance of whatever erotic message it conveys; it simply makes the message slightly less graphic.”

Nine years later a similar case came before the Court and a similar result was reached in City of Erie v. Pap’s A.M. Justice O’Connor wrote an opinion joined by Chief Justice Rehnquist and Justices Kennedy and Breyer. She said the Court has now clarified that government restrictions on public nudity “should be evaluated under the framework set forth in O’Brien for content-neutral restrictions on symbolic speech.” With respect to applying the O’Brien standard, Justice O’Connor adopted the analysis used by Justice Souter in Barnes. Thus, she said that the law was not related to expression, but instead was aimed at the content-neutral reasons of “combating crime and other negative secondary effects caused by the presence of adult entertainment establishments like Kandyland and not at suppressing the erotic message conveyed by this type of nude dancing.”

Justice Scalia concurred with Justice Thomas, saying of the law, as he had in Barnes, that because “as a general law regulating conduct and not specifically directed at expression, it is not subject to First Amendment scrutiny at all.” Justice Souter concurred in the Court’s choice of a standard for review, but said that the city had not made a sufficient evidentiary showing that the incidental speech restriction was not substantially greater than essential to advance the government’s interest. He said that he had not demanded such a showing in Barnes, but added that he should have demanded it, and the failure to do so was a mistake. As discussed at § 29.4.4.3 nn.171-75, Justice Souter is correct that this additional element is part of traditional intermediate review.

Dissenting, Justice Stevens, with Justice Ginsburg, objected that never before had the Court used the “secondary effects” test to justify a total ban on expression. In response, Justice O’Connor said that the ordinance did not enact a total ban. It merely limited one means of expressing the erotic message being conveyed, and this was not a case where “banning the means of expression so interferes with the message that it essentially bans the message.” The question of whether a total ban based on secondary effects should trigger intermediate review is discussed at § 29.4.4.3 text following n.159.

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92 Id. at 593-96 (White, J., joined by Marshall, Blackmun & Stevens, JJ., dissenting).
93 Id. at 571.
95 Id. at 291.
96 Id. at 307-08 (Scalia, J., joined by Thomas, J., concurring).
97 Id. at 316-17 (Souter, J., concurring in part and dissenting in part).
98 Id. at 293; id. at 317-18 (Stevens, J., joined by Ginsburg, J., dissenting).
§ 29.4.2 Kinds of Content-Based Regulations: Viewpoint Discrimination versus Non-Viewpoint or Subject-Matter Only Discrimination

The Court distinguishes between two kinds of content-based regulations: (1) those that discriminate on grounds of viewpoint; and (2) those that discriminate on grounds of subject-matter. Most of the time this distinction is clear, but occasionally categorizing a regulation can be problematic. For example, as noted at § 29.3.2 nn.81-82, the Court held in *Rosenberger v. Rector and Visitors of the University of Virginia* that the University of Virginia, which paid the printing costs for a wide variety of student publications, could not withhold payments for the sole reason that a student paper primarily promotes or manifests a particular belief in or about a deity or an ultimate reality. The university did not exclude religion as a subject matter, said Justice Kennedy, but engaged in viewpoint discrimination by selecting for disfavored treatment those student journalistic efforts with religious editorial viewpoints. Justice Kennedy said that when the state is the speaker or when it enlists private entities to convey its own message, it is entitled to say what it wishes. But here it spent funds to encourage a diversity of views from private speakers. When doing that, it may not silence the expression of selected viewpoints.

Justice Souter, dissenting with Justices Stevens, Ginsburg, and Breyer, agreed that viewpoint discrimination was a pernicious distinction based on content. However, he found no viewpoint discrimination as he understood the facts. Justice Souter concluded that the university’s guidelines did not skew debate but, rather, denied funding for hortatory speech that primarily promotes or manifests any view on the merits of belief in or about a deity or ultimate reality. Thus, the guidelines denied funding for the entire subject matter of religious or non-religious apologetics, and were a non-viewpoint, subject-matter regulation, not viewpoint discrimination. Justice Souter said that funding was not denied for those who discuss issues in general from a religious perspective, but only to those engaged in promoting or opposing religious conversion and religious observances as such.

Viewpoint discrimination was also the focal point in *National Endowment for the Arts v. Finley*. This case upheld a provision in the National Foundation on the Arts and Humanities Act of 1965 that requires the Chairperson of the National Endowment for the Arts to ensure that “artistic excellence and artistic merit are the criteria by which [grant] applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public.” This provision was challenged on the ground, among others, that it constituted viewpoint discrimination. For the Court, Justice O’Connor said that the provision imposes no categorical requirement and that it seems unlikely that the provision would introduce any greater element of selectivity than the determination of “artistic excellence” itself. *Rosenberger* is distinguishable, she said, because here there is a competitive process in the allocation of grants, and the content-based “excellence” threshold is merely a subject-matter type of standard. This is not a case, she said, like *Rosenberger*, where in the context of subsidizing a diversity of viewpoints,


100 *Id.* at 863-64 (Souter, J., joined by Stevens, Ginsburg & Breyer, JJ., dissenting).

viewpoint discrimination occurred. Until the law is applied in a manner that raises concerns about disfavored viewpoints the Court will uphold the provision’s constitutionality. The criteria of “decency” in the statute merely represents a “non-obscene” or “not indecent” kind of requirement that the Court typically analyzes as a subject-matter regulation, as noted at §§ 30.1.3 (obscenity) & 30.1.4 (indecency), not viewpoint discrimination.

Justices Scalia and Thomas concurred, saying that there is a distinction between abridging speech, where viewpoint discrimination is troublesome, and funding speech, which leaves free those who wish to create indecent art. Their view is that funding speech is not literally a regulation of speech, and thus viewpoint discrimination should not trigger strict scrutiny in a funding case, even in a case like Finley or Rosenberger where the government is not promoting its own message. This view is not shared by the rest of the Court. Justice Souter dissented in Finley, contending that the statute itself makes clear that Congress’ purpose was viewpoint based, i.e., to prevent the funding of art that conveys an offensive message in Congress’ judgment, as implemented by the NEA.

Cases involving regulations that permit some groups to use public school facilities after school hours, while banning other groups from such use of public facilities, often trigger a question of whether the ban involved viewpoint discrimination. Many of these cases have involved regulations banning the use of school facilities by individuals or groups for religious purposes. Often such regulations are viewed as involving viewpoint discrimination, triggering a strict scrutiny approach. A similar finding of viewpoint discrimination was made in the context of a public law school’s clinical education program which allegedly refused to represent a particular plaintiff because of plaintiff’s past criticism of the program, its director, and its suit challenging public display of the Ten Commandments. The court concluded that if the allegations were true that would constitute viewpoint discrimination under the First Amendment. In contrast, a county policy barring use of community centers for home schooling or other private courses intended to meet state educational requirements, while allowing informal community educational activities, was held to be viewpoint neutral, and based only on a subject-matter distinction between formal private education and informal educational activities.

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102 Id. at 599 (Scalia, J., joined by Thomas, J., concurring in the judgment).

103 Id. at 600-01 (Souter, J., dissenting).

104 See, e.g., Wigg v. Sioux Falls Sch. Dist. 49-5, 382 F.3d 807, 812-16 (8th Cir. 2004) (school district policy prohibiting employees from participating in religious activities conducted on school grounds by private groups is viewpoint-based discrimination against private religious speech); Bronx Household of Faith v. Board of Educ. of City of New York, 331 F.3d 342, 351-55 (2nd Cir. 2003) (school board’s refusal to rent school building for religious worship services that include teaching moral values, while allowing other groups to use facilities to teach moral values, viewpoint discrimination).

105 Wishnatsky v. Rovner, 433 F.3d 608, 609-13 (8th Cir. 2006).

106 Goulart v. Meadows, 345 F.3d 239, 251-55, 257-59 (4th Cir. 2003)
§ 29.4.3 Strict Scrutiny Review for Content-Based Regulations of Speech

§ 29.4.3.1 Strict Scrutiny for Viewpoint Discrimination Cases

As noted at § 29.2 nn.60-61 & Table 29.2, strict scrutiny is used by the Court for content-based regulations of speech imposed by the government in a public forum. Given the difficulty meeting the strict scrutiny test, particularly for cases of viewpoint discrimination, the Court occasionally will phrase the doctrine in more absolutist terms. For example, in *Rosenberger v. Rector and Visitors of the University of Virginia*, Justice Kennedy wrote for the Court, “It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys.” Justice Scalia said in *R.A.V. v. City of St. Paul*, “Content-based regulations are presumptively invalid.” This more presumptive phrasing usually appears in cases like *Rosenberger* or *R.A.V.* which involve government regulations of speech that are held to constitute viewpoint discrimination. It is clear, however, from these and other cases of viewpoint discrimination, including *Boos v. Barry*, that there is no *per se* rule of unconstitutionality for viewpoint discrimination, but that strict scrutiny applies to cases of viewpoint discrimination.

§ 29.4.3.2 Strict Scrutiny for Content-Based, Non-Viewpoint Discrimination Cases

In cases involving content-based regulations of speech that involve subject-matter regulation, rather than viewpoint discrimination, the strict scrutiny inquiry typically appears more clearly on the face of the opinion. For example, in *Texas v. Johnson*, a 5-4 Court held that a state flag desecration statute was invalid as applied to defendant, who had burned a flag as part of a political protest. Justice Brennan wrote for a majority composed of himself and Justices Blackmun, Marshall, Kennedy, and Scalia. Justice Brennan wrote that the state could not justify the prosecution as a way of preventing a breach of the peace, since no one was injured or threatened with injury and only several witnesses testified that they had been seriously offended by the flag-burning. With respect to an interest in preserving the flag as a symbol of nationhood and national unity, Justice Brennan said that this interest is related to the suppression of expression and, thus, strict scrutiny should be applied rather than the more relaxed rule of *O’Brien*. Applying strict scrutiny, Justice Brennan said, “It is not the State’s ends, but its means, to which we object.”

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111 *Id.* at 407-14.

112 *Id.* at 418.
In reaching this conclusion, Justice Brennan said that defendant’s political expression was restricted because of the content of the message he conveyed, and yet it is a bedrock general principle that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable. With respect to application of that principle, Justice Brennan said there is nothing in the precedents suggesting that a state may remove the flag as a subject-matter of political protest by prohibiting expressive conduct relating to it. Nor was there anything in the text of the Constitution or the precedents that indicated that a separate juridical category exists for the American flag alone. The government may pursue its legitimate interest in preserving the symbolic value of flag by making suggestions concerning the proper treatment of the flag. It might attempt to persuade those who feel differently about the flag that they are wrong. But it cannot justify a criminal conviction for engaging in political expression by use of the flag.

Reflecting a Holmesian predisposition to defer to government, Chief Justice Rehnquist, with Justices White and O’Connor, said that the flag has occupied a unique position as the symbol of our Nation. In Justice Rehnquist’s view, it was the use of this symbol, and not the ideas defendant sought to convey, for which he was punished. The Chief Justice cited a number of statements by individual Justices which supported his conclusion that the government may enforce minimal public respect for the flag. Justice Stevens, also dissenting, agreed that the case did not relate to “disagreeable ideas.” Instead, defendant was prosecuted because of the method he chose to express his dissatisfaction with national policies. Stevens noted, “Had he chosen to spray-paint – or perhaps convey with a motion picture projector – his message of dissatisfaction on the facade of the Lincoln Memorial, there would be no question about the power of the Government to prohibit his means of expression. The prohibition would be supported by the legitimate interest in preserving the quality of an important national asset. Though the asset at stake in this case is intangible, given its unique value, the same interest supports a prohibition on the desecration of the American flag.”

Justice Kennedy, concurring, made clear that the decision was quite difficult for him. He said, “The hard fact is that sometimes we must make decisions we do not like. We make them because they are right, right in the sense that the law and the Constitution, as we see them, compel the result. . . . Though symbols often are what we ourselves make of them, the flag is constant in expressing beliefs Americans share, beliefs in law and peace and that freedom which sustains the human spirit. The case here today forces recognition of the costs to which those beliefs commit us. It is poignant but fundamental that the flag protects those who hold it in contempt.”

Congress reacted to *Texas v. Johnson* by enacting a statute that provided criminal penalties for “Whoever knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground

113 *Id.* at 414.

114 *Id.* at 429-35 (Rehnquist, C.J., joined by White & O’Connor, JJ., dissenting).

115 *Id.* at 436-39 (Stevens, J., dissenting).

116 *Id.* at 420-21 (Kennedy, J., concurring).

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or tramples upon any flag of the United States.” 117 This law was struck down on its face in United States v. Eichman, 118 by the same 5-4 vote that was recorded in Texas v. Johnson. Writing again for the majority, Justice Brennan said that the new federal law, although wider in scope than the Texas law, “suppresses expression out of concern for its likely communicative impact.”

§ 29.4.4 Intermediate Review for Content-Neutral Regulations of Speech

§ 29.4.4.1 Content-Neutral Secondary Effects Cases

As discussed at § 29.2 nn.60-66 & Table 29.2, content-neutral regulations not related to the suppression of free expression are given a form of intermediate scrutiny, first articulated in 1968 by Chief Justice Warren, writing for the Court in United States v. O’Brien. 119 In that case the defendant was charged with knowingly destroying his draft card. Defendant had burned the card on the steps of a courthouse as part of a demonstration against the Vietnam war. The Court upheld the statute both on its face and as applied. The Chief Justice wrote that when speech and non-speech elements are combined in the same course of conduct, a government regulation is sufficiently justified if: (1) it is within the constitutional power of the government, (2) it furthers an important or substantial governmental interest; (3) the interest is unrelated to the suppression of free expression; and (4) the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Applying that standard to the facts, Chief Justice Warren first said that Congress has sweeping power to raise and support armies and to make all laws necessary and proper for that purpose. Second, legislation to insure the continuing availability of issued certificates serves a substantial purpose. Third, the continuing availability to each registrant of his certificate substantially furthers the smooth functioning of the system by making it easy to communicate with the local board. Fourth, the Court perceived no alternative means that would more precisely and narrowly assure the continuing availability of the card than a law which prohibits their wilful mutilation or destruction. The defendant argued that the real purpose of Congress was to suppress freedom of speech. Chief Justice Warren replied that inquiry into congressional purpose is always a hazardous matter, and that the inevitable effects of government action is usually a more appropriate way to determine whether a regulation is content-based or content-neutral. In any event, Committee Reports indicated concern that unrestrained destruction of the cards would disrupt smooth functioning of the system and this could be used to overcome inferences based on floor comments of certain Congressmen. 120

From a broader perspective, this discussion suggests that plausible governmental purposes, based upon the inevitable effects of government action or legislative reports, can be used to trigger a finding of content-neutrality that would lead to imposition of the intermediate scrutiny standard of


120 Id. at 383-86.
review. As discussed at § 26.1.3 nn.92-99, plausible governmental purposes typically can be considered under an intermediate standard of review under the Equal Protection Clause. The doctrine here is similar. There is no indication in O’Brien that the rational review “any conceivable basis” approach could be used to determine content-neutrality. Similarly, the Court did not adopt in O’Brien an “actual purpose” approach, as is used for strict scrutiny under the Equal Protection and Due Process Clauses, and for content-based regulations of speech under the First Amendment.

Several later cases in the instrumentalist era mirrored the Court’s analysis in O’Brien. In Schacht v. United States,121 the Court first cited O’Brien in upholding a federal statute making it a crime to wear a military uniform without authority. The Court then invalidated a portion of the law that allowed an actor in a theatrical production to wear the uniform “if the portrayal does not tend to discredit that armed force.” Justice Black wrote that an actor, like anyone else in our country, enjoys a constitutional right to freedom of speech, including the right openly to criticize the government during a dramatic performance. Thus, the restrictive portion of the law, obviously related to the suppression of expression, was content-based, leading to a strict scrutiny analysis of that portion of the law. That portion “clearly” was unconstitutional under such an approach.

Another example of the intermediate review level of O’Brien possibly not applying because the government regulation was content-based, not content-neutral, occurred in Spence v. State of Washington.122 There the defendant was charged with violating a prohibition against exposing to public view a flag to which is attached any word or design. The defendant had hung his own flag from a window in his apartment, upside down, with a black peace symbol having been removably attached. The main interest advanced by the state for the prosecution was a desire to preserve the national flag as an unalloyed symbol of our country. The Court noted that if this interest is valid if would be directly related to expression and, thus, O’Brien would not apply. However, the Court did not decide whether that interest was valid. Instead, it said that even if it was valid the law could not be applied to defendant because any interest the state might have in preserving the physical integrity of the privately owned flag was not significantly impaired where there was no risk that the act would mislead viewers into assuming that the government endorsed his viewpoint, the flag had not been permanently disfigured, and his message was direct and likely to be understood, and within the contours of the First Amendment.

As noted at § 29.4.1 n.90, a determination that the government’s interest was not related to the suppression of expression led to application of the four-part O’Brien test in Barnes v. Glen Theatre, Inc.123 There the Court held that a statute barring public nudity could be applied to nude dancing. Chief Justice Rehnquist wrote a plurality opinion, joined by Justices Kennedy and O’Connor. The Chief Justice began by acknowledging that nude dancing is expressive conduct. However, the government’s interest in reflecting the moral disapproval of people appearing in the nude among strangers in public places was unrelated to the suppression of free expression. “The requirement that

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the dancers don pasties and a G-string does not deprive the dance of whatever erotic message it conveys; it simply makes the massage slightly less graphic.”124 Finally, the incidental restriction on First Amendment freedoms was no greater than essential to furthering the government’s interest. Justice Souter, concurring in the judgment, also applied the O’Brien test, because the state had a substantial interest in combating the secondary effects of adult entertainment establishments.

The Court took another look at nude dancing in City of Erie v. Pap’s A.M.125 The result was the same, to uphold a ban on public nudity as applied to nude dancing, but there was some shift in the reasoning. Justice O’Connor announced the judgment of the Court and wrote a plurality opinion joined by Chief Justice Rehnquist and Justices Kennedy and Breyer. Justice O’Connor picked up on Justice Souter’s theory in Barnes, saying that the ordinance was aimed at combating crime (particularly increased prostitution and drug trafficking) and other negative secondary effects caused by the presence of adult entertainment establishments. That interest was not related to the suppression of expression, so O’Brien applied. The Court held that O’Brien was satisfied in that the regulation furthered a substantial interest and, since dancing was allowed with pasties and a G-string, the restrictions were no greater than necessary to further the city’s interest.

Justice Souter, concurring, approved of the plurality’s analytical approach, but said that the city had not made a sufficient evidentiary showing that the incidental speech restriction was not greater than necessary. He pointed out that the city had not introduced evidence to show that secondary effects could not be countered as well by zoning the location of nude dancing.126 Justice Souter said that he should have demanded such evidence in the Barnes case. Replying to Justice Souter’s concern that there was not enough evidence that the ordinance effectively combated secondary effects, Justice O’Connor said that the O’Brien test requires only that the regulation rationally further the interest in combating secondary effects. It does not require that they be substantially reduced. As discussed at § 29.4.4.3 nn.160-70, Justice O’Connor’s conclusion on this in Pap’s A.M. is inconsistent with the Court’s analysis in O’Brien, and is inconsistent with viewing O’Brien as a form of intermediate scrutiny. On this point, Justice Souter’s observations are more faithful to the Court’s precedents.127

Another secondary effects case is Members of the City Council of Los Angeles v. Taxpayers for Vincent.127 This case involved an ordinance barring the posting of signs on public property. Applying O’Brien, Justice Stevens said that it is well settled that a city can exercise its police powers to advance esthetic values. Second, citing Metromedia v. San Diego, a case which held that cities may ban commercial off-site advertising billboards, but permit signs on-site identifying the owner and the goods sold, he said the visual assault on people presented by an accumulation of signs posted

124 Id. at 571; id. at 583-87 (Souter, J., concurring in the judgment).


126 Id. at 314-17 (Souter, J., concurring in part and dissenting in part).

on public property is a significant evil, and the restriction on expression is incidental.128 Regarding whether that incidental restriction was no greater than essential, Justice Stevens said that a law would not be greater than essential if it was "narrowly tailored" to serve the esthetic interest. By banning signs, the ordinance did no more than eliminate the exact source of the evil it sought to remedy and, thus, curtailed no more speech than necessary to accomplish its purpose.129

Justice Stevens acknowledged that in Schneider v. State the Court had held that the esthetic interest cannot support a ban on distributing leaflets on public streets and sidewalks, although the city could penalize those who litter. However, Schneider was distinguishable because here the substantive evil was not a possible byproduct of communication but, instead, was created by the medium of expression itself.130 As in Metromedia, said Justice Stevens, the validity of the esthetic interest in the elimination of signs on public property is not compromised by failing to extend the ban to private property. The private citizen's interest in controlling the use of his own property justifies the disparate treatment. Even if some visual blight remains, a partial content-neutral ban may enhance the city's appearance.131

Regarding whether the law curtailed more speech than necessary, Justice Stevens added that there is no reason to believe that the advantages of communicating by signs cannot be obtained through other means. Thus, there were ample alternative means of communication in Los Angeles. In response to an argument that the city could have curtailed less speech by a more limited ban or exceptions for certain messages, times, or locations, and that this should be constitutionally required, Justice Stevens said this argument implied that the Court would have to hold that the City's interests are not sufficiently important to justify a complete ban. However, the Court accepted the city's position that it may decide that the esthetic interest in avoiding "visual clutter" justifies a removal.132 Further, under an intermediate standard of review, the government does not have to adopt the least restrictive alternative. It is enough if the regulation is not substantially broader than necessary and leaves open ample alternative channels of communication.

Reflecting a more vigorous liberal instrumentalist application of the O'Brien test, more favorably predisposed to protect rights of free speech, particularly of the poor, Justice Brennan dissented, with Justices Marshall and Blackmun. Justice Brennan agreed that the majority had used the correct standard of review. However, Justice Brennan said the law failed because its effect was to impose a total ban on poorly financed causes of little people. He said there was no indication in the record that a sufficient number of private parties would allow posting of signs, and leafletting has a much higher cost. Also, the city's real objective may not have been to eliminate visual clutter but, instead, to eliminate the messages typically carried by such signs. The city's statement of objectives should


129 Id. at 815-17.

130 Id. at 808-10, citing Schneider v. State, 308 U.S. 147 (1939).

131 Id. at 803-06.

132 Id. at 808-10.
be accepted as substantial and unrelated to the suppression of speech only if the city demonstrates that it is pursuing an identified objective seriously and comprehensively and in ways unrelated to the restriction of speech. Here that was not true because the city was addressing visual clutter in no other way than by prohibiting the posting of signs throughout the City and without regard to the density of their presence.133 This standard of seeming to focus on “actual” governmental purposes in order to determine whether a regulation is content-based or content-neutral, rather than merely “plausible” government purposes in light of effects, has not adopted by the majority of the Court.

The struggle to settle upon a perspective for dealing with zoning regulations that attempt to deal with the secondary effects of adult business continued into the 2001 Term of the Court, in City of Los Angeles v. Alameda Books, Inc.134 There the Court held that it was error to grant a summary judgment to the operators of multiple adult businesses in a single building who had challenged a zoning ordinance which barred the operation in the same building of an adult bookstore and an adult arcade or any two such operations. The plurality opinion written by Justice O’Connor was joined by Chief Justice Rehnquist and Justices Scalia and Thomas.

Citing Renton v. Playtime Theatres, Inc., Justice O’Connor said that the ordinance was not content-based because it was aimed at the secondary effects of a concentration of adult businesses. When an ordinance is content neutral, the inquiry is whether it is designed to serve a substantial governmental interest and does not unreasonably limit alternative lines of communication. Here, the city claimed to have based the ordinance on a 1977 study by the police department which showed that crime rates grew much faster in Hollywood, which had the largest concentration of adult establishments in the city. Justice O’Connor said it was rational for the city to infer that reducing the concentration of adult operations in a neighborhood, whether within separate establishments or in one large establishment, would reduce crime rates. It is enough for the city to rely on any evidence that is reasonably believed to be relevant to demonstrate a connection between speech and the content-neutral governmental interest.135 Justice Scalia said that he joined the plurality opinion because it correctly applied the Court’s jurisprudence on secondary effects. However, as he had said in Pap’s A.M., this was an unnecessary step because the First Amendment does not prevent a city from regulating the conduct of pandering sex.136

Justice Kennedy, with his slightly more speech-protecting perspective, concurred only in the judgment. Justice Kennedy agreed that a zoning restriction designed to decrease secondary effects and not speech should be subject to intermediate rather than strict scrutiny. He agreed with Justice O’Connor on the evidence required to support the government’s theory. However, Justice Kennedy emphasized that the claim to which the evidence must relate is that the ordinance will suppress

133  Id. at 818-31 (Brennan, J., joined by Marshall & Blackmun, JJ., dissenting).


secondary effects, but not by suppressing speech. The claim must therefore be that the ordinance will cause two businesses to split rather than one to close and that the total secondary effects will be significantly reduced. Reviewing the city’s study in light of common experience, Justice Kennedy said it was sufficiently likely that dispersing two adult businesses under one roof is reasonably likely to cause a substantial reduction in secondary effects while reducing speech very little. Of course, if this could be proved unsound at trial — either that there was no substantial benefit from the ordinance (and thus a problem with the second prong of the intermediate scrutiny test), or that it did substantially burden operations of the businesses (and thus a problem with the third prong of the intermediate scrutiny test) — the ordinance might not withstand intermediate scrutiny.137

Justice Souter dissented, with Justices Stevens and Ginsburg, and with Justice Breyer as to Part II of the dissent. In Part I of the dissent, Justice Souter called for the application of a slightly higher standard of intermediate review than that suggested by Justice O’Connor. Justice Souter first noted that a restriction based on content survives only on a showing of necessity to serve a compelling governmental interest, combined with least-restrictive narrow tailoring to serve it. The softer intermediate scrutiny, he said, is reserved for regulations justified by something other than content of the message, such as a straightforward restriction going only to the time, place, or manner of speech. In such a case, the Court asks only whether the regulation is narrowly tailored to serve a significant governmental interest and leaves open ample alternative channels for communication.

There is also the O’Brien test for limits on expression through action that is otherwise subject to regulation for nonexpressive purposes. That test approves regulations that further an important or substantial governmental interest unrelated to the suppression of free expression by a restriction no greater than is essential to the furtherance of that interest. Justice Souter then suggested in a footnote that O’Brien is a closer relative of secondary-effects zoning than is a mere time, place, or manner regulation. He then suggested that the Court should give this kind of zoning a label of its own, such as “content correlated.” This would serve to remind that the more closely a law applies to speech of a particular content, the greater is the opportunity for government censorship. This analysis calls for use of what Justice Souter called a relatively simple safeguard:

If combating secondary effects of property devaluation and crime is truly the reason for the regulation, it is possible to show by empirical evidence that the effects exist, that they are caused by the expressive activity subject to the zoning, and that the zoning can be expected either to ameliorate them or to enhance the capacity of the government to combat them (say, by concentrating them in one areas), without suppressing the expressive activity itself.138

Applying that test to the facts, Justice Souter concluded Part I by saying that the government had not shown that bookstores containing viewing booths isolated from other adult establishments increase crime or produce other negative secondary effects in surrounding neighborhoods. Thus, the ordinance had not been shown to be content correlated rather than simply content based, which would call for strict scrutiny. Thus he gave more concrete expression to the concern for evidentiary

137 Id. at 449-53 (Kennedy, J., concurring in the judgment).

138 Id. at 457 (Souter, J., joined by Stevens & Ginsburg, JJ., dissenting).
proof that he first raised in City of Erie v. Pap’s A.M.\textsuperscript{139}

In Part II of his dissenting opinion in Alameda Books, Justice Souter contended that even under the assumptions of the plurality opinion, the city had not met its burden of showing that the restriction on speech was no greater than essential to realizing an important objective, in this case policing crime. He pointed out that no study conducted by the city has reported that this type of traditional business, combining a bookstore and adult video booths, any more than any other adult business, has a correlation with secondary effects in the absence of concentration with other adult establishments in the neighborhood. He said that the reasonable supposition is that splitting some of these businesses up will have no consequence for secondary effects whatever. Justice O’Connor replied to Justice Souter’s dissent by saying that it would be unwise to depart from the Renton framework because none of the parties had requested it, the courts have not had difficulty working with it, it would be inappropriate for the Court to reach the question of content neutrality or content-based before permitting the lower court to pass on it, and because it is unclear what kind of evidence cities could rely upon to meet the evidentiary burden he would impose.\textsuperscript{140}

\textbf{§ 29.4.4.2 Content-Neutral Time, Place, or Manner Cases}

The use of intermediate scrutiny for time, place, or manner regulations of speech is illustrated in the 1989 case of Ward v. Rock Against Racism.\textsuperscript{141} The Court held in Ward that New York City did not deprive musicians of First Amendment rights by insisting that bandshell performers in Central Park use sound-amplification equipment and a sound technician provided by the city. Justice Kennedy noted that the regulation was content-neutral because its justifications, such as controlling noise in the park and avoiding undue intrusion into residential areas, had nothing to do with content. Regarding the city’s interest in ensuring the quality of sound at park events, the challengers argued that the city was seeking to assert artistic control. Justice Kennedy replied that the city requires its technician to defer to the wishes of event sponsors concerning sound mix, and the record indicates that the city's equipment and sound technician could meet the standards requested by the performers.

The challengers also argued that by placing control in the hands of the city's technician the law swept more broadly than necessary. Justice Kennedy replied that this argument would have considerable force if the city's scheme had a substantial deleterious effect on performers' ability to achieve the quality of sound they desired. However, the technician does all he can to accommodate to the sponsor's wishes and the district court found that the technician was able properly to implement a sponsor's instructions as to sound quality or mix, with no evidence offered at trial to

\textsuperscript{139} 529 U.S. 277, 316 (2000) (Souter, J., concurring in part and dissenting in part).

\textsuperscript{140} 491 U.S. 781, 790-803 (1980).
the contrary. Finally, said Justice Kennedy, applying the last element of the O’Brien test, there are ample alternative channels because the city’s rule does not attempt to ban any particular manner or type of expression. It had no effect on quality or content beyond regulating amplification.

Justice Marshall dissented with Justices Brennan and Stevens. Justice Marshall conceded that the majority had adopted the correct standard of review. However, reflecting the more vigorous application of the test often done by liberal instrumentalist judges, Marshall concluded that the law was not narrowly tailored because the government's goals could be pursued effectively and less intrusively by punishing persons responsible for excessive sounds.142 Under intermediate scrutiny, of course, the third prong of the test is not whether there are any less restrictive alternatives that could be adopted, the strict scrutiny approach, but only whether the choice adopted by the government is not substantially more burdensome than necessary or creates a substantial burden on free speech by not leaving open ample alternative channels of communication. The majority opinion in Ward seemed to be sensitive to these issues.

The O’Brien intermediate standard of scrutiny was also applied in Clark v. Community for Creative Non-Violence143 to allow application of a rule of the National Park Service barring overnight sleeping in Lafayette Park and the Mall. The Court said that the rule was content-neutral, was within government power, plainly served a substantial interest in conserving park property, and left open ample alternatives for communicating concern with the plight of the homeless. Justice Marshall, dissenting with Justice Brennan, agreed with the standard enunciated by the majority but said that in finding that ample alternatives existed the majority had failed to take into account the difficulties of the relatively disadvantaged to convey their political ideas. Here, by using sleep as an integral part of the protest, respondents could express with their bodies the poignancy of their plight.

An early case to apply the intermediate scrutiny “narrowly tailored” requirement was Grayned v. City of Rockford.144 There the Court declared that an anti-noise ordinance was not invalid on its face which provided that persons adjacent to a school with classes in session “shall not willfully make or assist in the making of any noise or diversion which disturbs or tends to disturb the peace or good order of such school session.” Justice Marshall delivered the Court’s opinion which recited that reasonable time, place, or manner regulations may prohibit expressive activities if, as in Tinker v. Des Moines Independent Community School District, discussed § 29.6.2.2 nn.28-68, they materially disrupt class work or involve a substantial disorder or invasion of the rights of others. Justice Marshall said the ordinance went no further than Tinker permits, since the ordinance was narrowly

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142  Id. at 404-07 (Marshall, J., joined by Brennan & Stevens, JJ., dissenting).

143  468 U.S. 288, 293-99 (1984); id. at 301 (Marshall, J., joined by Brennan, J., dissenting).

144  408 U.S. 104, 107, 111-12 (1972), citing Cox v. Louisiana, 379 U.S. 559 (1965) (upholding a ban on picketing in or near a courthouse); Cameron v. Johnson, 390 U.S. 611 (1968) (upholding a ban on picketing that unreasonably interferes with ingress or egress to any county courthouse). See also Faustin v. City and Cty. of Denver, Colo., 423 F.3d 1192 (10th Cir. 2005) (city policy banning signs and banners from highway overpasses narrowly tailored to serve interest in traffic safety).
tailored to further an important or substantial interest in not having a substantial disruption of school sessions.

A case where the Court found no ample alternative channels of communication, as thus a failure of the third prong of the intermediate standard of review, occurred in *City of Ladue v. Gileo*.145 There, the Court held unconstitutional on its face an ordinance which prohibited all signs within the city except those that fell into one of 10 exemptions, but which did not contain an exemption for signs on private property (other than "For Sale" or "Sold" signs). The challenger wanted to put a 24" by 36" sign on her lawn with the words, "Say No to War in the Persian Gulf, Call Congress Now." For the Court, Justice Stevens wrote that the interest in minimizing visual clutter was valid, but the ordinance did not leave open ample alternative channels for communication. The Court was not convinced that adequate substitutes existed for the important medium of speech being closed off. Justice Stevens gave four reasons why no adequate substitute exists:

a. Displaying a sign from one's own residence often carries a message distinct from what can be conveyed by other means;
b. Residential signs are unusually cheap and convenient forms of communication, especially for persons of modern means and limited mobility;
c. A special respect for individual liberty in the home has long been part of our culture and our law; and
d. The need to regulate temperate speech from the home is less pressing than the need to mediate among various competing uses for streets and other public facilities.146

A similar case of an ordinance that was not narrowly tailored occurred in *Deegan v. Ithaca*.147 In this case, the Second Circuit held that a municipal ordinance prohibiting any noise audible from 25 feet away was not sufficiently narrowly drawn when applied to a street evangelist to quiet him in a public forum. The court noted that the regulation was substantially broader than necessary, particularly since it would ban the sound of a person stepping in high heel boots, the opening and closing of a door, or the ringing of a cell phone. In *Bowman v. White*,148 a case involving a public university’s 5-day cap per semester on non-university persons speaking on a designated public forum on campus, the Eighth Circuit held that the 5-day cap was substantially more burdensome than necessary to advance the university’s content-neutral interests in protecting the students’ educational experience, ensuring public safety, and encouraging diverse use of resources. The court noted that a more narrowly drawn policy might permit the plaintiff extra days when the space was not being used by others, but grant preference to individuals who have not already been granted 5 days of use.149

146 Id. at 58.
147 444 F.3d 135, 142-44 (2nd Cir. 2006).
148 444 F.3d 967, 980-83 (8th Cir. 2006).
§ 29.4.4.3 Recent Controversy Over How to Apply The Intermediate Scrutiny Test in Cases Involving Secondary Effects and Time, Place, or Manner Cases

The case of City of Los Angeles v. Alameda Books, Inc. 149 is useful in raising a number of points about levels of scrutiny in these First Amendment cases. As noted at § 27.1.2 nn.43-45, there are four kinds of questions regarding benefits and burdens that can be asked about any statute. Two relate to Equal Protection (underinclusiveness and overinclusiveness) and two relate to Due Process (service and oppressiveness/restrictiveness). Because First Amendment scrutiny does the jobs of both Equal Protection and Due Process kinds of concerns when applied to free speech issues, both questions of benefits (underinclusiveness and service) and both questions of burdens (overinclusiveness and restrictiveness) are necessary for a complete First Amendment analysis.

For example, as the Court noted in City of Ladue v. Gilleo, 150 “[T]he notion that a regulation of speech may be impermissibly underinclusive is firmly grounded in basic First Amendment principles.” As Justice Kennedy noted in Ward v. Rock Against Racism, 151 a content-neutral regulation of speech cannot burden substantially more speech than necessary to further the interest (the overinclusiveness inquiry), nor can it place a substantial burden on speech (the restrictiveness inquiry involved with leaving open ample alternative channels for communication) that does not serve to advance its goals (the service inquiry). Thus, in Alameda Books, 152 Justice Kennedy was correct that a full First Amendment analysis must consider both benefits and burdens on the speech. As Justice Kennedy observed, “[T]he necessary rationale for applying intermediate scrutiny is the promise that zoning ordinances like this one may reduce the costs of secondary effects [the service inquiry] without substantially reducing speech [the restrictiveness inquiry].”

Justice Souter’s dissent in Alameda Books was thus in error when it stated, “Although the goal of intermediate scrutiny is to filter out laws that unduly burden speech, this is achieved by examining the asserted government interest, not the burden on speech, which must simply be no greater than necessary to further that interest.” 153 Justice Souter’s “asserted government interest” is the intermediate requirement of a substantial government interest, and Justice Souter’s “no greater than necessary” analysis is the overinclusiveness inquiry, which must be done. Justice Kennedy’s restrictiveness inquiry, however, must also be done to do a complete First Amendment intermediate review analysis of burdens. And, as always under standard intermediate scrutiny, this third prong restrictiveness inquiry is a separate inquiry from the prong one requirement of a substantial government interest.

Justice Souter’s dissent correctly noted, however, that there are in fact two different versions of

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151 491 U.S. at 798-99.
152 535 U.S. at 450 (Kennedy, J., concurring).
153 Id. at 464 n.8 (Souter, J., joined by Stevens, J., Ginsburg, J., & Breyer, J., dissenting).
intermediate scrutiny used in the Court’s First Amendment cases. One version, which Justice Souter termed the “comparatively softer intermediate scrutiny,” is appropriately used for “restrictions going only to time, place, and manner or speech,” since in those cases “[n]o one has to disagree with any message to find something wrong with a loudspeaker at three in the morning.”154 In other cases, however, where the government proffers a content-neutral justification, but there is a greater reason to “ensure that an asserted rationale does not cloak an illegitimate governmental motive,” as in cases involving the “[r]egulation of commercial speech,” the Court uses the higher intermediate review standard of Central Hudson Gas & Elec. Corp. v. Public. Serv. Comm’n.155

As discussed at § 30.3.2 nn.228-30, the intermediate review with bite standard of Central Hudson is more stringent than basic intermediate scrutiny on the second prong of the test – that is, it requires that the governmental statute satisfy the strict scrutiny requirement of both directly and substantially advancing the government’s interest, not mere indirect, substantial advancement. However, the Central Hudson test adopts the intermediate scrutiny test for the third prong of the analysis, by not requiring a least restrictive alternative analysis, but only that the statute not substantially burden more speech than necessary.

Having made these points, Justice Souter is correct that regulations of speech that are content-neutral because the government’s focus is on secondary effects are logically different than regulations of speech that are content-neutral because they are merely reasonable time, place, or manner regulations. Historically, such secondary effects regulations, or, in Justice Souter’s words, “content-correlated” regulations, have been given the same kind of “basic” or “softer” intermediate scrutiny as time, place, or manner regulations. Justice Souter, however, does make an argument that such content-correlated regulations should perhaps be given higher scrutiny.156 If so, the better approach would be to adopt the Central Hudson test for these cases.

The intermediate review with bite used in Central Hudson actually tracks Justice Souter’s concerns in Alameda Books, and thus would seem to be appropriate to use. As Justice Souter indicated, the real extra concern in these “content-correlated” cases is a risk of viewpoint discrimination. He noted that this risk of viewpoint discrimination “is subject to a relatively simple safeguard, however. If combating secondary effects of property devaluation and crime is truly the reason for the regulation, it is possible to show by empirical evidence that the effects exist, that they are caused by the expressive activity subject to the zoning, and that the zoning can be expected either to ameliorate them or to enhance the capacity of the government to combat them (say, by concentrating them in one area), without suppressing the expressive activity itself.”157 Or to phrase it more simply, it should be possible to show that the regulation is “directly” related to dealing with the property devaluation and crime problem without resorting to an indirect chain of causation beginning with “suppressing the expressive activity itself.” As discussed at § 30.3.2 nn.228-30, such a showing of

154 Id. at 455 (Souter, J., joined by Stevens & Ginsburg, JJ., dissenting).
155 Id. at 458 n.3, citing Central Hudson, 447 U.S. 557, 569 (1980).
156 Id. at 455-58 & n.2.
157 Id. at 457.
a direct relationship between means and ends is what distinguishes the intermediate review with bite standard of *Central Hudson* from basic intermediate review.

If this understanding were adopted, then all secondary effects cases, like *United States v. O'Brien*, would use this “higher” intermediate review with bite kind of intermediate review, while time, place, or manner cases would use the “softer” basic intermediate review. Once this issue is addressed, there likely will be debate on the Court whether the current understanding of *O'Brien* adopts this higher standard of scrutiny. In *Alameda Books*, Justice Souter, joined by Justices Stevens and Ginsburg, indicated his belief that the *O'Brien* test does represent this more stringent kind of intermediate scrutiny consistent with *Central Hudson*. For example, while the precise language in *O'Brien* speaks only of “substantially furthering” the government’s interest, not “direct” furtherance, it is true on the facts in *O'Brien* that the government’s ban on burning a draft card did “directly” advance the government’s interest in preserving the card for use in the Selective Service System, so the government in *O'Brien* could have met the *Central Hudson* test. Historically, as indicated in Justice Kennedy’s majority opinion in *Ward v. Rock Against Racism*, *O'Brien* has been viewed as a basic intermediate scrutiny case, similar to time, place, or manner regulations. Whether the additional level of rigor supported by Justice Souter’s analysis of “content-correlated” regulations is worth adopting a separate level of scrutiny for these cases, higher than the scrutiny for “time, place, or manner” regulations, rather than just having all content-neutral regulations, whether “content-correlated” secondary effects cases or “time, place, or manner” cases subjected to one intermediate standard of review, is open to some doubt.

This issue does raise the question, however, what to do about secondary effects cases that involve complete bans on speech, rather than secondary effects cases that involve only partial bans of a time, place, or manner variety. As discussed at § 29.4.1 n.98, in *City of Erie v. Pap’s A.M.* Justices Stevens and Ginsburg noted that prior to *Pap’s A.M.* all the Court’s secondary effects cases had not involved complete bans on certain kinds of speech. This fact suggests the difficult line-drawing that might have to be done under Justice Souter’s proposed approach, if different standards for “secondary effects” and “time, place, or manner” regulations were adopted. What of a regulation based on a secondary effects rationale that involves a time, place, or manner ban, as most of them do? If only complete bans based on secondary effects trigger the higher *Central Hudson* test, then Justice Souter’s proposed approach would have little practical effect. Further, it would call for line-drawing on whether a ban, like that in *Pap’s A.M.*, on complete nudity is a complete ban on totally nude dancing, as it was viewed by Justices Stevens and Ginsburg, or is merely a manner regulation of permitting erotic dancing but only with a G-string, as viewed by Justice O’Connor in her opinion for the Court. Instead, if every secondary effects case triggers the *Central Hudson* test, even time, place, or manner regulations based on secondary effects, a principled justification would need to be developed, presumably based on “content-correlated” concerns, for those time, place, or manner cases having a higher standard of review than other time, place, or manner cases.

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158 *Id.* at 456 n.2 & 458 n.3 (Souter, J., joined by Stevens & Ginsburg, JJ., dissenting).

The Court can avoid all these difficult category questions by just continuing the current approach that any content-neutral secondary effects case, and any content-neutral time, place, or manner regulation, triggers the same basic intermediate standard of review. Any heightened intermediate scrutiny, such as proposed by Justice Souter, does not seem to be worth the candle. Further, any truly complete ban on speech based on a secondary effects rationale would seem to have trouble even under current doctrine meeting the intermediate prong three restrictiveness requirement that it not be a “substantial burden” on speech, but instead leave open “ample alternative channels for communication.”

Of course, these cases should all involve a full application of the basic intermediate standard of scrutiny. In Justice O’Connor’s plurality opinion in Alameda Books,160 based upon her similar use of language in Erie v. Pap’s A.M., the O’Brien intermediate test seemed to be “watered-down” into some version of a hybrid kind of rational relationship to a substantial government interest test. That would be inconsistent with O’Brien, as well as represent an unnecessary and unwise proliferation in standards of review. In Pap’s, as well as prior cases, the Supreme Court viewed the O’Brien test as a version of intermediate review.161 Under basic intermediate review, the government has the burden to demonstrate that the statute advances substantial or important governmental interests, the statute is substantially related to advancing those interests, and the statute is not substantially more burdensome than necessary. In the First Amendment context, the Court usually requires that for a statute not to be substantially too burdensome the statute must “leave open ample alternative channels of communication.”162 The Court’s opinion in O’Brien required each of these elements.

At to the first element, the Court concluded in O’Brien that the government’s interest “in having a system for raising armies that functions with maximum efficiency and is capable of easily and quickly responding to continually changing circumstances” was a “vital interest,” thus satisfying the requirement that the government’s interest be important or substantial.163 Second, the Court required the government to establish “that the continuing availability to each registrant of his Selective Service certificates substantially furthers the smooth and proper functioning of the system that Congress has established to raise armies.”164 Indeed, the Court spent a number of pages discussing how the requirement of a certificate substantially furthers the government’s interest, thus giving the


163 O’Brien, 391 U.S. at 381 (emphasis added).

164 Id. (emphasis added).
government a “substantial interest in preventing their wanton and unrestrained destruction.”165 Finally, the Court noted that the statute was “an appropriately narrow means of protecting [the government’s] interest and condemns only the independent noncommunicative impact of conduct within its reach.”166

When summing up this approach in O’Brien, however, the O’Brien Court conflated the inquiry of government ends and the inquiry into statutory means. Thus, the Court concluded that because the statute involved “vital” government ends, and “substantially furthers” the government’s ends, that meant the government had a “substantial interest” in assuring the continued existence of Selective Service certificates.167 The Court then phrased the O’Brien test as whether the government regulation “furthers an important or substantial governmental interest.”168

Devoid of the context and the rest of the Court’s opinion in O’Brien, this phrasing of the test may suggest that the government in O’Brien only needed to show some rational reason to believe the government’s interest is furthered to some extent, a rational review kind of relationship to benefits inquiry. This is how Justice O’Connor’s plurality opinion in Pap’s A.M. read the O’Brien test, accusing Justice Souter, in dissent, of “conflating” two distinct concepts under O’Brien: whether there is a substantial governmental interest and whether the regulation furthers that interest.169 However, when O’Brien is read in context, the O’Brien Court clearly required the statute to “substantially further” the government’s interest. As noted above, the Court’s use of the phrase “substantial government interest” in O’Brien included both a requirement that the government’s interest be “substantial” and that the statute “substantially further” those ends.

To be consistent with O’Brien, one should phrase the O’Brien test as the standard phrasing under intermediate scrutiny that the statute substantially further important or substantial governmental interests, and not be substantially more burdensome than necessary. Justice O’Connor’s language in her plurality opinion in Alameda Books that the city only needs to show that “it is rational for the city to infer that reducing the concentration of adult operations in a neighborhood . . . will reduce crime”170 is thus a “watered-down” version of O’Brien. A similar “watered-down version” of the Central Hudson test for commercial speech in Posadas was later recognized by a majority of the Court as a “watered-down” version and thus overruled in Liquormart, as discussed at § 30.3.2 nn.246-48.

165 Id. at 378-81 (emphasis added).
166 Id. at 382 (emphasis added).
167 Id. at 381.
168 Id. at 377.

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Additionally, as an intermediate scrutiny test, the government does have the burden in *O'Brien* to make the showing of a substantial governmental interest and a substantial relationship, which is what Justice Souter required in his dissent in *Pap's A.M.* In applying this test, however, Justice O'Conner is right in stating in her plurality opinion in *Pap’s A.M.* that the government need not always conduct its own studies, “so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses.” But the ultimate burden of proof should remain on the government, as it was in both *O'Brien* and *Renton*. As stated in *O'Brien*, “In conclusion, we find that because of the Government’s substantial interest . . ., a sufficient government interest has been shown to justify O’Brien’s conviction.” In *Renton*, the Court noted that while the “Court of Appeals imposed on the city an unnecessarily rigid burden of proof,” the burden still remained on Renton, which was “entitled to rely on the experiences of Seattle and other cities, and in particular on the ‘detailed findings’ summarized in the Washington Supreme Court’s *Northern Cinema* opinion, in enacting its adult theater zoning ordinance.” It appears in *Alameda Books* that the ultimate burden does remain on the government even in Justice O’Connor’s opinion. Justice O’Connor stated, “If plaintiff succeed in casting doubt on the municipality’s rationale . . . either by demonstrating that the municipality’s evidence does not support its rationale or by furnishing evidence that disputes the municipality’s factual findings, the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies the ordinance.  

Despite these various disagreements, some real and some only potential, among Justices O’Connor, Kennedy, and Souter regarding the details of the proper tests in First Amendment cases, it is likely that over time the Court will clarify First Amendment doctrine in a manner faithful to Court precedents. After all, natural law Justices are committed to a reasoned elaboration of the law in light of the Court’s precedents. As noted at §§ 12.4.1-12.4.3, Justice Kennedy may have an occasional affinity for a formalist approach that, like Justice Black, would prefer an absolutist First Amendment position in cases of content-based regulation, as in Justice Kennedy’s concurrences in *Simon & Schuster* and *Republican Party of Minnesota v. White*, discussed at § 29.2 nn.58-59. Justice O’Connor may have had an occasional affinity for the Holmesian deference to government style of interpretation that may explain a predisposition to “water-down” the intermediate scrutiny test in *Pap’s A.M.*, discussed at § 29.4.4.3 nn.160-70. Justice Souter may have an occasional affinity for the instrumentalist position that will cause him to propose a slighter higher standard of review more protective of free speech in *Alameda Books*, discussed at § 29.4.4.3 nn.154-59. At the end of the day, however, the modern natural law approach is likely to come together around a reasoned

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171 *Pap’s A.M.*, 529 U.S. at 313-15 (Souter, J., concurring in part and dissenting in part).


173 *O'Brien*, 381 U.S. at 382.

174 *Renton*, 475 U.S. at 50-51.

elaboration of the Court’s precedents regarding the standards of review in First Amendment cases as they have elaborated in the modern era, clarifying that as the majority approach on the Court.

§ 29.5  The Public versus Non-Public Forum Distinction

§ 29.5.1  Classic Statement of the Public/Non-Public Forum Distinction

As noted at § 29.2 nn.67-68 & Table 29.2, the Court applies a different standard of scrutiny to government regulations of speech in non-public forums owned by the government. The leading case on what standard of review to apply in such non-public forums remains Perry Education Association v. Perry Local Educators’ Association.176 Decided in 1983, Perry held that a school could reserve access to an interschool mail system and to teacher mailboxes for the union certified as the exclusive representative of the teachers. Summarizing and organizing precedents, Justice White first pointed out that strict scrutiny applied to content-based exclusions from a public forum, from public property which the state has opened for use by the public as a place for expressive activity, or for government attempts to regulate individual speech on an individual’s own “non-public” private property. However, with regard to non-public forum property owned by the government, the state can impose time, place, or manner restrictions, and also may reserve the forum for its intended purposes, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker’s view, i.e., viewpoint discrimination.

The facilities at issue in Perry were a non-public forum, Justice White said, as there was no indication in the record that the system had been opened for use by the general public. A few instances of access by organizations such as the YMCA or the cub scouts had not transformed the government property into a public forum. The fact that the challengers at one time could use the system had no legal effect because at that time there was no exclusive union representation for the teachers to which the restrictions on access were related.

Applying a reasonableness test, the Court said that use of school mail facilities enabled the certified union to perform its obligations effectively. The Court also noted that substantial alternative channels remain open to the challengers, such as bulletin boards, meetings, and the mail. Nor was there viewpoint discrimination because access was based on the status of the respective unions, rather than on their views. Thus, the Court concluded that there was no violation because the policy reasonably furthered a legitimate state purpose, i.e., facilitating the carrying out of the special responsibilities of an exclusive bargaining agent.

In reaching this decision, Justice White distinguished Police Department of Chicago v. Mosley,177 and Carey v. Brown,178 where the Court struck down prohibitions on peaceful picketing in a public forum which exempted labor picketing. Justice White explained, “The key to those decisions, however, was the presence of a public forum. In a public forum, by definition, all parties have a

177  408 U.S. 92, 95-99 (1972).
constitutional right of access and the State must demonstrate compelling reasons for restriction of access to a single class of speakers, a single viewpoint, or a single subject.”179

Justice Brennan dissented in Perry with Justices Marshall, Powell, and Stevens. Justice Brennan said that the exclusive-access provision in the collective-bargaining agreement amounted to viewpoint discrimination, which should always trigger strict scrutiny, even in a non-public forum. He said the access policy favors a particular viewpoint on labor relations in the Perry schools. Under a strict scrutiny analysis, the policy was overinclusive because it did not strictly limit the petitioner’s use of the mail system to performance of its special legal duties, and was underinclusive because the Board permitted other organizations with no special duties to teachers or students to use the system. Finally, there was no showing that an interest in preserving labor peace was advanced by the policy.180

The decision in Perry was based on earlier decisions in the instrumentalist era which had implicitly recognized that governments own property that had not been dedicated to expressive activity. For example, in Adderley v. Florida,181 a case upholding a criminal trespass conviction of demonstrators on grounds of a jail, Justice Black wrote for the Court, “The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.” Similarly, with the exception of viewpoint discrimination, which always triggers strict scrutiny, as noted at § 29.4.3.1, a prison can regulate the speech of prisoners for reasons reasonably related to penological objectives under a rational review approach, as in Thornburgh v. Abbott.182 A similar result was reached in Greer v. Spock183 with regard to handbill distribution on a military base, and well as in Brown v. Glines184 concerning reasonable safeguards regarding military security and morale.

Where government owned property has been open to the public, standard First Amendment public forum doctrine applies. For example, in Southeastern Promotions, Ltd. v. Conrad,185 the promoters of the musical “Hair,” requested to use the municipal auditorium in Chattanooga, Tennessee. The auditorium managers denied the request on the ground that the production would not be in the best interest of the community. The promoters sought an injunction, which was denied on the ground that the production was obscene and not entitled to First Amendment protection.

179 460 U.S. at 55.
180 Id. at 55-57, 66-69 (Brennan, J., joined by Marshall, Powell & Stevens, JJ., dissenting).
Reversing that judgment, the Court held that the auditorium, having been designed for and dedicated to expressive activities, was a public forum. Since the theater could accommodate the production, the denial of a request constituted the imposition of a prior restraint. This could not be done by a content-based regulation unless the minimal procedural safeguards specified in Freedman v. Maryland were complied with. Those safeguards were:

1. a burden on the city to seek judicial proceedings and prove the material is unprotected;
2. insurance that any restraint prior to judicial review could be imposed only for specified brief period and only for the purpose of preserving the status quo; and
3. assurance of a prompt and final judicial determination.

Justice White, joined by Chief Justice Burger, and Justice Rehnquist filed dissents. Reflecting more of a Holmesian deference-to-government predisposition, the dissents concluded that where a theater is owned by the city, the court should apply non-public forum standards requiring only rational review. Here, it was not unreasonable for the city to limit attractions in its theater to those which would not offend any substantial number of potential theatergoers and where there were no allegations that the city was discriminating because of any expressions of political or social belief.

Of course, if the government had a content-neutral reason for regulating, only an intermediate standard of scrutiny would apply. As the Court noted in Thomas v. Chicago Park District, “We have never held that a content-neutral permit scheme regulating speech in a public forum must adhere to the procedural requirements set forth in Freedman.”

The 1983 Perry case put Southeastern Promotions into a larger framework by recognizing three kinds of forums owned by the government. The first was the traditional public forum in which content-based regulations must be justified by strict scrutiny and content-neutral regulations by a form of intermediate scrutiny. The second kind was a designated public forum, opened by the state as a place for expressive activity. Although the state is not required indefinitely to retain the open character of the facility, as long as it does so it is bound by the same standards that apply in a traditional public forum. Then there are non-public forums. As to those forums, Justice White said, “In addition to time, place, and manner regulation, the State may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker’s

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186 Id. at 552-54.
187 Id. at 559, citing Freedman, 380 U.S. 51, 58 (1965).
188 Id. at 564-69 (White, J., joined by Burger, C.J., dissenting); id. at 570-74 (Rehnquist, J., dissenting).
190 Perry, 460 U.S. 37, 45 (1983).
Although this opinion was very helpful in developing a set of forum categories, it did not clarify the extent to which, in classifying the nature of a forum, the government’s intent or the objective nature of a facility is determinative. In general, formalist Justices focus more on the government’s intent, and whether the government has expressly, or literally, opened the forum for public use. Holmesian Justices also tend to focus on governmental intent, deferring to the government’s contention in litigation that the forum is a non-public forum unless the opposite conclusion is clear. In contrast, instrumentalist and natural law Justices focus more on whether the objective nature of the forum is compatible with free speech uses. Based on their predisposition to protect free speech rights, particularly of the poor and dissenters, instrumentalist Justices tend to resolve close questions more in the direction of finding that the forum is a public forum than do natural law Justices.

For example, in 1985, in *Cornelius v. NAACP Legal Defense and Educational Fund*, the Court upheld a federal rule limiting its annual workplace charitable fundraising drive (CFC) to organizations that provide or support direct health and welfare services to individuals or their families, thus excluding advocacy, lobbying, and litigating organizations. Justice O'Connor first said that charitable solicitation of funds is protected speech, even in the brief statements allowed in CFC literature, since those statements directly advance the speaker's interest in informing readers about its existence and goals. As to whether the CFC was a public or non-public forum, Justice O'Connor adopted an approach reflective of her occasional affinity for a Holmesian approach, discussed at § 12.4.2, making the government’s intent the critical issue in determining the nature of a forum that it had opened. However, she also indicated that in resolving that matter the Court should consider not only the government’s policy and historical practice of the government, but also the objective nature of the property and its compatibility with expressive activity. In this case, Justice O’Connor said the historical background indicated that CFC was designed to minimize disruption from ad hoc solicitation by lessening the amount of expressive activity occurring on federal property, and thus the forum had not been open to the public.

Because it was a non-public forum, rational review applied. Justice O'Connor said that the reasonableness of government action is judged in light of the purpose served by the forum and all the surrounding circumstances. Applying this test, Justice O’Connor concluded that the purpose of CFC was to minimize disruption, assure fundraising success, and avoid the appearance of political favoritism. The limits on who might participate were reasonable because limiting participation to widely accepted groups likely will avoid controversy and contribute to ultimate success. Further, the President could reasonably conclude that a dollar directly spent is more beneficial than a dollar spent in litigation that might not be successful. Remanded to lower courts was the issue of whether the exclusion was motivated by a desire to suppress a particular point of view. The lower courts had not considered this issue, and the Court did not want to decide the matter in the first instance. If viewpoint discrimination were involved, strict scrutiny would apply even in a non-public forum.

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191  *Id.* at 46.

Justice Blackmun dissented, with Justice Brennan. Justice Blackmun said that the compatibility part of Justice O’Connor’s test was critical to him, so that if speech is found compatible with the normal uses of government property, he would find that the government had opened a limited public forum and would apply strict scrutiny to exclusion policies. Further, he thought the exclusion was viewpoint-based discrimination, triggering strict scrutiny even if it were a non-public forum. Applying that level of scrutiny, Justice Blackmun did not find that the interests identified by Justice O’Connor were necessary for a compelling interest. Increasing contributions may be compelling, but that does not justify the exclusion of groups who work to enforce the rights of minorities through litigation. A simple disclaimer would suffice to achieve the government's interest in avoiding the appearance of support. As to avoiding controversy, the government should have to show that the excluded speech would disrupt other activities. In fact, however, the evidence showed increased contributions during years the respondents were allowed to participate. Justice Stevens also dissented, based on a view that, without regard to public or non-public forum analysis, the government’s exclusion of the designated charities could not survive rational review.

§ 29.5.2 Modern Development of the Public/Non-Public Forum Distinction

The instrumentalist Court never classified any public property like parks or streets as other than a traditional public forum. However, in 1988 it was argued by challengers in *Frisby v. Schultz* that a street should lose its status as a traditional public forum when it runs through a residential neighborhood. This argument was rejected by the Court in an opinion by Justice O’Connor, which noted that since 1939 in *Hague v. Committee for Industrial Organization*, discussed at § 29.1.3 nn.26-27, the Court had uniformly held that public streets and parks are public forums held in “trust” for the public. Applying intermediate scrutiny to a content-neutral regulation in a public forum, the Court upheld a content-neutral ban on picketing directed at a single residence in order to protect residential privacy. Describing residents as a captive audience, Justice O’Connor wrote, “The First Amendment permits the government to prohibit offensive speech as intrusive when the ‘captive’ audience cannot avoid the objectionable speech.”

Justice Brennan, joined by Justice Marshall, dissented and said that the ordinance was not narrowly tailored because it might be applied to a lone, silent individual, walking back and forth with a sign. Justice Stevens, also dissented, viewing the ordinance as “substantially overbroad” and thus in violation of the overbreadth doctrine, discussed at § 29.6.1.5.

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193 *Id.* at 813 (Blackmun, J., joined by Brennan, J., dissenting).

194 *Id.* at 833 (Stevens, J., dissenting).


196 *Id.* at 495-96 (Brennan, J., joined by Marshall, J., dissenting); *id.* at 496-99 (Stevens, J., dissenting).

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In 1990, a sidewalk question came again before the Court in United States v. Kokinda. The Court upheld a postal regulation which forbade soliciting charitable contributions on postal premises, as applied to solicitors for the National Democratic Policy Committee who had set up a table for in-person solicitation on a sidewalk outside the postoffice. Justice O'Connor's plurality opinion, joined by Holmesians Chief Justice Rehnquist and Justices White, and formalist Justice Scalia, reasoned that because the sidewalk leading to and from the post office was constructed for the purpose of entering and leaving the post office, not for general use of the public, the sidewalk was a non-public forum. The regulation barring solicitation on postal premises was constitutional as viewpoint neutral and reasonable in view of the fact that solicitation was inherently disruptive of the Postal Service's business. Justice Kennedy concurred only in the judgment, noting that “the public’s use of postal property for communicative purposes means the surrounding sidewalks” may be a public forum. However, he said it was unnecessary here to decide whether the sidewalk was a public or a non-public forum because the postal regulations met the traditional intermediate review standards for a content-neutral time, place, and manner regulation of protected expression in a public forum.

Justice Brennan dissented, with Justices Marshall, Blackmun, and Stevens. Justice Brennan said that a sidewalk adjacent to a public building to which citizens are freely admitted is a natural location for speech to occur and, thus, is a traditional public forum or a limited public forum. Brennan added that even if strict scrutiny were not required, the regulation was not reasonable under rational review because the government did not subject to the same categorical prohibition many other types of speech presenting the same risk of disruption as solicitation, such as soapbox oratory, pamphleteering, distributing literature for free, or even flag burning.

Another case involving how to determine what kind of forum has been opened by the government is International Society for Krishna Consciousness v. Lee. Chief Justice Rehnquist wrote for a majority that a public airport terminal was not a public forum and reasonably could ban the repetitive solicitation of money within its terminals. With respect to the nature of the forum, the Chief Justice’s opinion was joined unreservedly by Justices White, Scalia, and Thomas, and, in a concurrence, by Justice O’Connor. Adapting the formalist and Holmesian focus on government intent, Rehnquist said that the decision to create a public forum is made by intentionally opening a non-traditional forum for public discourse. The tradition of airport activity does not demonstrate that airports have historically been opened for speech activity, and the operators have frequently objected in litigation to such activity. It is not persuasive that speech activity has occurred at various "transportation nodes," such as rail stations, because they traditionally have had private ownership and here the relevant unit is the airport, not "nodes" generally. Airports are commercial enterprises, whose management considers their purpose to be the facilitation of passenger air travel. Therefore, only a reasonableness standard need be applied. Viewing the case against a background of

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198 Id. at 737-38 (Kennedy, J., concurring in the judgment).

199 Id. at 740-60 (Brennan, J., joined by Marshall, Blackmun & Stevens, JJ., dissenting).

substantial congestion, Chief Justice Rehnquist, with Justices White, Scalia, and Thomas, upheld both a ban on solicitation and a ban on literature distribution, including leafleting. Rehnquist noted that allowing solicitation on outside sidewalks, as provided by the airport managers, gives sufficient access to an area universally traveled.

Justice O'Connor agreed that the airport was not a public forum because no intent had been expressed to open airports to the types of expression here involved. She said, however, that the reasonableness inquiry is whether the restrictions are consistent with the multipurpose environment deliberately created. Solicitation of money impedes the normal flow of travel and risks confrontation with a person asking for money. Thus that ban was reasonable. However, the ban on leafleting was not reasonable given the minimal disruption caused by a person giving out information.201

Justice Kennedy, joined by Justices Blackmun, Stevens, and Souter, said that an airport is a public forum. Focusing more on the objective characteristics of the property, Justice Kennedy concluded that public forum status should be given to property if its physical characteristics and actual public uses permitted by the government indicate that expressive activity would be appropriate and compatible with those uses. Under this test, airport terminals are a public forum because their public spaces are broad, they have public thoroughfares full of people, and they are lined with stores and other commercial activities. And there had been no showing that any real impediments could not be cured with reasonable time, place, or manner regulations.202 Given the current membership on the Court, this approach would likely be adopted by a majority of Justices, composed of Justices Stevens, Kennedy, Souter, Ginsburg, and Breyer.

Applying intermediate scrutiny appropriate for content-neutral regulations in a public forum, Justice Kennedy concluded that the ban on solicitation for the receipt of money was valid as a time, place or manner restriction. This behavior creates a risk of fraud and duress, and there are ample alternatives because the solicitor can give a pre-addressed envelope. However, the ban on distributing or selling literature was invalid. The government has less interest and the danger of fraud is more limited. Justices Souter, Blackmun, and Stevens thought that both bans were invalid. The claim for duress was weak and there was no evidence of coercive conduct. There was almost no evidence of fraud. Ample alternative channels for solicitation did not exist because the distribution of pre-addressed envelopes is unlikely to be much of an alternative.203

Reflecting more the “objective” characteristics of the property approach of the Kennedy concurrence in Lee, lower federal courts since Lee have held that a private sidewalk encircling a privately owned sports arena complex, which appears like any public sidewalk and is used as a public thoroughfare, is a public forum, and that a mass transit agency’s acceptance of advertisements on a wide range of

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201 Id. at 685-86 (O’Connor, J., concurring in part and concurring in the judgment).

202 Id. at 693 (Kennedy, J., joined in Part I by Blackmun, Stevens & Souter, JJ., concurring in the judgment).

203 Id. at 703-04 (Kennedy, J., concurring in the judgment); id. at 709-10 (Souter, J., joined by Stevens & Blackmun, JJ., concurring in the judgment in part and dissenting in part).
topics under contracts for display in its stations and vehicles, for the purpose of raising revenue, made such areas designated public fora, triggering public forum First Amendment review.204

§ 29.6 Specialized First Amendment Topics under Current Legal Standards

§ 29.6.1 Process-Based First Amendment Topics

§ 29.6.1.1 Prior Restraints on Speech

A prior restraint is a legal sanction that has the effect of suppressing future speech before there is a judicial finding, after appropriate proceedings, that such speech is not constitutionally protected from restraint. The Court has often emphasized that any prior restraint has a “‘heavy’ presumption against its constitutional validity.”205 This is particularly true because of the collateral bar rule. While a person accused of violating a law can defend on the grounds that the law is unconstitutional, in the case of a prior restraint “a court order must be obeyed until it is set aside” and “persons subject to the order who disobey it may not defend against the ensuing charge of criminal contempt on the ground that the order was erroneous or even unconstitutional.”206

This “heavy” presumption can be seen as far back as the formalist era. In 1931, in 

Near v. Minnesota,207 the Court was confronted with a state statute that permitted courts to enjoin as a nuisance any “malicious, scandalous and defamatory newspaper, magazine, or other periodical.” For the Court, Chief Justice Hughes noted that under the statute an injunction could issue that would make further publication punishable as contempt unless the publisher could prove in an initial hearing that the material was true and published with good motives for justifiable ends. Hughes concluded that an injunction imposed on these grounds would be unconstitutional, as injunctions can be imposed only in exceptional cases, such as the threatened publication of military secrets, or incitements to violence or government overthrow. Such was not the case in Near.

A case that raised directly the issue of publication of military secrets was 

New York Times Co. v. United States (The Pentagon Papers Case).208 This case involved the desire of The New York Times, Washington Post, and other newspapers to publish leaked government documents relating to the ongoing Vietnam war. On an expedited basis, a fragmented Court decided the case 6-3, in nine


207 283 U.S. 697, 701-02 (1931).

208 403 U.S. 713, 718-20 (1971) (Black, J., joined by Douglas, J., concurring); id. at 753-59 (Harlan, J., joined by Burger, C.J., and Blackmun, J., dissenting).
separate opinions. At one extreme, Justices Douglas and Black took an absolutist view that prior restraints are never permissible under the First Amendment. At the other extreme, Chief Justice Burger, and Justices Harlan and Blackmun, concluded that, given the record presented on the expedited review, the prior restraint was justified.

In the middle of the Court, Justices Brennan, White, Stewart, and Marshall held that the prior restraint could not be justified under prior Court precedents. Although the language in each of four opinions which served as the controlling votes was slightly different, each indicated the difficulty in justifying a prior restraint in language tracking a strict scrutiny approach. Justice Brennan wrote that to justify a prior restraint the government must allege and prove that publication of the information would “inevitably, directly, and immediately” cause the happening of an event such as a nuclear holocaust.\textsuperscript{209} Justice Stewart concluded that the government must show that disclosure of the information would result in “direct, immediate, and irreparable damage to our Nation or its people.”\textsuperscript{210} While acknowledging that disclosure in this case might well result in substantial damage to the public interest, Justice White nevertheless concluded that the government had not met its “very heavy burden” in this case.\textsuperscript{211} Justice Marshall based his decision on the fact that Congress had not authorized a prior restraint in this case, and that “[w]hen Congress specifically declines to make conduct unlawful it is not for this Court to redecide those issues – to overrule Congress.”\textsuperscript{212}

For this strict scrutiny analysis to apply, a prior restraint must be involved. In \textit{Alexander v. United States},\textsuperscript{213} the Court rejected an argument that a forfeiture of a bookstore under the RICO statute was a prior restraint. Chief Justice Rehnquist noted that the forfeiture did not forbid any future expressive activities or require prior approval for actions. It merely punished the defendant by depriving him of assets derived from prior racketeering activities. Justice Kennedy dissented, with Justices Blackmun and Stevens, saying that the forfeiture was a prior restraint because it served not only an interest in purging a criminal taint, but also an interest in deterring the activities of his speech-related business.

A prior restraint was upheld in \textit{Snepp v. United States}.\textsuperscript{214} In \textit{Snepp}, a former agent of the Central Intelligence Agency breached his employment contract when he failed to submit for pre-publication review a book concerning the CIA. The Court concluded that, in light of his employment agreement, Snepp should have submitted the proposed book to the CIA, and then if Snepp and the

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\begin{footnotes}
\item[209] \textit{Id.} at 726-27 (Brennan, J., concurring).
\item[210] \textit{Id.} at 730 (Stewart, J., joined by White, J., concurring).
\item[211] \textit{Id.} at 731 (White, J., joined by Stewart, J., concurring).
\item[212] \textit{Id.} at 745-46 (Marshall, J., concurring).
\item[213] 509 U.S. 544, 549-54 (1993); \textit{id.} at 565-76 (Kennedy, J., joined by Stevens & Blackmun, JJ., dissenting).
\item[214] 444 U.S. 507, 510-16 (1980); \textit{id.} at 526 (Stevens, J., joined by Brennan & Marshall, JJ., dissenting).
\end{footnotes}
CIA disagreed on any disclosures, the CIA would have the burden to seek an injunction against publication. Because Snepp failed to follow this procedure, the Court put all the profits from his book into a constructive trust for the benefit of the government. Justice Stevens, joined by Justices Brennan and Marshall, dissented, stating that the Court’s “drastic new remedy [of a constructive trust] has been fashioned to enforce a species of prior restraint on a citizen’s right to criticize his government.”

Reflecting the rigor of the strict scrutiny “least restrictive alternative” test, the Court indicated in *Freedman v. Maryland*215 that for even a temporary prior restraint to be valid the restraint must: (1) put the burden on the government to go to court and bear the burden of proving the speech unprotected; (2) merely preserve the status quo for the shortest fixed period compatible with sound judicial resolution; and (3) provide for a prompt, final judicial disposition of the case. Further, due to the concern expressed by the Court about the repressive character of a prior restraint, strict scrutiny will apply to any injunction that has such a prior restraint impact on speech.216 As an example, in *Tory v. Cochran*,217 the trial court had enjoined the defendant, who had engaged in a pattern of defamatory statements about famous trial attorney Johnnie Cochran, to stop picketing or uttering oral statements about Cochran or his law firm in any public forum. While the case was on appeal, Mr. Cochran died. After concluding the case was not moot, because the injunction remained in force even after Cochran’s death, the Court held that since picketing Cochran and his law office could no longer achieve its objective of forcing Cochran to pay “a tribute” to stop the activity, the injunction was now an overly broad prior restraint upon speech that lack plausible justification.

Of course, as part of management of a trial, a trial court judge may impose a “gag order” on parties not to reveal certain information about the on-going proceedings if such an order can satisfy strict scrutiny by being necessary to advance the compelling government interest of ensuring a fair trial. However, that order rarely could be justified if applied to non-parties to the case. For example, in *Multimedia Holdings v. Circuit Court of Florida*,218 a lower court initially had issued an order seeming to tell both the parties to the case and news media outlets that they would be guilty of a misdemeanor and criminal contempt of court if they published the contents of transcripts of grand jury proceedings. However, the court then entered a second order indicating that the court was only enjoining the parties from publication, and that the first order merely pointed out to news media outlets they might be prosecuted by the district attorney’s office if they revealed secret grand jury proceedings. Thus, although “informal procedures undertaken by officials and designed to chill expression can constitute a prior restraint,” citing *Bantam Books, Inc. v. Sullivan*, and “[w]arnings from a court have added weight,” in this case “any threat once implicit in the court’s first order is much diminished,” and thus no stay of the order pending petition for certiorari was warranted.


216 See *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376, 390 (1973); *Carroll v. President and Commissioners of Princess Anne*, 393 U.S. 175, 183-84 (1968).


§ 29.6.1.2  Content-Neutral Injunctions on Speech

A refinement in the standard of review for content-neutral injunctions on speech, rather than content-neutral regulations of speech, was announced by the Supreme Court in *Madsen v. Women's Health Center.*219 There the Court dealt with a challenge to an injunction regarding what actions could be taken by protesters at an abortion clinic. Chief Justice Rehnquist stated that the differences between an injunction and a generally applicable ordinance required somewhat more stringent application of First Amendment principles regarding content-neutral injunctions than the usual time, place, or manner rule, which requires that the law must be "narrowly tailored to serve a significant public interest." The reason closer attention should be paid flows from the general rule that injunctive relief should be no more burdensome than necessary. Thus, the Court said the relevant inquiry is whether a challenged provision "burdens no more speech than necessary to serve a significant government interest." Thus, "no more speech than necessary" was substituted for the “narrow tailoring” or “not burdening substantially more speech than necessary” third prong of intermediate scrutiny.

Applying this heightened test to the facts, the Chief Justice reached the following conclusions, which shed light on the current meaning of burdening “no more speech than necessary”:

1. A 36-foot buffer zone around clinic entrances burdens no more speech than necessary to accomplish the government interests at stake: protecting unfettered ingress and egress.
2. A 36-foot buffer zone to the private property north and west, which staff and patients do not have to cross, burdens more speech than necessary.
3. The noise restrictions were permissible to ensure the health and well-being of patients.
4. A blanket ban on all "images observable" by persons in the clinic burdens more speech than necessary since the clinic can simply pull its curtains.
5. It burdens more speech than necessary to ban all approaches to persons seeking services of the clinic, unless such person indicates a desire to communicate, because in public debate our citizens must tolerate insulting and even outrageous speech in order to provide adequate breathing space to First Amendment freedoms.
6. A ban on picketing, demonstrating, or using sound amplification equipment within 300 feet of the residences of clinic staff is not sufficiently supported in the record as necessary since it appears that a limitation on the time, duration of picketing, and number of pickets outside a smaller zone could have accomplished the same result.220

Justice Scalia, with Justices Kennedy and Thomas, did not think the injunction justified. Justice Scalia first pointed out that the public sidewalk is a public forum and that a restriction on speech imposed by injunction is at least as deserving of strict scrutiny as a content-based restriction because:

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220 Id. at 768-75.
1. An injunction lends itself as readily to the targeted suppression of particular ideas;
2. The right to free speech should not lightly be placed under control of one person; and
3. The injunction is a more powerful weapon than a statute because the collateral bar rule requires an injunction must be obeyed until reversed by a court on appeal.\textsuperscript{221}

Justice Scalia’s second main point was that even by the standard stated by the Court its performance was inadequate. With respect to the 36-foot buffer zone, Justice Scalia noted that there are many ways to protect interests in ingress and egress. The trial court could have ordered demonstrators to stay out of the street and limited the number of demonstrators on the clinic side, and could have forbidden pickets to walk on the driveways. Of course, under intermediate scrutiny, the government does not have to adopt the least restrictive alternative, as Justice Scalia implicitly suggested here. Justice Scalia also concluded that the Court rendered its new test less stringent than plain old intermediate scrutiny by saying the need for a complete buffer zone may be debatable, but some deference must be given to the trial court. The Court was thus saying that the test is whether the means “arguably burden no more speech than is necessary.” As to noise, there was nothing in the original injunction about noise and there is no indication in the record that there is a Florida law on the matter which had been violated. Thus, these interests cannot qualify as “significant interests.”\textsuperscript{222}

One aspect of the majority’s decision in this case is unquestionably unfortunate. The Court adopted in \textit{Madsen v. Woman’s Health Center, Inc.} an analysis under prong three of heightened scrutiny that was described as being somewhere between the intermediate “not substantially more burdensome” test and the strict scrutiny “least restrictive alternative” test.\textsuperscript{223} From the opinion, it is not clear exactly how much more stringent this test is than traditional intermediate scrutiny, nor are other precedents of any help, since the standard is not used in any other case. As the dissent noted in \textit{Madsen}, “The Court creates, brand-new . . . an additional standard. . . . The difference between it and [intermediate scrutiny] is frankly too subtle for me to describe.”\textsuperscript{224}

In fact, this additional version of the narrowly drawn analysis is unnecessary under the “base plus six” model of scrutiny discussed at § 7.2.1 text following n.42. It is understandable the Court might wish to adopt in \textit{Madsen} a standard of review higher than traditional intermediate scrutiny, which applies to a content-neutral regulation of speech, because \textit{Madsen} involves review of a court injunction rather than a generally applicable ordinance.\textsuperscript{225} The majority opinion in \textit{Madsen} discussed the differences between ordinances and injunctions, and concluded that “these differences require a somewhat more stringent application of general First Amendment principles in this

\textsuperscript{221} Id. at 790-95 (Scalia, J., joined by Kennedy & Thomas, JJ., concurring in part and dissenting in part).

\textsuperscript{222} Id. at 803-15.

\textsuperscript{223} Id. at 765 (Rehnquist, J., opinion for the Court).

\textsuperscript{224} Id. at 791 (Scalia, J., joined by Kennedy & Thomas, JJ., concurring in part and dissenting in part).

\textsuperscript{225} Id. at 764-66 (Rehnquist, J., opinion for the Court).
context.*226 The “base plus six” model gives the Court three well-formed options from which to choose – intermediate with bite, loose strict scrutiny, or strict scrutiny.

The dissent in Madsen opted for strict scrutiny.227 The majority could have achieved basically the same result it reached in the case by adopting the intermediate review with bite standard of Central Hudson, discussed at § 30.3.2 nn.228-30. As the majority’s analysis reveals, where the injunction at issue in Madsen was constitutional, it was because it was “directly related” to the perceived harms and was a close enough fit to satisfy the intermediate “not substantially more burdensome than necessary” test. The Court found that a 36-foot buffer zone in front of an abortion clinic was directly related to protecting unfettered ingress and egress from the clinic, and a close enough fit given the deference due to the state court’s familiarity with the factual background, and the Court concluded that the regulation of noise levels was directly related to the need for noise control around hospitals and medical facilities.228 Where the injunction was unconstitutional, it was because it was not directly related to perceived harms, or not a close enough fit, and thus substantially overbroad. The Court concluded that inclusion of 36-foot buffer zone at the back and side of the clinic was not directly related to ingress and egress from clinic, nor was the prohibition on all uninvited approaches to persons seeking to enter the clinic directly related to preventing clinic patients from being stalked or shadowed.229 The Court concluded that banning all images observable from the clinic was not narrowly drawn given the substantially less burdensome option for the clinic to pull its curtains, and the 300-foot ban on picketing around the clinic was “much larger” than necessary and substantially overbroad.230

§ 29.6.1.3 Government Fees or Permits to Speak

Where the government has a content-neutral justification for imposing a fee prior to permitting speech, such as ensuring two groups are not trying to speak at the same time in the same place, or ensuring that the costs are covered of cleaning up any littering that might occur following an event, the court applies an intermediate standard of review. As typically phrased,231 such laws are only allowed if the government has: (1) an important, content-neutral reason for the regulation (the prong one requirement of an intermediate standard of review requiring an important or substantial interest); (2) there are clear criteria leaving no overly broad discretion to the licensing authority (the prong two requirement of ensuring the regulation is substantially related to advancing the important

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226 Id. at 765.

227 Id. at 792-94 (Scalia, J., joined by Kennedy & Thomas, JJ., concurring in part and dissenting in part) (“speech-restricting injunction[s]” should always be given strict scrutiny).

228 Id. at 768-70, 772-73 (Rehnquist, J., opinion for the Court).

229 Id. at 771, 773-74.

230 Id. at 773, 774-75.


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content-neutral interest and is not a cover for content-based discrimination; and (3) procedural safeguards, such as requiring prompt determinations as to license requests and judicial review of license standards (the prong three requirement of the regulation not being substantially more burdensome than necessary and not imposing substantial burdens on free speech).

A case where a permit fee was held constitutional is *Cox v. New Hampshire*.232 In this case, the Court confronted a state statute that required payment of a license fee up to $300 to local governments for the right to parade in the public streets. The fee could be adjusted based on the size of the parade, as the fee "for a circus parade or a celebration procession of length, each drawing crowds of observers, would take into account the greater public expense of policing the spectacle, compared with the slight expense of a less expansive and attractive parade or procession." The Court stated, "There is nothing contrary to the Constitution in the charge of a fee limited to the purpose stated. The suggestion that a flat fee should have been charged fails to take account of the difficulty of framing a fair schedule to meet all circumstances, and we perceive no constitutional ground for denying to local governments that flexibility of adjustment of fees which in the light of varying conditions would tend to conserve rather than impair the liberty sought.” Because collecting a modest fee to reimburse for public expense in policing events is an important government interest that is not a substantial burden on free speech, and the permit system substantially limited the discretion of the licensing board in determining the amount of the fee, and required the permit to be granted as long as the area was not already committed to the use by another group, the Court indicated that the fee system was constitutional.

Where the fee provision is drafted in a way that could permit viewpoint discrimination, the Court applies a strict scrutiny approach. For example, in *Forsyth County, Georgia v. Nationalist Movement*,233 the Court considered fee provisions for assembling or parading on public property where, other than imposing a $1,000 maximum, they vested an official with discretion that could permit viewpoint discrimination in setting the fee. That could occur if the fee was made to depend on the content of the speech, as by estimating the cost needed to protect participants from audience hostility to the content. The Court said that the fee requirement was a prior restraint, but could be upheld if it did not delegate overly broad licensing discretion to a government official and, as a time, place, or manner restriction, was not based on the content of the message, was narrowly tailored to serve a significant government interest, and left open ample alternatives for communication. In the particular case, the Court noted that there were no standards in the ordinance to guide a decision on the amount of the fee, and the evidence indicated that the administrator was not required to rely, and did not always rely, on objective factors. Thus, there was nothing to prevent the official “from encouraging some views and discouraging others through the arbitrary application of the fees.” The maximum cap did not save the law because a tax based on the content of speech does not become more constitutional because it is a small tax. A dissent would have remanded the case to determine whether the phrase "maintenance of public order" would support the imposition of fees based on the size of opposition crowds.234

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232 312 U.S. 569, 576-78 (1941).


234 Id. at 140-42 (Rehnquist, C.J., joined by Justices White, Scalia & Thomas, JJ., dissenting).
Despite *Cox* suggesting an intermediate scrutiny kind of approach, and *Forsyth Country* suggesting strict scrutiny, it was unclear prior to 2002 what was the exact standard of review in these cases. The Court appeared to use in *Forsyth County* the strict scrutiny approach of *Freedman v. Maryland*, noted at § 29.6.1.1 nn.215-16, which was developed in the context of a licensing system that concerned the content-based decision of whether a movie was obscene. On the other hand, the cite to *Freedman* in *Forsyth County* supported a sentence that required only that the permit system “not delegate overly broad licensing discretion to a government official,” which reflects an intermediate approach, rather than strict scrutiny.

In *Thomas v. Chicago Park District,* a unanimous Court clarified in 2002 that the procedural standards required are different in content-based versus content-neutral cases, with content-based licensing, permit, or fee systems having to meet the *Freedman* strict scrutiny test, while content-neutral regulations only have to meet the less stringent test of “adequate standards to guide the official's decision and render it subject to effective judicial review.” This test was supported by a cite to the 1951 case, *Niemotko v. Maryland.* Reflecting an intermediate standard of scrutiny, focused on narrowly drawn regulations to advance a substantial governmental interest, *Niemotko* phrased the relevant test as indicating a permit system would fail where “[n]o standards appear anywhere; no narrowly drawn limitations; no circumscribing of this absolute power; no substantial interest of the community [is] to be served.” Justifying this lower level of scrutiny, Justice Frankfurter stated in a concurrence in *Niemotko,* “A licensing standard which gives an official authority to censor the content of a speech differs *toto coelo* from one limited by its terms, or by nondiscriminatory practice, to considerations of public safety and the like.”

In *Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton,* the Court used the intermediate approach of *Thomas* to strike down an ordinance requiring individuals to obtain a permit prior to engaging in door-to-door advocacy and to display the permit upon demand. Although the Court acknowledged that the prevention of fraud, the protection of residents' privacy,

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236 *Forsyth County*, 505 U.S. at 130.


239 *Id.* at 282 (Frankfurter, J., concurring in the result). *See also* Burk v. Augusta-Richmond County, Georgia, 365 F.3d 1247 (11th Cir. 2004) (ordinance, adopted in advance of expected protests by women’s groups at the Masters Golf Tournament, which requires a permit for political demonstrations and submission of indemnification suitable to city attorney, discriminates on the basis of content, and gives city attorney unbridled discretion to deny indemnification pacts).

and crime prevention were important interests, the statute was not narrowly tailored, either because it was not substantially related to advancing the interests, as for fraud or crime prevention, or was substantially more burdensome than necessary, as for protection of residential privacy. The Court noted:

Even if the interest in preventing fraud could adequately support the ordinance insofar as it applies to commercial transactions and the solicitation of funds, that interest provides no support for its application to petitioners, to political campaigns, or to enlisting support for unpopular causes. . . . With respect to [residential privacy], it seems clear that § 107 of the ordinance, which provides for the posting of "No Solicitation" signs and which is not challenged in this case, coupled with the resident's unquestioned right to refuse to engage in conversation with unwelcome visitors, provides ample protection for the unwilling listener. With respect to [prevention of crime], it seems unlikely that the absence of a permit would preclude criminals from knocking on doors and engaging in conversations not covered by the ordinance. They might, for example, ask for directions or permission to use the telephone, or pose as surveyors or census takers. Or they might register under a false name with impunity because the ordinance contains no provision for verifying an applicant's identity or organizational credentials.

Reflecting the fact that at intermediate scrutiny the government bears the burden to justify its statute, and cannot justify it “on any conceivable basis,” but must use “actual or plausible” governmental interests, discussed at § 26.1.3 nn.92-99, Justice Breyer noted that here the interest in crime prevention was not alleged to be an “actual” interest and was also “intuitively implausible.”

§ 29.6.1.4 Vagueness Challenges

As discussed at § 27.4.3.1, a law is unconstitutionally vague under the Due Process Clauses of the Fifth and 14th Amendments if the law does not define with “sufficient definiteness” what conduct is permitted and what conduct is prohibited and “in a manner that does not encourage arbitrary and discriminatory enforcement.” While any law can be unconstitutionally vague, the Court has expressed the greatest concern regarding vagueness in the context of criminal statutes and in the context of the First Amendment.

Regarding vagueness in the First Amendment context, Professor Erwin Chemerinsky has noted, “[C]ourts are particularly troubled about vague laws restricting speech out of concern that they will chill constitutionally protected speech.” In NAACP v. Button, the Court stated that “standards of permissible statutory vagueness are strict in the area of free expression. . . . Because First Amendment freedoms need breathing space to survive, government may regulate in the area only

241 Id. at 168-69. S

242 Id. at 170 (Breyer, J., joined by Souter & Ginsburg, JJ., concurring).

243 Chemerinsky, supra note 231, at 911.

with narrow specificity. . . . [The freedom of speech is] delicate and vulnerable, as well as supremely precious in our society. . . . [and] the threat of sanctions may deter their exercise almost as potently as the actual application of sanctions.”

Based on concerns such as these, the Court has declared unconstitutional a state statute preventing any “subversive person” from being employed by the state and requiring persons to swear they are not members of a “subversive organization.” The Court concluded that the term “subversive” was “unduly vague” and “uncertain.” The Court has also struck down on vagueness grounds a statute that prohibited treating the flag of the United States “contemptuously.” The Court also ruled unconstitutional a statute making it unlawful to “interrupt” police officers in the performance of their duties. The Court noted that the law was not clearly limited to “disorderly conduct or fighting words” and the law effectively grants police “the discretion to make arrests selectively on the basis of the content of the speech.”

A lower federal court has ruled that the provisions of the USA Patriot Act that include within the definition of “knowingly provides material support or resources” to a terrorist group the activities of providing “training,” “expert advice or assistance,” or “service” are unconstitutionally vague. The Court noted that such terms could be construed to ban pure speech or advocacy activities that presumably would be protected under the First Amendment, such as teaching international law for peacemaking resolutions or how to petition the United Nations to seek redress for human rights violations.

The Court has noted that the concern with vagueness is less in cases involving government funding of speech, as opposed to government regulation of speech. Thus, in National Endowment for the Arts v. Finley, discussed at § 29.4.2 nn.101-03, the Court said that “when the Government is acting as patron rather than as sovereign, the consequences of imprecision are not constitutionally severe.” And, of course, in every case some ambiguity is inherent in language. But the void-for-vagueness doctrine is an important aspect of First Amendment doctrine because of the more stringent application of the doctrine in the free speech context, and the fact that statutes, which otherwise might be constitutional under the First Amendment, can be challenged as being void for vagueness.

In general, liberal instrumentalist Justices, more strongly predisposed to protect free speech rights, have been more willing to use the vagueness doctrine to protect free speech rights. Conservative formalists, with their predisposition to defer to states, and conservative Holmesians, with their predisposition to defer to government in general, and states specifically, are typically less willing

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to use vagueness doctrine as vigorously. Liberal Holmesians, such as Justice White, tend to be pulled in one direction by their liberal predisposition to protect free speech rights, but in the other direction by basic Holmesian deference-to-government principles. Liberal formalists and natural law Justices, based upon their analytic approach to law, are similarly concerned with truly vague statutes, but do not have the instrumentalist strong predisposition toward finding vagueness.

§ 29.6.1.5 \hspace{1em} Substantial Overbreadth Challenges

As noted at § 17.3.1.4. E n.471, one exception to the normal rule that parties cannot bring cases to vindicate the rights of third parties involves the application of the substantial overbreadth doctrine, which is only applicable to free speech cases. As explained by the Court in Members of the City Council of Los Angeles v. Taxpayers for Vincent:

"[T]he transcendent value to all society of constitutionally protected expression is deemed to justify allowing 'attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.' This is deemed necessary because persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression."

In the development of the overbreadth doctrine the Court has been sensitive to the risk that the doctrine itself might sweep so broadly that the exception to ordinary standing requirements would swallow the general rule. In order to decide whether the overbreadth exception is

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applicable in a particular case, we have weighed the likelihood that the statute's very existence will inhibit free expression. "[T]here comes a point where that effect – at best a prediction – cannot, with confidence, justify invalidating a statute on its face and so prohibiting a State from enforcing the statute against conduct that is admitted within its power to proscribe.

"Simply put, the doctrine asserts that an overbroad regulation of speech or publication may be subject to facial review and invalidation, even though its application in the instant case is constitutionally unobjectionable. Thus, a person whose activity could validly be suppressed under a more narrowly drawn law is allowed to challenge an overbroad law because of its application to others. The bare possibility of unconstitutional application is not enough; the law is unconstitutionally overbroad only if it reaches substantially beyond the permissible scope of legislative regulation. Thus, the issue under the overbreadth doctrine is whether a government restriction of speech that is arguably valid as applied to the case at hand should nevertheless be invalidated to avoid the substantial prospect of unconstitutional application elsewhere."

"The requirement of substantial overbreadth is directly derived from the purpose and nature of the doctrine. While a sweeping statute, or one incapable of limitation, has the potential to repeatedly chill the exercise of expressive activity by many individuals, the extent of deterrence of protected speech can be expected to decrease with the declining reach of the regulation." In short, there must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds.250

Given the purpose behind the substantial overbreadth doctrine, the Court has held that the doctrine does not apply in every free speech context. For example, because the incentive to engage in advertising is sufficiently strong to avoid worries that such speech will be chilled, the Court ruled in Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.251 that “the overbreadth doctrine does not apply to commercial speech.” Further, particularly in cases of less protected speech, such as speech raising concerns of obscenity, the Court has been quite willing to allow courts wide latitude to construe a statute narrowly to limit any potential overbreadth problems. For example, in Osborne v. Ohio,252 the United States Supreme Court accepted a narrowing construction by the Ohio Supreme Court of an Ohio statute that literally made the possession of any photo of nude children unlawful, even “innocuous photographs” of babies. The Ohio Supreme Court adopted a narrowing construction that applied the statute only to “lewd exhibition” or “a graphic focus on the genitals” and “where the person depicted is neither the child nor the ward of the person charged.” Given this narrowing, the statute was not unconstitutionally overbroad.

The Court can avoid striking down a whole statute as unconstitutional by “severing” the substantially overbroad part of the statute, and then enforcing the rest of the statute. An example

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is *Brockett v. Spokane Arcades, Inc.*,\(^{253}\) where the Court upheld the rest of an obscenity law by severing out part of the statute that defined “lust,” which was “unduly broad.” As the Court observed in *Virginia v. Hicks*,\(^ {254}\) a law that punishes a substantial amount of protected free speech “suffices to invalidate all enforcement of that law until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression.”

In determining whether a statute, administrative rule, municipal ordinance, or other governmental regulatory program or policy is substantially overbroad, a court must consider any overbreadth judged in relation to the law’s plainly legitimate sweep. The Court has stated:

> [T]here comes a point at which the chilling effect of an overbroad law, significant though it may be, cannot justify prohibiting all enforcement of that law – particularly a law that reflects "legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct." For there are substantial social costs created by the overbreadth doctrine when it blocks application of a law to constitutionally unprotected speech, or especially to constitutionally unprotected conduct. To ensure that these costs do not swallow the social benefits of declaring a law "overbroad," we have insisted that a law's application to protected speech be "substantial," not only in an absolute sense, but also relative to the scope of the law's plainly legitimate applications, before applying the "strong medicine" of overbreadth invalidation.\(^ {255}\)

Reflecting that the doctrine of overbreadth is an exception, *i.e.*, a defense, to application of standard First Amendment analysis, the challenger bears the burden of establishing overbreadth, as is standard for most defenses. This is true even for cases where the underlying First Amendment claim would be analyzed under an intermediate or strict scrutiny standard of review, where the burden is on the government.\(^ {256}\) In determining overbreadth, the court must consider not merely whether the part of the law involved in the instant case is overbroad, but whether the law, *taken as a whole*, is substantially overbroad judged in relation to its plainly legitimate sweep.\(^ {257}\)

As with the vagueness doctrine, liberal instrumentalist Justices, more strongly predisposed to protect free speech rights, have been more willing to use the substantial overbreadth doctrines to protect free speech rights. Conservative formalists, with their predisposition to defer to states, and conservative


\(^ {255}\) *Id.* at 119-20 (citations omitted).

\(^ {256}\) *Id.* at 122.

\(^ {257}\) *Id.*
Holmesian, with their predisposition to defer to government, and states specifically, are typically less willing to use this doctrine as vigorously. Liberal formalists, liberal Holmesians, and natural law Justices, although concerned about overbreadth in statutes, do not always have the same strong predisposition toward finding overbreadth sometimes found in liberal instrumentalist opinions.


For cases involving support for finding substantial overbreadth among this group of Justices, see, e.g. Schad v. Borough of Mt. Ephraim, 452 U.S. 61 (1981) (finding of substantial overbreadth by instrumentalists Justices Brennan, Marshall, Stevens, Blackmun, supported by liberal Holmesian Justice White and natural law Justice Powell); Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002) (Child Pornography Protection Act of 1996 is unconstitutionally overbroad as it criminalizes the production or possession of images that appear to depict minors engaged in sexual activities, even though those images may have been computer generated; Chief Justice Rehnquist, Justice Scalia, and Justice O’Connor dissenting in part; Justice Thomas concurring in the judgment only), discussed at § 30.1.4.1 n.116; Ashcroft v. ACLU, 535 U.S. 564 (2002) (Child On-line Protection Act not substantially overbroad on its face, with plurality opinion of conservative formalists Justices Scalia and Thomas, and conservative Holmesian Chief Justice Rehnquist, limited by concurrences of natural law Justice O’Connor; of natural law Justice Kennedy, joined by natural law Justice Souter and moderate liberal instrumentalist Justice Ginsburg; and with a dissent by moderate liberal instrumentalist Justice Breyer, joined by moderate liberal instrumentalist Justice Stevens), discussed at § 30.1.4.2 nn.134-40.
§ 29.6.2 Specialized Subject Areas Under the First Amendment

§ 29.6.2.1 Coerced Expression or Membership in a Group

Government employees may need to restrain their speech when the matter is not of public concern or when they are in policy-making positions, under the Supreme Court’s doctrine in Connick v. Myers, discussed at § 30.2.2.2 nn.185-86. Property owners may sometimes be obligated to provide a third party with access to engage in free speech activity if their activities are sufficiently connected with the state to create state action, as in Marsh v. Alabama, discussed at § 21.1.2.3 n.11. Where the regulated individuals have not related to the government in such a manner, however, the ability of the government, as sovereign, to require individuals to engage in expressive activity or to admit one or more persons to membership in a group is limited. In such cases, strict scrutiny has usually been applied.

The cases involving requiring groups to admit individuals to membership in a group are discussed at § 31.2.2, as part of analyzing the First Amendment Freedom of Association. In these cases, while the government must meet a strict scrutiny test, the government has been able to satisfy that demanding requirement in a few cases where the government was combating racial or gender discrimination. Cases involving requirements that individuals take oaths that they are not members of disfavored organizations have also proven difficult for the government to justify, as discussed at § 31.2.3, although occasionally such oaths have been upheld. In cases involving more direct forms of coerced expression, the government has had an even more difficult time satisfying the strict scrutiny test.

The foundation for all modern cases on coerced expression was laid in the 1943 case of West Virginia State Board of Education v. Barnette. There the Court held it unconstitutional to require teachers and pupils, as a regular part of a public school program, to participate in a salute to the flag of the United States. In an oft-quoted paragraph, Justice Jackson said, “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.” Justice Jackson added that while government has a power to educate the young for citizenship by strengthening national unity, history teaches the futility of attempting to compel patriotism. Our government was set up by the consent of the governed, and the Bill of Rights denies the power to coerce the consent of the governed. Three deference-to-government

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Holmesian Justices dissented in the case.265

In 1977, in Wooley v. Maynard,266 the Court was confronted with a First Amendment challenge to a New Hampshire law that required all passenger vehicle license plates to carry the motto, "Live Free or Die." This slogan was at odds with plaintiff's religion and his politics since he believed that life is more precious than freedom. The Court was thus faced with the question of whether a state may constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public. Chief Justice Burger applied strict scrutiny to the state's requirement that the license plates on all passenger vehicles bear the motto. He concluded that the state did not have a compelling interest in this mode of facilitating passenger vehicle identification, or in promoting the appreciation of history, individuals, and state pride. To support those conclusions, the Chief Justice said the record showed that New Hampshire passenger license plates have a special configuration of letters and numbers which makes them readily distinguishable without reference to the motto. Regarding the second interest, where a state seeks to disseminate an ideology, such interest cannot outweigh the individual's First Amendment right to avoid becoming the courier of the state’s message.

Reflecting his Holmesian deference-to-government predisposition, Justice Rehnquist dissented, joined, somewhat surprisingly, by Justice Blackmun. Justice Rehnquist said that the plaintiff was not required to say anything. Plaintiffs have simply been required to carry a state auto license tag for identification and registration purposes. They would not be considered to be advocating political or ideological views simply because the tag is on their car. They can easily display their disagreement with the state motto as long as they do not obscure the plate. By analogy, the fact than an atheist carries and uses United States currency does not convey any affirmation of belief on his part in the motto, "In God We Trust."267

Another way that persons may be compelled to participate actively in speech with which they may disagree is to be forced to contribute money that will pay for speech. In Abood v. Detroit Board of Education,268 the Court held that government employees, who were non-union employees included in an "agency shop" contract, had a constitutional right that the union not spend part of their required service fee toward the advancement of ideological causes not germane to the union’s duties as collective-bargaining representative. The Abood Court reaffirmed its prior holdings in Railway

265 Id. at 642-43 (Roberts, J., joined by Reed, J., dissenting); id. at 646 (Frankfurter, J., dissenting).


267 Id. at 710-20 (Rehnquist, J., joined by Blackmun, J., dissenting). Justice White, joined in part by Justices Blackmun and Rehnquist, also dissented in the case, but on the grounds that while declaratory relief against the statute may have been appropriate, the “stronger medicine” of injunctive relief was not appropriate on the facts. Id. at 717-19 (White, J., joined in part by Blackmun & Rehnquist, JJ., dissenting in part).

Employees’ Department v. Hanson and International Association of Machinists v. Street that employees may be required to pay dues under a union shop contract because such interference with their rights of free speech is justified by the legislative assessment of the compelling contribution by the union shop to the system of labor relations established by Congress, as long as the union does not use this power, over an employee's objection, to use his exacted funds to support political causes which the employee opposes. The Abood Court reaffirmed that the Constitution requires that expenditures for causes not germane to duties as collective-bargaining representative must be financed from charges paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of government employment.

The post-instrumentalist Court has generally followed these instrumentalist-era precedents, but has typically avoided extending those cases to new situations. In contrast, instrumentalist Justices have been more willing to adopt added exceptions to standard First Amendment analysis for regulations that support what they perceive as valid business or educational objectives. For example, Abood was followed in Keller v. State Bar of California. There, in 1990, the Court held that although an attorney could be required to join and financially support a state bar association, the attorney’s rights were violated if, without his consent, the State Bar funded activities not germane to regulating the legal process and improving the quality of legal services. However, in 1997, in Glickman v. Wileman Bros., Abood was distinguished by a majority composed of instrumentalist Justices Stevens, Ginsburg, and Breyer, joined by natural law Justices O’Connor and Kennedy.

In Glickman, the Court upheld California legislation which required growers of certain crops to pay assessments which were used by the state for generic advertising of California nectarines, plums, and peaches. The Court said this was an economic regulation and did not abridge anyone's right to speak. For the Court, Justice Stevens pointed out that the marketing orders did not restrain anyone from communicating any message. Nor did they compel any person to engage in any actual or symbolic speech. Further, they did not require the producers to endorse or to finance any political or ideological views. And for the most part, none of the generic advertising conveyed any message with which the challengers disagreed. They complained of having less money for their own advertising. But that is equally true, said Justice Stevens, of assessments to cover employee benefits, inspection fees, or any other activity authorized by a marketing order. The Court noted:

The use of assessments to pay for advertising does not require respondents to repeat an objectionable message out of their own mouths, require them to use their own property to convey an antagonistic ideological message, force them to respond to a hostile message when they "would prefer to remain silent," or require them to be publicly identified or associated with another's message. Respondents are not required themselves to speak, but are merely required

to make contributions for advertising. With trivial exceptions on which the court did not rely, none of the generic advertising conveys any message with which respondents disagree. Furthermore, the advertising is attributed not to them, but to the California Tree Fruit Agreement or "California Summer Fruits."

.... Abbood, and the cases that follow it, did not announce a broad First Amendment right not to be compelled to provide financial support for any organization that conducts expressive activities. Rather, Abbood merely recognized a First Amendment interest in not being compelled to contribute to an organization whose expressive activities conflict with one's "freedom of belief." . . . Here, however, requiring respondents to pay the assessments cannot be said to engender any crisis of conscience. . . . The mere fact that objectors believe their money is not being well spent "does not mean [that] they have a First Amendment complaint."

Moreover, rather than suggesting that mandatory funding of expressive activities always constitutes compelled speech in violation of the First Amendment, our cases provide affirmative support for the proposition that assessments to fund a lawful collective program may sometimes be used to pay for speech over the objection of some members of the group. Thus, in Lehnert v. Ferris Faculty Assn., while we held that the cost of certain publications that were not germane to collective-bargaining activities could not be assessed against dissenting union members, we squarely held that it was permissible to charge them for those portions of "the Teachers' Voice that concern teaching and education generally, professional development, unemployment, job opportunities, award programs . . . , and other miscellaneous matters."

. . . . While the First Amendment unquestionably protects the individual producer's right to advertise its own brands, the statute is designed to further the economic interests of the producers as a group. The basic policy decision that underlies the entire statute rests on an assumption that in the volatile markets for agricultural commodities the public will be best served by compelling cooperation among producers in making economic decisions that would be made independently in a free market. . . . Doubts concerning th[is] policy judgments . . . do not . . . justify reliance on the First Amendment as a basis for reviewing economic regulations. Appropriate respect for the power of Congress to regulate commerce among the States provides abundant support for the constitutionality of these marketing orders.273

A dissent by Justice Souter, joined by Chief Justice Rehnquist and Justices Scalia and Thomas, concluded that compelling speech officially is just as suspect as suppressing it, and should typically be given the same level of scrutiny.274 Since this involved commercial speech, Justice Souter and Chief Justice Rehnquist called for the intermediate scrutiny used in Central Hudson, discussed at § 30.3.2 nn.228-30. Justice Scalia and Thomas have disagreed with the Central Hudson balancing test and would apply strict scrutiny to all content-based regulations of commercial speech.275

273 Id. at 470-76, citing Lehnert v. Ferris Faculty Ass’n, 500 U.S. 507, 527-29 (1991).

274 Id. at 477-78 (Souter, J., joined by Rehnquist, C.J., and Scalia & Thomas, J.J., dissenting).

275 Id. at 491-92 (Souter, J., joined by Rehnquist, C.J., dissenting), citing Central Hudson, 447 U.S. 557, 566 (1980); id. at 504-05 (Thomas, J., joined by Scalia, J., dissenting).
The *Glickman* case was narrowly interpreted and distinguished in *United States v. United Foods, Inc.* 276 In this case, the Court struck down a federal program that mandated assessments on handlers of fresh mushrooms to fund, for the most part, generic advertising to promote mushroom sales. The majority opinion by Justice Kennedy and the dissenting opinion by Justice Breyer both agreed that the case was similar to *Glickman* in that: (1) the program did not impose restraints on the freedom of any producer to communicate any message to any audience; (2) no person was compelled to engage in any actual or symbolic speech; and (3) producers were not compelled to endorse or finance any political or ideological views. However, for Justice Kennedy and Justice Stevens, who switched sides from their votes in *Glickman*, that case was distinguishable on the ground that the tree fruits involved in that case were marketed pursuant to detailed marketing orders that had displaced many aspects of independent business activity. The mandated participation in an advertising program was part of a valid scheme of economic regulation. Here, in contrast, almost all of the funds collected were for one purpose: generic advertising. Because it had not been raised below, the Court did not consider an alternative argument by the government that its advertising was government speech that could be upheld under *Rust v. Sullivan*, discussed at § 29.3.2 nn.79-80.

According to Justice Breyer, dissenting with Justices Ginsburg and O’Connor, this case was similar enough to *Glickman* that it should be upheld as an economic regulation. Based not merely on faithfulness to precedent, which supported Justice O’Connor joining the dissent, 277 Justice Breyer and Ginsburg also indicated strong support for the *Glickman* approach. They noted:

> Nearly every human action that the law affects, and virtually all governmental activity, involves speech. For First Amendment purposes this Court has distinguished among contexts in which speech activity might arise, applying special speech-protective rules and presumptions in some of those areas, but not in others. Were the Court not to do so – were it to apply the strictest level of scrutiny in every area of speech touched by law – it would, at a minimum, create through its First Amendment analysis a serious obstacle to the operation of well-established, legislatively created, regulatory programs, thereby seriously hindering the operation of that democratic self-government that the Constitution seeks to create and to protect. That, I believe, is why it is important to understand that the regulatory program before us is a "species of economic regulation," which does not "warrant special First Amendment scrutiny." 278

Reliance on the speech being government speech was the basis of the decision in 2005 in *Johanns v. Livestock Marketing Association*. 279 In *Johanns*, the government imposed an assessment on cattle

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277 *Id.* at 419 (Breyer, J., joined by Ginsburg, J., and joined as to Parts I & III by O’Connor, J., dissenting).

278 *Id.* at 424-25 (Breyer, J., joined by Ginsburg, J., dissenting).

sales and used the money to fund generic ads which usually said, “Beef. It’s What’s for Dinner.” The ads usually bore the attribution, “Funded by America’s Beef Producers.” In an opinion by Justice Scalia, a majority of the Court upheld the law on the ground that the message set out in the beef promotions was from beginning to end a message established by the federal government, although some ideas for ads were submitted by a private advisory board. Justice Scalia noted that citizens have no First Amendment right not to fund government speech through general taxes or targeted assessments, and that when “the government sets the overall message to be communicated and approves every word that is disseminated, it is not precluded from relying on the government speech doctrine merely because it solicits assistance from nongovernmental sources in developing specific messages.” Justices Breyer and Ginsburg concurred in the result, voting, as they did in United Foods, to view this as a standard economic regulation not warranting First Amendment scrutiny.280

Justice Souter dissented in the case, joined by Justices Stevens and Kennedy. In their view, a compelled subsidy should not be justified as a government speech program similar to Rust v. Sullivan unless the government clearly put the speech forward as its own. This was not true here on the face of the statute, which did not require the ads to show any sign of speech by the government, or as applied, because the ads did not in fact show any such sign and were misleading as to their origin.281

Justice Souter’s approach reflects a sound natural law approach to the issue of compelled speech versus government speech. However, the current majority approach of the Court in cases like Johanns resonates from the combination of conservative formalist Justices, such as Justices Scalia and Thomas, along with Holmesian or Holmesian-leaning deference-to-government Justices, i.e., Chief Justice Rehnquist and Justice O’Connor, combined with the liberal instrumentalist Justices Ginsburg and Breyer, who are predisposed to support government economic regulation.

A related case in this series was Board of Regents of University of Wisconsin System v. Southworth.282 There, the Court upheld a mandatory student activity fee which was used in part to support student organizations engaging in political or ideological speech, so long as there was viewpoint neutrality. Justice Kennedy said for the Court, “When a university requires its students to pay fees to support the extracurricular speech of other students, all in the interest of open

advertising constitutional based on Johanns); Pelts & Skins LLC v. Landreneau, 365 F.3d 423 (5th Cir. 2004) (mandatory assessment on harvested alligator skins to finance generic advertising of alligator products unconstitutional), cert. granted and judgment vacated, 544 U.S. 1058 (2005) (reconsider in light of Johanns), on remand, 448 F.3d 743 (5th Cir. 2006) (remanded to the district court to develop evidence regarding the extent of government control over the speech].

280 Id. at 569 (Breyer, J., concurring); id. at 569-70 (Ginsburg, J, concurring in the judgment).

281 Id. at 570-80 (Souter, J., joined by Stevens & Kennedy, J.J., dissenting).

discussion, it may not prefer some viewpoints to others." Justice Kennedy said that the standard of viewpoint neutrality was being used, rather than the standard of being germane to the organization’s purposes, which was used in *Aboid*, because the germane standard would be unmanageable in a university setting, “particularly where the State undertakes to stimulate the whole universe of speech and ideas.” The Court remanded a referendum aspect of the university’s program, explaining it was not clear how allowing a vote of the student body to control the funding of particular grants could protect viewpoint neutrality.

Justice Souter concurred in the judgment, with Justices Stevens and Breyer. Reflecting an instrumentalist willingness to create exceptions to standard First Amendment doctrine where valid governmental objectives are involved, Justice Souter cautioned against imposing a cast-iron viewpoint neutrality requirement on the university because protecting a university’s discretion to shape its educational mission is an important consideration regarding objections to student fees.

**§ 29.6.2.2 The Government as Educator**

Although the initial set of cases involving the government as educator did not use precise strict scrutiny, intermediate review, or rational review terminology, the cases were decided consistent with standard First Amendment doctrine. Thus, where the regulation involves an aspect of school life viewed as occurring in a non-public forum, such as government control over school classrooms or school auditoriums, some form of rational review has been applied. Where the regulation involves an aspect of school life on playgrounds or in a school lunchroom, which are viewed more as places designated for free speech, and thus public forums, content-neutral regulations have been subjected to intermediate scrutiny, and content-based regulations have triggered strict scrutiny.

The foundational case in the modern era regarding the constitutional rights of students in school is *Tinker v. Des Moines Independent Community School District*, decided in 1969. In that case, several students had been disciplined for wearing black armbands in violation of a school policy against wearing such bands. The Court said that wearing black bands in protest of the Vietnam war was a symbolic act, *i.e.*, “symbolic speech,” akin to “pure speech,” and thus was protected by the First Amendment. The Court then concluded that the school could not sanction the behavior unless it materially disrupted class work, involved substantial disorder, or invaded the rights of others, or unless school authorities could reasonably forecast substantial disruption or material interference with school activities. The Court said that to justify prohibition of a particular expression having no relation to school work, school officials must show more than a desire to avoid the discomfort and unpleasantness that may accompany an unpopular viewpoint. Applying its material disruption test, the Court noted that only a few of 18,000 students in the school wore armbands, and there was no indication that work of any class was substantially disrupted. Outside classes only a few students

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283 *Id.* at 233.

284 *Id.* at 232.

285 *Id.* at 236 (Souter, J., joined by Stevens & Breyer, JJ., concurring in the judgment).

made hostile remarks to children who wore the armbands, and there was no evidence of any threats or acts of violence on school premises.

Although *Tinker* did not use precise intermediate scrutiny language, its requirement that the threat of disruption be “substantial” or “material” to justify school regulation follows the requirement of intermediate scrutiny that the government have an “important or substantial” government interest to regulate and the government action be “substantially related” to advancing that interest. That standard of review is appropriate in *Tinker* because *Tinker* involved an attempt to regulate wearing armbands even on the playground or the lunchroom, typically viewed as public forums, based on a content-neutral, secondary effects concern with disruption of the school’s educational mission.

Justice Black, dissenting, said the record showed that the armbands did divert students' minds from their regular lessons and diverted them to thoughts about the highly emotional subject of the Vietnam war. Also, he seemed to view *Tinker* as applying its approach even to aspects of regulation in the classroom, and thus was concerned that the Court might apply the heightened *Tinker* standard, and not a rational review “reasonableness” standard, to those kinds of regulations. Thus, Black stated that he thought that if pupils of state-supported schools can defy orders of school officials to keep their minds on their schoolwork, it is the beginning of a new revolutionary sort of permissiveness in this country, fostered by the judiciary. Soon, students would believe that it is their right to control the schools, rather than the right of the states that collect taxes to hire teachers for the benefit of the pupils. In Justice Black’s view, this case could subject all public schools to “the whims and caprices of their loudest-mouthed, but maybe not their brightest, students.”287 As noted in the cases discussed below, Justice Black’s fears on this score have not materialized, and rational review is applied to school regulations of matters in the curriculum and, typically, to matters of school dress codes or school uniforms to be worn in school classrooms.

Justice Harlan, also dissenting, would have cast on the challengers the burden of showing that a particular school measure was motivated by other than legitimate school concerns, e.g., a desire to prohibit the expression of a particular point of view, while allowing a dominant view to be expressed, *i.e.*, viewpoint discrimination.288 While this view is consistent with the Holmesian predisposition to defer to government, it is inconsistent with the general rule that for cases at intermediate scrutiny the government bears the burden of defending its action, rather than the challenger bearing the burden of establishing that the action is unconstitutional.

Four years later, in 1973, the views of the majority in *Tinker* were reinforced in a case involving the distribution of a newspaper at a state university. In *Papish v. Board of Curators of the University of Missouri*,289 a university student had been disciplined for distributing on the campus a newspaper containing indecent language. In a *per curiam* opinion, the Court set aside the discipline as a violation of the First Amendment, saying that “the mere dissemination of ideas – no matter how offensive to good taste – on a state university campus may not be shut off in the name alone of

287 *Id.* at 515-25 (Black, J., dissenting).

288 *Id.* at 526 (Harlan, J., dissenting).

‘conventions of decency.’” The majority cited cases where criminal prosecutions had not been allowed to punish indecency. Chief among them was Cohen v. California,290 where it was held that the state could not convict for disturbing the peace where the defendant, in a courthouse corridor, wore a jacket on which an indecent word was inscribed.

Applying more of a rational review standard, Justice Rehnquist, joined by Chief Justice Burger, dissented. Justice Rehnquist said that educational sanctions should be distinguished from criminal prosecutions, basically viewing the entire campus as a non-public forum for which only rational review should apply. Rehnquist explained, “A state university is an establishment for the purpose of educating the State’s young people, supported by tax revenues of the State’s citizens. The notion that the officials lawfully charged with the governance of the university have so little control over the environment for which they are responsible that they may not prevent the public distribution of a newspaper on campus which contains the language described in the Court’s opinion is quite unacceptable to me and I would suspect would have been equally unacceptable to the Framers.”291

The perspective evidenced by the majority in Tinker and Papish continued in place, although just barely, in the 1982 case of Board of Education v. Pico.292 There the Court considered: (1) the extent to which the First Amendment limits a school board's power at elementary or secondary schools to remove books from a library used for supplemental reading; and (2) whether the evidence raised a genuine issue of material fact regarding whether the board exceeded those limits in the case.

On the first issue, a four-Justice instrumentalist plurality, led by Justice Brennan, and joined by Justices Marshall, Blackmun, and Stevens, said that in their view Pico did not involve aspects of control over the curriculum, as the books concerned were not required reading, nor did the case involve government funding, since the issue was not the acquisition of books. Rather, the case only involved the removal of books already in the library and available for general student use. Viewed in this way, the Brennan opinion considered the case from the perspective of standard public forum First Amendment law. From this perspective, Justice Brennan indicated that the books could have been removed for the content-neutral reason that they were "pervasively vulgar" or lacked "educational suitability." On the other hand, the school board could not claim unfettered discretion to make content-based decisions to remove the books because "our Constitution does not permit the official suppression of ideas." If the board intended to deny access to ideas with which it disagreed, and thus attempted to prescribe what is orthodox, and this intent was the decisive factor in its decision, the Constitution was violated. On the procedural issue, Justice Brennan said that the district court erred in entering a summary judgment for the board because the evidence, construed most favorably to the challenging students, does not foreclose the possibility that the board's decision rested decisively on disagreement with constitutionally protected ideas in the books.293


291 410 U.S. at 677 (Rehnquist, J., joined by Burger, C.J., dissenting).


293 Id. at 861-63, 869-75 (plurality opinion of Brennan, J., joined by Marshall, Blackmun & Stevens, JJ.).
In addition to these points, Justice Brennan indicated that for him, and for Justices Marshall and Stevens, there is a constitutional right to receive ideas. This right exists as a logical corollary to the explicit rights of free speech and press, and is a necessary predicate to the recipient's meaningful exercise of his own rights of speech, press, and political freedom. Although he joined the rest of Justice Brennan’s plurality opinion, Justice Blackmun disagreed that there is a right to receive ideas, and a majority of the Court has never agreed with Justice Brennan on this view. In contrast, for Justice Blackmun, this case was based on Justice Brennan’s analysis that state officials may not act to deny access to an idea simply because they disapprove of the idea for partisan or political reasons. School officials may not remove books to restrict access to the political ideas or social perspectives in them. The purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, and to place those subjects beyond the reach of majorities and officials.

Justice White concurred in the judgment because determining the reasons underlying the removal was fact-bound, and he was not inclined to disagree with the Court of Appeals’ view that there was a material issue on why the books were removed. If at trial the books were determined to have been removed for the content-neutral reason of being vulgar, then even under the plurality opinion there would be no valid constitutional challenge to their removal. Reflecting a Holmesian deference-to-government predisposition, Justice White preferred to avoid discussing any further First Amendment aspect of the case until after the trial court had a chance to make a decision on that issue.

Chief Justice Burger dissented with Justices Powell, Rehnquist, and O’Connor. These Justices viewed the case through the lens of rational review, viewing the case a routine matter of government control over the non-public forum aspects of the school curriculum. In this view, the fact that schools can legitimately be used to inculcate values is what was critical. Vulgarity need not be "pervasive" since a board might reasonably decide that random vulgarity is inappropriate for teenage students. In their view, the “vulgarity” of the books was sufficiently well-established that the district court’s summary judgment on that matter was appropriate, and no trial was needed.

The Chief Justice also noted that there is not a hint in the First Amendment or any prior decision of a "right" to have the government continue providing access to certain books. In separate dissents, Justice Rehnquist and Justice Powell also noted that the "right to receive ideas" is not supported by

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294 Id. at 863-69 (plurality opinion of Brennan, J., joined by Marshall & Stevens, JJ.). On such a right, see generally Marc Johnathan Blitz, Constitutional Safeguards for Silent Experiments in Living: Libraries, the Right to Read, and a First Amendment Theory for an Unaccompanied Right to Receive Information, 74 UMKC L. Rev. 799 (2006).

295 Id. at 878-79 (Blackmun, J., concurring in part and concurring in the judgment).


297 Id. at 883-84 (White, J., concurring in the judgment).

298 Id. at 889-93 (Burger, C.J., joined by Rehnquist, Powell & O’Connor, J.J., dissenting).
prior decisions, nor by the necessarily selective process of elementary and secondary education. Later cases have reflected this view, and the First Amendment today does not include any “right to receive” ideas. For this reason, although sometimes phrased in First Amendment terms, any right of the public or press to certain government-held information is dependent on statutory grounds only, like the Freedom of Information Act, and is not, properly speaking, a constitutional issue.

A majority of post-instrumentalist cases have involved regulations relating to activities more clearly within the core of what the Court views as non-public forum curricular matters or school-sponsored events. Tinker and Pico have also been hemmed in, to an extent, by an expanding concept of what is within the curriculum, and the power of school authorities to implement the curriculum.

In 1986, in Bethel School District No. 403 v. Fraser, the Court held that the First Amendment does not prohibit a school district from disciplining a high school student for a “lewd” speech at a high school assembly. As part of supporting a candidate for a student government office, the speaker used phrases like, “he is firm in his pants, firm in his shirt, and firm in his beliefs,” and he “doesn’t attack things in spurts – he drives hard, pushing and pushing until finally – he succeeds.” Chief Justice Burger wrote that the freedom of students to advocate unpopular and controversial views must be balanced against society’s interest in teaching students the boundaries of socially appropriate behavior. It was appropriate and reasonable for the school to prohibit the use of vulgar terms in public discourse, particularly in an assembly where students as young as 14 were in attendance.

None of the four instrumentalist Justices on the Court in 1986 joined in the Fraser majority opinion. Justice Marshall dissented on the ground that the Court should have applied the Tinker standard of review, and the school had failed to demonstrate that the student’s remarks were disruptive. Justice Stevens doubted that the student could have known from the school’s rule that his speech was punishable, and thus to punish him absent such notice violated his due process rights. Justice Brennan concurred only in the judgment, saying that the speech may well have been protected were it delivered elsewhere than the assembly hall, but that the speech could be viewed as disruptive under the Tinker standard of review given the school’s educational mission on how to conduct civil and effective public discourse. Justice Blackmun concurred only in the result without explanation.

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299 Id. at 886-89; id. at 895 (Powell, J., dissenting); id. at 910-15 (Rehnquist, J., joined by Burger, C.J., and Powell, J., dissenting).


301 478 U.S. 675, 678 (1986); id. at 687 (Brennan, J., concurring in the judgment).

302 Id. at 690 (Marshall, J., dissenting); id. at 691 (Stevens, J., dissenting); id. at 687-88 (Brennan, J., concurring in the judgment); id. at 678 (Blackmun, J., concurring in the result).
A general test for determining what behavior is encompassed by the curriculum was stated in *Hazelwood School District v. Kuhlmeier*.

There the Court upheld the exercise of editorial judgment by a high school principal concerning several articles proposed for inclusion in a school-financed student newspaper. The two main concerns in light of which the censorship was exercised were: (1) the name of a pregnant student might be identifiable from the text, and (2) references to sexual activity and birth control were inappropriate for some of the younger students in the school. The principal believed that there was no time to make other changes. Thus, he eliminated the two pages on which the articles appeared, resulting in several other stories being excluded.

Justice White said that the student paper was not a public forum because it was developed within the school curriculum and the evidence did not show a clear intent to create a public forum. The test for being within the curriculum was whether there is supervision by faculty members and whether the activity is designed to impart particular knowledge or skills to student participants and audiences. Since the school had reserved this forum for its purposes, and, consistent with this, all articles were submitted to the principal prior to publication, school officials were entitled to regulate the contents in any reasonable manner. The Court stated that educators are entitled to exercise control to assure that participants learn whatever lessons the activity is designed to teach, that the audience is not exposed to material inappropriate for their level of maturity, and that the views of speakers are not erroneously attributed to the school. Summing up, Justice White said that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."

Applying that rule to the facts, Justice White said that the principal had acted reasonably because of (1) respect for student anonymity, since there were so few pregnant students, and (2) the publication was distributed to 14-year-olds, and might be taken home to be read by even younger siblings. Accordingly, the principal might reasonably have concluded that the students had not sufficiently mastered principles of journalism pertaining to the treatment of controversial issues, personal attacks, and the restrictions imposed on journalists within a school community. Finally, in view of time constraints, the principal acted reasonably in deleting the two pages.

In accord with the liberal instrumentalist predisposition to protect free speech, Justice Brennan dissented, with Justices Marshall and Blackmun. Justice Brennan began by asserting that public educators might accommodate some student expression even if it contradicts views or values that the school wishes to inculcate. He would apply the standard of *Tinker* to the facts, rejecting any distinction between school-sponsored speech versus incidental student speech separate from the school’s curriculum. For Justice Brennan, the mere fact of school sponsorship does not license thought control and interference with the students' right to receive information and ideas. Regarding concerns about school sponsorship, a published disclaimer would have been sufficient. Nor did the publication interfere with other students' rights that are protected by law. In addition, even if

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304 *Id.* at 270-73.

305 *Id.* at 274-76.
different standards apply to school curricular decisions, Justice Brennan characterized what was done by the principal as viewpoint discrimination, camouflaged as protecting students from sensitive topics, which would trigger strict scrutiny anyway. Finally, even under a rational review standard, Justice Brennan concluded that it was unreasonable simply to withdraw the pages rather than make deletions or additions, rearrange the layout, or delay publication.306

These cases make clear that indecency by students in the school environment can be sanctioned in order to advance curricular goals, such as teaching students the boundaries of socially appropriate behavior,307 and a student newspaper supervised by faculty members can be censored by the school to insure that the audience is not exposed to material inappropriate for their level of maturity, the test being whether the actions of educators are reasonably related to legitimate pedagogical concerns.308 Reflecting a view widely shared among the lower federal courts, the Ninth Circuit Court of Appeals held in Chandler v. McMinnville School District 309 that the goal of teaching students the boundaries of appropriate behavior applies throughout the school grounds to any “vulgar, lewd, obscene, or plainly offensive speech,” and thus Fraser applies to any such speech anywhere in the school.

With respect to non-vulgar speech, courts have struggled with the question of when speech is sufficiently connected with on-campus activities that it can be regulated under Hazelwood versus when the speech is sufficiently unconnected to the school that Tinker applies. The easy cases involve off-campus student speech later brought on-campus by persons other than the speaker. These cases have dealt with such things as "underground" student newspapers distributed off-campus, student-run websites created on off-campus computers, and various writings brought on-campus by students other than their original author. In these cases, Tinker usually applies.310

In harder cases of on-campus speech by students, a number of courts have suggested, consistent with the Ninth Circuit’s opinion in Chandler, that Hazelwood only applies to speech or speech-related activities that "students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school."311 While this was true of the student newspaper in Hazelwood, the better reasoning is that the Court’s opinion in Hazelwood focused on any activity “supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences.”312 It is this context to which the non-public forum analysis of Hazelwood should apply.

306 Id. at 279-90 (Brennan, J., joined by Marshall & Blackmun, JJ., dissenting).
309 978 F.2d 524, 528-29 (9th Cir. 1992).
309 Chandler, 978 F.2d at 529, citing Hazelwood, 484 U.S. at 271.
311 Chandler, 978 F.2d at 529, citing Hazelwood, 484 U.S. at 271.
312 Hazelwood, 484 U.S. at 271.
Faced with a possible limitation on Hazelwood as in Chandler, some lower courts have suggested that for on-campus speech Tinker should be limited to “political” speech of the students, and that other forms of student speech should never be entitled to the Tinker intermediate standard of review, even if the speech is not being regulated under Hazelwood as school sponsored or school generated, or otherwise part of the school’s curriculum or educational mission.\(^{313}\) While such an approach may reflect the Miekeljohn view that the First Amendment is principally about political speech, discussed at § 29.2.2 n.21, it is inconsistent with modern doctrine where “literary, artistic, political, or scientific” speech are all entitled to the same level of First Amendment scrutiny, even in the school context.\(^{314}\) The better approach would be to have an analysis faithful to Hazelwood, where rational review applies to speech not merely school sponsored or school generated, and thus bearing the imprimatur of the school, but also to speech connected to the school’s curriculum or educational mission.

For such cases of school-sponsored or school-generated speech, under standard non-public forum analysis, noted at § 29.2 nn.67-68 & Table 29.2, content-neutral or content-based subject-matter regulations would trigger rational review,\(^{315}\) while regulations involving viewpoint discrimination would trigger strict scrutiny.\(^{316}\) This would allow Tinker’s intermediate standard of review to apply for literary, artistic, political, or scientific speech that is clearly student generated and not supervised by faculty members as part of the school’s general educational mission, as long as the school has a content-neutral reason for the regulation, such as safety or avoiding disruption of the educational environment.\(^{317}\) For content-based regulations of such student speech, strict scrutiny would apply.

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\(^{314}\) See, e.g., LaVine v. Blaine Sch. Dist., 257 F.3d 981, 988-89 (9th Cir. 2001).

\(^{315}\) See, e.g., Bannon v. School Dist. of Palm Beach County, 387 F.3d 1208, 1212-17 (11th Cir. 2004), cert. denied, 126 S. Ct. 330 (2005) (prohibition of student’s religious messages on hallway murals opened to non-profane, non-offensive student artwork as part of supervised beautification project is content-based, subject matter restriction of school-sponsored expression that is reasonably related to legitimate pedagogical purpose of avoiding disruption of the learning environment).

\(^{316}\) See, e.g., Peck v. Baldwinsville Central Sch. Dist., 426 F.3d 617, 629-33 (2nd Cir. 2005), cert. denied, 126 S. Ct. 1880 (2006) (evidence that kindergarten teacher and public school principal censored religious image from student poster prepared in response to assignment on protecting the environment because the poster offered religious viewpoint precludes summary judgment, as issue exists whether the action constituted viewpoint discrimination triggering strict scrutiny review).

\(^{317}\) See, e.g., Walker-Serrano v. Leonard, 325 F.3d 412 (3rd Cir. 2003) (public elementary school officials who interrupted third grader’s effort on icy playground, and in silent reading class period, to gather fellow student’s signatures on petition objecting to field trip to circus because of perceived cruelty to animals, satisfied Tinker based on safety and disruption concerns).
Although the Supreme Court has not ruled on the issue, many lower courts have upheld various school dress codes or uniform policies at the elementary and secondary school level on rational review grounds of exercising control over student appearance in the classroom as it is related to the school’s educational mission.\(^\text{318}\) This would appear to be a sound approach. In contrast, in Canady v. Bossier Parish School Board,\(^\text{319}\) the Fifth Circuit upheld a school dress code by viewing the dress code as a content-neutral time, place, or manner restriction, but concluded that this form of intermediate scrutiny, which the court associated with the draft-card burning case of O’Brien, discussed at § 29.4.4.1 nn.119-20, is less vigorous than the Tinker form of intermediate scrutiny.

This view tracks the view proposed by Justice Souter, discussed at § 29.4.4.3 nn.154-59, that a “content-correlated” regulation of speech, justified in Tinker on content-neutral, secondary effects grounds of concern with school disruption, should be analyzed under a higher form of scrutiny than standard content-neutral time, place, or manner regulations. The Fifth Circuit’s view differs from Justice Souter, however, in concluding that O’Brien represents the less stringent form of intermediate review associated with time, place, or manner regulations, rather than Justice Souter’s view that O’Brien represents the higher “content-correlated” kind of case. In Guiles v. Marineau,\(^\text{320}\) a Second Circuit panel applied the regular Tinker analysis to the case of a seventh-grader’s T-shirt that depicted President Bush as a drug and alcohol abuser. The Second Circuit found that the student had a constitutional right to wear the T-shirt absent a showing of disruption or confrontation in the school.

As suggested at § 29.4.4.3 text following n.159, the better analysis would be to recognize that the same level of basic intermediate review is represented in content-neutral time, place, or manner regulations, the O’Brien test for content-neutral secondary effects cases, and Tinker. However, without regard to this aspect of intermediate scrutiny, school uniform cases should be analyzed under the Hazelwood/Fraser line of rational review cases, as involving regulation of student appearance as part of the non-public forum aspect of school control over the school’s educational program, at least for elementary and secondary school cases. Naturally, cases involving students over 18 in the college or university setting raise different considerations regarding the school’s educational mission, particularly for dress on campus grounds outside the classroom.

An additional issue regarding the First Amendment and schools is the recent practice at some colleges and universities to designate official “free speech zones” dedicated to the advocacy of ideas, but then to limit the handing out of leaflets, or making speeches, on other parts of the university campus. The university typically justifies such zones on content-neutral grounds, such as limiting littering that might result from unrestricted leafletting, and administrative control to help prevent organizations with different viewpoints possibly clashing anywhere on campus. Since applicable to the entire campus, such regulations typically are viewed as content-neutral regulations in a public forum, triggering intermediate review, and requiring that the regulations ensure that

\(^{318}\) See generally Andrew D.M. Miller, Balancing School Authority and Student Expression, 54 Baylor L. Rev. 623, 664-75 (2002).

\(^{319}\) 240 F.3d 437, 442-44 (5th Cir. 2001).

\(^{320}\) 461 F.3d 320 (2nd Cir. 2006).
meaningful communication with intended audiences can take place, as part of ensuring under the last prong of *O’Brien* that ample alternative channels of communication exist.\footnote{\textsuperscript{321}}

Another issue regarding the First Amendment and schools is a growing number of school districts that have expanded their curriculum to include "service learning" initiatives. Also known as “mandatory community service programs,” such “service learning” initiatives require that students devote a specified number of hours over their high school careers to preparing for placement at a community service organization, performing the various types of labor required at such organizations, and discussing and reflecting upon their experiences. These programs are alleged to develop teamwork, communication, and problem-solving skills by placing the student in a "real-world" setting; instill a sense of civic obligation; advance an understanding of the student's links to his or her community; and generate lasting pro-social behavioral inclinations. Either as an aspect of rational review under *Hazelwood* as part of the school’s curriculum, or even if viewed as regulating “off-campus” activities for the content-neutral reasons alleged to support such programs, such “service learning” initiatives would appear to be constitutional under the First Amendment, although arguments have been made reaching the opposite conclusion.\footnote{\textsuperscript{322}}

\section*{§ 29.6.2.3 Invasion of Privacy}

The government has power to protect persons from intolerable intrusions into their privacy, particularly in the home. The matter was well expressed by Justice Harlan, writing for the Court in *Cohen v. California*.\footnote{\textsuperscript{323}} Justice Harlan said:

While this Court has recognized that government may properly act in many situations to prohibit intrusion into the privacy of the home or unwelcome views and ideas which cannot be totally banned from the public dialogue, . . . we have at the same time consistently stressed that “we are often ‘captives’ outside the sanctuary of the home and subject to objectionable speech.” The ability of the government, consonant with the Constitution, to shut off discouragement solely to protect others from hearing it is . . . dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner.\footnote{\textsuperscript{324}}
In the post-instrumentalist era, the Justices have disagreed on what is an essentially intolerable intrusion. Conservative formalist and Holmesian Justices tend to be more deferential to privacy rights, while liberal instrumentalist Justices tend to be more deferential to rights of free speech. Natural law Justices tend to strike a middle ground, balancing privacy concerns of the audience against the free speech rights of demonstrators or the press.

For example, in *Frisby v. Schultz*, the Court dealt with an ordinance interpreted to prevent picketing directed at a single residence. For the Court, Justice O’Connor said, “The First Amendment permits the government to prohibit offensive speech as intrusive when the ‘captive’ audience cannot avoid the objectionable speech. . . . The target of the focused picketing banned by the Brookfield ordinance is just such a ‘captive.’” Justice O’Connor also referred to cases holding that individuals are not required to welcome uninvited speakers into their houses and that the government may protect this freedom, whether arising from offensive radio broadcasts, offensive mail, or sound trucks.

Justice Brennan dissented with Justice Marshall on the ground that the ordinance was not narrowly tailored. He explained, “Once size, time, volume, and the like have been controlled to ensure that the picket is no longer intrusive or coercive, only the speech itself remains, conveyed perhaps by a lone, silent individual, walking back and forth with a sign . . . . Such speech, which no longer implicates the heightened governmental interest in residential privacy, is nevertheless banned by the Brookfield law.”

In contrast, in *Bartnicki v. Vopper*, the Court concluded that a broadcaster could not be held liable for broadcasting an illegally intercepted communication when the broadcaster did not participate in the interception and the matter was of public concern. The Court held that the privacy interest had to give way to the interest in publishing matters of public importance. Regarding the level of scrutiny applicable to the case, the majority opinion of Justice Stevens, joined unreservedly by Justices Kennedy, Souter, and Ginsburg, seemed to adopt a strict scrutiny kind of analysis. However, the concurring opinion of Justices Breyer and O’Connor, two Justices with an occasional affinity for the Holmesian approach, as noted at §§ 11.4 nn.107-09 & 12.4.2, said that “strict scrutiny – with its strong presumption against constitutionality – is normally out of place where, as

situation the right of a householder to bar solicitors, hawkers, and peddlers from his property.


327 *Id.* at 494.


329 *Id.* at 532, 535 ("need . . . of the highest order" and “overriding importance of that commitment” needed to “remove the First Amendment shield”).
here, important competing constitutional interests are implicated.\(^{330}\) The dissenting opinion of Chief Justice Rehnquist and Justices Scalia and Thomas also indicated that given the content-neutral privacy interests involved, the proper standard of scrutiny should be intermediate review.\(^{331}\)

Applying a slightly higher than ordinary intermediate review to an injunction rather than a criminal prosecution, the Court struck down in Madsen v. Women’s Health Center, Inc.\(^{332}\) portions of an injunction intended to protect the privacy of patients in an abortion clinic, as discussed at § 29.6.1.2 nn.219-30. In part, the injunction had ordered the defendants, from 7:30 a.m. through noon, on Mondays through Saturdays, not to display images observable to patients inside the clinic. Chief Justice Rehnquist wrote, “The only plausible reason a patient would be bothered by ‘images observable’ inside the clinic would be if the patient found the expression contained in such images disagreeable. But it is much easier for the clinic to pull its curtains than for a patient to stop up her ears, and no more is required to avoid seeing placards through the windows of the clinic. This provision of the injunction violates the First Amendment.”\(^{333}\)

The result of these cases seems to be that invasions of privacy by speech are protected today unless the Court finds them intolerable, and that finding depends on the extent to which the audience is captive and the nature of the sanction that is sought to be applied. Other cases that could be viewed as invasions of privacy, such as in Hustler Magazine v. Falwell,\(^{334}\) where a public figure sued for intentional infliction of emotional distress caused by publication of a satirical cartoon, have been handled under standard defamation law principles, discussed at § 30.2.1.1.B.

§ 29.6.2.4  Balancing Free Speech and Fair Trial Rights

In 1907, in Patterson v. Colorado,\(^{335}\) the author of editorials thought by a trial judge to have a tendency to interfere with the administration of justice in a pending case was held entitled to protection against a contempt citation only if the proceedings were arbitrary. However, in the 1941 case of Bridges v. California,\(^{336}\) the publishers of materials relating to a pending case were protected from a contempt citation by a version of the clear and present danger test which required the threat of an serious evil and an extremely high degree of imminence.

330 Id. at 536-37 (Breyer, J., joined by O’Connor, J., concurring).
331 Id. at 544-46 (Rehnquist, C.J., joined by Scalia and Thomas, JJ, dissenting).
333 Id. at 773.
335 205 U.S. 454, 458-63 (1907).
The modern series of cases begin in 1966 with *Sheppard v. Maxwell*.\(^{337}\) Prejudicial publicity about the defendant had saturated the community in which he was tried. The Court said that the press must have a free hand if there is no threat to the integrity of a trial. However, where the accused might be prejudiced, the court can and should take appropriate steps to protect the accused’s Sixth Amendment right to a fair trial, noted at § 23.2.1.3.A nn.163-65. The court can limit the presence of the press at judicial proceedings. The judge can also continue the case until publicity subsides, transfer it to another county, or sequester the jury. Failure to protect the defendant from inherently prejudicial publicity, as in this case, will result in reversal of the conviction.

In contrast, direct efforts to stop pretrial publicity have been treated rather harshly by the Court. In *Nebraska Press Association v. Stuart*,\(^{338}\) the trial judge had restrained a news service from publishing or broadcasting accounts of confessions or admissions made by the accused or facts “strongly implicative” of the accused’s guilt. Reversing, the Court said that prior restraints are the most serious and least tolerable infringement of First Amendment rights and “it is nonetheless clear that the barriers to prior restraint remain high unless we are to abandon what the Court has said for nearly a quarter of our national existence and implied throughout all of it.” Here there had been no finding that alternative measures, such as those mentioned in *Sheppard*, would not have protected defendant’s rights. Also, to the extent the order reached evidence adduced at an open hearing, it plainly violated settled principles, and was too vague and too broad to survive scrutiny.

Despite these statements, protective orders that would enhance the litigation process have been approved. For example, in *Seattle Times Co. v. Rhinehart*,\(^{339}\) the Court allowed a protective order restraining the parties to civil litigation from publishing material obtained through the discovery process. The Court said this furthered a substantial interest unrelated to the suppression of expression, *i.e.*, a purpose to assist in the preparation of trial or settlement. By use of this language, the Court approved use of an intermediate standard of review for a protective order justified by a content-neutral reason. The Court noted that this cases did not involve the classic kind of prior restraint, to which strict scrutiny would be applied, because the protective order “prevents a party from disseminating only that information obtained through use of the discovery process. Thus, a party may disseminate the identical information covered by the protective order as long as the information is gained through means independent of the court’s processes.”

Cases involving complete bans on persons, including the media, from criminal courtrooms have triggered strict scrutiny review. As the Court noted in *Globe Newspaper Co. v. Superior Court*,\(^{340}\) the Court’s precedents have “firmly established” that “the press and general public have a constitutional right of access to criminal trials.” Closing court proceedings will only be allowed if it were “necessitated by a compelling government interest, and is narrowly tailored to serve that


interest.” In *Globe Newspaper*, the Court concluded that a law allowing trial courts to exclude the press and the public from hearing the testimony of witnesses under 18 who were allegedly were the victims of sex crimes was supported by the compelling government interest of protecting such victims from public exposure, but that the law requiring closure in all cases was not the “least restrictive alternative” and that a case-by-case approach would adequately serve the state’s interests.

The Court has also held under a strict scrutiny approach that it is unconstitutional to exclude the public or the press from *voir dire* proceedings, since such proceedings are a key phase of a trial. The Court acknowledged in *Press-Enterprise Co. v. Superior Court*[^341] that closure might be justified to advance the compelling government interest of protecting prospective jurors from answering “deeply personal matters” in open court, but that “the presumption of openness may be overcome only by an overriding interest based on findings the closure is essential to preserve higher values and is narrowly tailored to serve that interest.” Under this standard, the Court said, closure should be regarded as the last resort, *i.e.*, a “least restrictive alternative” approach.

In each of these cases the Court has treated the rights of the press and the rights of the public equally, confirming that for purposes of First Amendment law there is no difference in the standards of review applicable in “freedom of speech” and “freedom of the press” cases. Similarly, in *Branzburg v. Hayes*,[^342] the Court concluded that members of the press have no special protection to resist subpoenas requiring the disclosure of confidential sources, although the Court did note that for any person the relevant test to justify a subpoena in these circumstances was a strict scrutiny “compelling state interest” test, and that this was met in the case. In *Zurcher v. Stanford Daily*,[^343] the Court held that the press have no special right to resist searches and seizures of material in press rooms which are otherwise constitutional under the Fourth Amendment.

Reflecting a special solicitude for the press, Justice Stewart dissented in both *Branzburg* and *Zurcher*, as did a number of liberal instrumentalist Justices in each.[^344] Despite this view, the majority of the Court has not adopted doctrines granting the press special First Amendment protection. The press also have no special right of access to gather information, or exemption from antitrust laws, or exemption from the application of any general law.[^345] As a matter of state law, a


[^344]: *Branzburg*, 408 U.S. at 711 (Douglas, J., dissenting); *id.* at 725 (Stewart, J., joined by Brennan & Marshall, JJ., dissenting); *Zurcher*, 436 U.S. at 570-71 (Stewart, J., joined by Marshall, J., dissenting); *id.* at 577 (Stevens, J., dissenting).

[^345]: See *Branzburg*, 408 U.S. at 682-86. See also *Baltimore Sun Co. v. Ehrlich*, 437 F.3d 410 (4th Cir. 2006) (Governor’s directive forbidding all state executive employees to speak with two specific news reporters because of their perceived bias in reporting had only *de minimis* impact on reporters’ exercise of their First Amendment rights to speak and therefore did not give rise to retaliation claim based upon activity “sufficient to chill the exercise of First Amendment rights” actionable under 42}
large number of states have adopted shield laws to protect reporters from having to reveal their sources, but this is a matter of state law, not constitutional right. No such federal statute exists regarding prosecutions in the federal courts.\textsuperscript{346}

There is no evidence that the Court has changed its position with respect to the above matters in the post-instrumentalist era. However, there has been a slight retreat by the Court with respect to standards protecting the speech rights of defense attorneys. In \textit{Gentile v. State Bar of Nevada},\textsuperscript{347} a 1991 case, a defense attorney had said some six months before trial that the state had indicted his client as a scapegoat for crooked cops. For this speech he was discipline by the State Bar of Nevada. In an opinion by Chief Justice Rehnquist, a majority of the Court said that because lawyers are officers of the court, their speech, when representing clients in pending cases, may be regulated under a less demanding standard than that established for regulation of the press in \textit{Nebraska Press}. The Chief Justice said the Court should ask only whether the speech created “a substantial likelihood that his statements would materially prejudice the trial of his client,” an intermediate level of review, rather than a strict scrutiny level of review of “actual prejudice” or “an imminent threat to fair trial,” reflected in cases like \textit{Nebraska Press}, discussed at § 29.6.2.4 n.338, and its cite to \textit{New York Times Co. v. United States} (The Pentagon Papers Case), discussed at § 29.6.1.1 nn.208-12.

Justice Kennedy dissented on this point, joined by the instrumentalist Justices Marshall, Blackmun, and Stevens. He would have applied “normal First Amendment principles” to the case, which would have required a strict scrutiny approach for this content-based regulation of speech. Justice Kennedy noted that the state has many avenues for disseminating information adverse to a criminal defendant, whereas defendants cannot speak without risking incrimination and their only means of countering prosecution statements is likely to be their defense counsel.\textsuperscript{348} These four Justices were joined by Justice O’Connor, however, regarding whether the State Bar’s rule under which the attorney was disciplined were unconstitutionally vague. Announcing the judgment of the Court which set aside disciplinary sanctions for making that statement, Justice Kennedy wrote that the rule on which the sanctions were based was unconstitutionally vague since it was not clear whether the attorney knew or reasonably should have known that his remarks created “a substantial likelihood of material prejudice” in a trial for which a jury was not to be empaneled for six months and at which no juror indicated any recollection of the lawyer or his press conference.\textsuperscript{349}

\footnotesize{U.S.C. § 1983, despite the inconvenience to reporters of relying on other sources to gather information).}

\textsuperscript{346} \textit{See generally} Chemerinsky, \textit{supra} note 231, at 1129, \textit{citing} Richard Totel, \textit{The Case for a National Reporter’s Shield Law}, New Jersey Law Journal, March 21, 1991, at 9 (28 state legislatures had adopted a reporters’ shield law, and courts in another 18 states and the District of Columbia have recognized some sort of privilege at common law or as a matter of state constitutional law).


\textsuperscript{348} \textit{Id.} at 1053-56 (Kennedy, J., joined by Brennan, Marshall & Blackmun, JJ.).

\textsuperscript{349} \textit{Id.} at 1048-51; \textit{id.} at 1082 (O’Connor, J., concurring).
A separate issue arises when the press requests, and courts permit, either on their own motion or pursuant to statutory authorization, cameras to be placed in the courtroom to television court proceedings live. As discussed at § 23.2.1.3.A nn.164-68, while in extreme circumstances such coverage can be viewed as interfering with the defendant’s Sixth Amendment right to a fair trial, all 50 states have some provision for televised access in their state courts in some circumstances, although that access may be limited in certain cases.

In contrast to this more receptive attitude regarding cameras in the courtroom in state courts, the federal courts, and United States Supreme Court, have continued their historic reluctance to permit cameras in the courtroom. As of October, 2006, only a couple of federal Circuit Courts of Appeals, the Second Circuit and the Ninth Circuit, have rules providing for televising appellate proceedings in some limited circumstances, pursuant to authority granted them by the Judicial Conference in 1996.350 As discussed at § 23.2.1.3.A n.169, beginning with the 2006 Term, the Supreme Court will make same-day written transcripts available of all oral arguments.

§ 29.6.2.5 Protecting the Press from Taxation That Threatens to Suppress Ideas

In the original natural law period, Chief Justice Marshall observed, “The Power to tax involves the power to destroy.”351 In the formalist era, Justice Holmes rebutted Marshall by saying, “The Power to tax is not the power to destroy while this Court sits.”352 Even so, during the Holmesian era, the Court tended to uphold taxes that seriously interfered with an activity, so long as that activity was entitled to no special constitutional protection.353 Of course, the press is entitled to protection as a matter of routine free speech protections. From an historical perspective this is appropriate because in England, after licensing prior restraints were abandoned, taxes soon were passed whose principal objective was the control of “licentious, schismatical, and scandalous” publications.354

The first Supreme Court case involving a challenge to a tax specially applicable to the press was Grosjean v. American Press Co.,355 decided in 1936, on the borderline between the formalist and Holmesian eras. In Grosjean, the Court struck down a tax on the gross receipts of newspapers

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having a circulation of more than 20,000 copies per week. The Court said that in light of its history and setting, the tax was “a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the constitutional guarantee.” Many of the papers being taxed had been critical of the most powerful political figure in the state, Senator Huey Long.356

First Amendment protection from taxation was broadened during the instrumentalist era in *Minneapolis Star and Tribune Company v. Minnesota Commission of Revenue*.357 Justice O’Connor said that government can subject newspapers to generally applicable economic regulations without creating constitutional problems, but a use tax on the cost of paper and ink products, with the first $100,000 being exempt, singled out the press for special treatment. Such singling out cannot stand unless under strict scrutiny necessary to achieve a compelling government interest. The state had not shown such an interest since it had not explained why it chose to use a substitute for the state’s general sales tax.

In the modern post-instrumentalist era, the protection traditionally given the press from being singled out in taxes was extended by requiring strict scrutiny whenever incidence of a tax was based on content. Thus, in *Arkansas Writers’ Project v. Ragland*,358 decided in 1987, the Court held that the First Amendment was violated by a state sales tax scheme that taxed general interest magazines but exempted newspapers and religious, professional, trade, and sports journals. For the Court, Justice Marshall pointed out that this made incidence of the tax depend entirely on the content of the magazine, and yet the state did not show that this was justified by a compelling state interest necessary to achieve that end.

In 1991 there was a slight retreat from the protection given the press by this series of cases. By a 7-2 vote, the Court held in *Leathers v. Medlock*359 that Arkansas could impose a sales tax on cable television, but exempt newspapers, magazines, and satellite broadcast services. On behalf of the majority, Justice O’Connor pointed out that the record did not show an impermissible motive to discriminate against the press, the law did not single out a small group of publishers, since there were approximately 100 cable systems operating in the state, and the law did not discriminate on the basis of content. She added that there is no rule that intermedia or intramedia discrimination violates the First Amendment in the absence of any evidence of intent to suppress speech or of any effect on the expression of particular ideas.

Justice Marshall, dissenting with Justice Blackmun, said that the state’s only expressed interest, that of raising revenue, was not sufficiently compelling to overcome the presumption of unconstitutionality that should apply where the state discriminates between elements of the media, thus creating the risk of covert censorship. He added that it was not necessary for the Court to find
evidence of an improper censorial motive. It was up to the state to justify its discrimination because the government has an obligation of evenhandedness.  

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Id. at 454 (Marshall, J., joined by Blackmun, J., dissenting).
CHAPTER 30: EXCEPTIONS TO STANDARD FREE SPEECH DOCTRINE

The Supreme Court has created a number of exceptions to standard free speech doctrine for certain categories of speech that do not receive full First Amendment protection. In some of these cases, such as fighting words, obscenity, indecency involving children, or certain advocacy of illegal conduct, discussed at § 30.1.1-30.1.4, the speech receives no First Amendment protection, except for the prescription against viewpoint discrimination that triggers strict scrutiny review, as discussed at § 30.1. For other kinds of speech, like defamatory speech or governmental regulation of the speech of government employees on matters of public concern, discussed at § 30.2, a version of rational review is applied. For regulations of broadcast radio or television, or regulations of commercial speech, discussed at § 30.3, a version of intermediate scrutiny is applied. In campaign finance cases, or speech regulating the choice and election of candidates, discussed at § 30.4, a version of strict scrutiny is applied.

Not surprisingly, these versions of rational review, intermediate scrutiny, and strict scrutiny track the different levels of scrutiny used in other cases involving individual rights. As discussed at § 7.2.1 text following n.42, there are basically seven different levels of scrutiny. These seven levels are minimum rational review, second-order rational review, third-order rational review, basic intermediate review, intermediate review with bite, loose strict scrutiny, and strict scrutiny.

§ 30.1 Content-Based Regulations of “Unprotected” Speech That Trigger No Further First Amendment Review, Except for the Prescription Against Viewpoint Discrimination

The Court has identified certain categories of speech that, as traditionally defined, are not protected by the First Amendment. The four basic categories of such speech involve some advocacy of illegal conduct, discussed at § 30.1.1; fighting words, discussed at § 30.1.2; obscenity, discussed at § 30.1.3; and indecency involving children, discussed at § 30.1.4. While libel was also historically viewed as an additional category of “unprotected” speech, libelous speech has been entitled to some First Amendment protection since New York Times Co. v. Sullivan in 1964, discussed at § 30.2.1.1. In addition, false or unlawful statements made in the context of commercial speech are entitled to no First Amendment protection. Only truthful, lawful representations are provided First Amendment protection under the Central Hudson test for commercial speech, discussed at § 30.3.2.

The Court has sometimes stated that these categories of “unprotected” speech are not protected at all by the First Amendment. For example, in 1942, in Chaplinsky v. New Hampshire,¹ a case involving fighting words, the Court noted, “There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words – those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”

¹ 315 U.S. 568, 571-72 (1942).
However, in 1992, that perspective was clarified in *R.A.V. v. City of St. Paul.* Speaking for a 6-3 Court, Justice Scalia said that such statements are not literally true:

> What they mean is that these areas of speech can, consistently with the First Amendment, be regulated *because of their constitutionally proscribable content* . . . – not that they are categories of speech entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content.

Noting that content-based regulations are presumptively invalid, Justice Scalia said that this principle applied to impose upon even these kinds of proscribable speech a viewpoint discrimination limit. For example, he noted, “We recently acknowledged this distinction in [*New York v. Ferber*], where, in upholding New York's child pornography law, we expressly recognized that there was no ‘question here of censoring a particular literary theme.’” Similarly, Scalia noted, if this were not the rule “a city council could enact an ordinance prohibiting only those legally obscene works that contain criticism of the city government or, indeed, that do not include endorsement of the city government. Such a simplistic, all-or-nothing-at-all approach to First Amendment protection is at odds with common sense and with our jurisprudence as well.” Thus, even for these categories of speech, viewpoint discrimination triggers strict scrutiny review, as discussed at § 29.4.3.1.

Under this doctrine, there are three situations in which content discriminations can be made. The first is where the discrimination is based entirely on the same reason that the category of speech is proscribable, that is, the regulation would be a subject-matter regulation, not an example of viewpoint discrimination. For example, the law could bar the most lascivious displays of sexual activity, but could not prohibit only obscenity which includes offensive political messages. The second exception is where the defined subclass of proscribable speech is associated with particular “secondary effects” of the speech so that the regulation is justified on a content-neutral basis without reference to the content of the speech. Justice Scalia noted that a case of this kind is *Renton v. Playtime Theatres, Inc,* discussed at § 29.4.4.1 n.135, where adult movie theaters could be zoned because of their secondary effects on the surrounding neighborhood. The third exception occurs where the nature of the content discrimination is such that there is no realistic possibility that official suppression of ideas is afoot. As an example, Justice Scalia said, “We could not think of any First Amendment interest that would stand in the way of a State’s prohibiting only those obscene motion pictures with blue-eyed actresses.” Of course, such a law, if not rationally related to any legitimate interest, would probably violate the Equal Protection Clause or Due Process Clause as being “irrational,” “arbitrary,” or “capricious” under standard minimum rational review.

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4 *Id.* at 388-89.


6 *Id.* at 390.
In short, these three situations all involve non-viewpoint based discrimination. The Court made clear in *R.A.V.* that viewpoint discrimination will trigger strict scrutiny even with respect to “unprotected” speech, as it did in *R.A.V.*, where the law, discussed at § 30.1.1.3 n.41, was a version of “hate crimes” legislation proscribing only fighting words that involved messages of racial, gender, or religious intolerance, but did not ban fighting words against racial, gender, or religious intolerance. In the vast majority of cases involving proscribable speech, no such viewpoint discrimination has appeared, and *R.A.V.* currently stands as a rather lonely beacon.

§ 30.1.1 Advocacy of Illegal Conduct

There are four kinds of cases that fall generally under the category of speech involving the advocacy of illegal conduct. The classic case involves advocacy by a speaker to a group at a demonstration, or the distribution of leaflets or other literature, advocating lawless action, discussed at § 30.1.1.1. A second kind of case involves advocacy where the speaker indicates a possible intent for the speaker to commit violence. The Court has defined these cases as involving whether the speaker’s statement indicates a “true threat” to commit violence, discussed at § 30.1.1.2. A third kind of case involves speech concerning violence done in the context of on-going illegal actions. These cases involve application of special “hate crimes” statutes that make the related speech a crime independent of the on-going illegal action, discussed at § 30.1.1.3. Finally, sometimes statutes or government regulations have attempted to regulate or ban certain kinds of “hate speech” where no other illegal or violent conduct was taking place, discussed at § 30.1.1.4.

§ 30.1.1.1 Classic Cases of Advocacy of Illegal Conduct

The earliest and most historic line of cases dealing with content-based governmental restrictions on speech involved the advocacy of illegal conduct. The classic case involves advocacy by a speaker to a group at a demonstration, or the distribution of leaflets or other literature, advocating lawless action, discussed at § 29.1. The ultimate outcome of this series of cases, as discussed at § 29.2, was that the Supreme Court applies strict scrutiny to content-based restrictions on speech in a public forum, whether imposed by the federal government or the states, unless the speech is determined to be “unprotected” speech. As discussed below, at § 30.1.1.1 nn.16-24, the test today to be “unprotected” speech regarding advocating illegal conduct under *Brandenburg v. Ohio* is whether the speech is “directed to inciting or producing imminent lawless action and is likely to incite or produce such action.” If the speech meets this test, the speech is “unprotected” and there is no further First Amendment review, unless viewpoint discrimination is involved, which always triggers strict scrutiny, as noted at § 30.1 nn.2-6.

There were no First Amendment decisions regarding the advocacy of illegal conduct during the original natural law era, as noted at § 29.1.1. During the formalist era, in *Schenck v. United States*, discussed at § 29.1.2 nn.10-11, the Court upheld punishment for distributing circulars urging conscripts not to submit to intimidation and saying the United States had no power to send citizens abroad to fight. In oft-quoted language, Holmes said that "the question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present
danger that they will bring about the substantive evils that Congress has a right to prevent."

In 1941, the Court took a step toward firmly accepting the clear and present danger test when in *Bridges v. California*, discussed § 29.1.3 n.29, the Court set aside a contempt fine imposed on Harry Bridges and a newspaper for publications that tended to interfere with the fair and orderly administration of justice. Justice Black said that the Holmes test amounted to a working principle that, at a minimum, "the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished." In fact, this phrasing was a step beyond the language adopted by Holmes and Brandeis in *Whitney v. California* for regulation to be a clear and present danger under the Schenck test, which only required that the threat be "relatively serious" and "imminent."

A step backwards was taken in 1951, in *Dennis v. United States*, discussed at § 29.1.3 nn.36-39, when a plurality of the Court characterized the situation as one involving a party designed and dedicated to the overthrow of the Government, the Communist Party, in the context of a world crisis. So saying, the plurality adopted a watered-down version of the clear and present danger test written by Judge Learned Hand in *Masses Pub. Co. v. Patten*, discussed at § 29.1.3 n.37. The Smith Act was held validly applicable to convict the leaders of the Communist Party for advocating violent overthrow with intent to cause it as soon as circumstances permit because "the gravity of the evil, discounted by its improbability, justified such invasion of free speech as was necessary to avoid the danger." The creation of an organized, disciplined conspiracy, viewed in light of world conditions, created the requisite danger. The plurality opinion said that neither Holmes nor Brandeis ever envisioned that their test should be an absolute, applied without regard to its reasons. Justice Frankfurter agreed, where the type of speech ranks low in the scale of values. Adopting even a more extreme limitation on the clear and present danger test, Justice Jackson wrote that he would use a clear and present danger test only for street corner cases, leaving the problem to the executive and legislative branches for larger, organized conspiracies. Justices Black and Douglas, dissenting, would require, as did Holmes, that some immediate injury to society be imminent.

Reflecting the liberal instrumentalist predisposition in favor of free speech, discussed at § 29.1.4, the Court adopted tests after 1954 that provided greater protection for speech than either the majorities in *Schenck* or *Dennis*, or that advocated by Holmes and Brandeis, as reflected in *Whitney* or *Bridges*. In 1957, the Court cautioned in *Yates v. United States* that advocacy of overthrow as a doctrine, divorced from efforts to instigate action, is protected by the Constitution, even if there

9   *Id.* at 52.

10  314 U.S. 252, 263 (1941) (emphasis added).

11  274 U.S. 357, 376-77 (1927) (emphasis added).

12  341 U.S. 494, 510 (1951) (plurality opinion of Vinson, C.J., joined by Reed, Burton & Minton, JJ.); *id.* at 544-45 (Frankfurter, J., concurring in the judgment); *id.* at 567-69 (Jackson, J., concurring); *id.* at 580 (Black, J., dissenting); *id.* at 584-86 (Douglas, J., dissenting). Justice Clark took no part in the consideration or decision of the case. *Id.* at 517.

is evil intent. Thus, the Smith Act was read to apply only where there is incitement to illegal action and a sufficient orientation toward action that it likely will occur. The Court read Dennis as holding that even incitement is protected unless the group being indoctrinated is of sufficient size and cohesiveness, is sufficiently oriented towards action, and other circumstances reasonably justify apprehension that action will occur.

In 1961, as the perception of any imminent threat by the Communist Party receded, the Court imposed in Scales v. United States rigorous proof requirements for punishing membership in the Communist Party. The member must be active, know of the party's illegal advocacy, and have a specific intent to bring about overthrow as speedily as circumstances permit. On the question of constitutionality as applied, the Court said there must be evidence of teaching forcible overthrow, accompanied by directions as to the type of illegal action which must be taken when the time for the revolution is reached, or teaching conduct to render effective the later illegal activity which is advocated. This requirement was so difficult to meet that the prosecution of Communists shortly came to an end.

In 1964, addressing itself to the value of political speech, the Court said in New York Times Co. v. Sullivan that the First Amendment reflects a "profound national commitment" to the principle that "debate on public issues should be uninhibited, robust, and wide-open." Consistent with such a commitment, the Court formulated in 1969 a new test for regulating the advocacy of illegal action. In Brandenburg v. Ohio, the Court held that a state may not proscribe advocacy of force or law violation except where such advocacy is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action."

Interpreted in terms of the Court's currently used levels of review, this test is consistent with strict scrutiny because avoiding lawless action would be a compelling governmental interest and banning only the advocacy of imminent lawless action likely to be incited is the least restrictive alternative necessary to advance that compelling interest. In practice, the same result is achieved under current doctrine by holding that for speech which meets the Brandenburg definition of illegal advocacy there is no further First Amendment review and the statute survives a First Amendment challenge.

The Court applied the Brandenburg test in Hess v. Indiana. In Hess, the Court set aside a conviction for disorderly conduct based upon the fact that defendant, an antiwar demonstrator who with his companions had been moved off a street by the sheriff, said in a loud voice, "We'll take the fucking street later." The Indiana Supreme Court had affirmed the trial court's finding that defendant's statement was intended to incite further lawless action on the part of the crowd in the vicinity of appellant and was likely to produce such action. In a 6-3 per curiam opinion, the Court replied, "At best, however, the statement could be taken as counsel for present moderation; at worst,

it amounted to nothing more than advocacy of illegal action at some indefinite future time.” Thus, although the words might tend toward violence, this did not satisfy the requirement that advocacy be directed to inciting or producing imminent lawless action that is likely to be produced. Justice Rehnquist, dissenting with Chief Justice Burger and Justice Blackmun, said that the Court had exceeded the proper scope of judicial review in not considering the evidence in the light most favorable to the appellee state.18

No imminence was also found in Cohen v. California.19 In Cohen, the Court reversed a conviction for disorderly conduct. In a corridor outside a courtroom the defendant had worn a jacket which bore the words “Fuck the Draft.” The Court said that at least so long as there is no showing of an intent to incite disobedience to or disruption of the draft, defendant could not, consistently with the First Amendment, be punished for asserting his opposition to the draft. The word was not an obscenity since it was in no sense erotic. It could not be regarded as fighting words, since no individual could have found it to be a personal insult. Nor was there an intent to provoke a group to hostile action. Since the speech was not “unprotected speech” in any sense, the Court applied normal First Amendment doctrine. The case was held not to involve a content-neutral justification of privacy, because there was no captive audience whose privacy interests were being invaded in an intolerable manner. As guardian of public morality, the state could not justify punishment of a single word since this would be an inherently boundless power and there would be a substantial risk of suppressing ideas in the process. To make the simple public display of this single four-letter word a criminal offense, the state would need a more particularized and compelling reason.

Since 1986, the Court has not had a major case on advocacy of illegal conduct. Most of the post-1986 cases on political speech have involved the question of whether a standard lower than strict scrutiny should be applied because the speech was possibly uttered in a non-public forum, an issue addressed in Frisby v. Schultz, discussed at § 29.5.2 nn.195-96, or because of audience reactions, e.g., where the audience was hostile, and thus the case might involve fighting words, discussed at § 30.1.2. The Court has said a number of times, as in Boos v. Barry,20 that if the Brandenburg test for what speech constitutes “advocacy of illegal conduct” is not met, then content-based restrictions on political speech in a public forum are given strict scrutiny, i.e., the government must show that the regulation is necessary to serve a compelling state interest and narrowly drawn to achieve that end. In passing, Justice Thomas noted in Lorillard Tobacco Co. v. Reilly21 that regulations banning tobacco ads within 1,000 feet of schools or playgrounds, as part of an effort to proscribe solicitation for unlawful conduct, the sale of cigarettes to minors, “clearly fail the Brandenburg test” as not involving speech likely to incite imminent lawless action of cigarette purchases by minors.

Because the Court has not had a recent major case on the advocacy of illegal conduct, possible limits on a Brandenburg analysis for larger, organized conspiracies, rather than street corner cases, as

18 Id. at 111-12 (Rehnquist, J., joined by Burger, C.J., and Blackmun, J., dissenting).
21 533 U.S. 525, 579-80 (Thomas, J., concurring in part and concurring in the judgment).
suggested by Justice Jackson in his concurrence in Dennis, discussed at §§ 29.1.3 n.39 & 30.1.1.1 n.12, have not been tested. However, it seems likely that if a political speech advocated overthrow, the Court would find that the government could establish a compelling interest and that its law was narrowly tailored only if the Brandenburg test were satisfied. It seems not far fetched to predict that conservative formalists and Holmesians, who tend to be more deferential to the government than other Justices, might be willing to follow Justice Jackson and use a standard lower than Brandenburg if the defendant advocate was a large, well organized conspiracy and a legislature had found that its variety of speech was a danger. Liberal instrumentalists would predictably disagree, leaving the matter in the hands of the natural law Justices. Based upon their respect for precedent, as well as the traditional natural law respect for freedom of speech, it is likely that these Justices would support application of Brandenburg in every case.

For this reason, the Brandenburg rule is likely to be applied in a situation involving a group as large and well organized as was the Communist Party in the 1950s. However, it is unresolved whether the Brandenburg rule would be applied to groups, including terrorist groups, better organized and more effective than the Communist Party, whose members in retrospect posed not as great an internal threat to the stability and security of the United States during the 1950s as was feared at the time. Similarly, although the Brandenburg rule would likely apply, it is unresolved whether Brandenburg would be used in a prosecution involving religious speech advocating the violent overthrow of government, such as a cleric's speech or sermons regarding jihad and calling for the overthrow of infidels – where that would mean the United States or its allies – that went beyond mere metaphor or abstract doctrine and was directed to advocacy of action.22

Even more so than in cases of speech by terrorists, it is likely that Brandenburg supplies the relevant precedent for cases of “media-inspired violence,” whether based on a movie or a violent video game. In a suit alleging that the producers of the film Natural Born Killers were liable to the victims for distributing a film "which they knew or should have known would cause and inspire people" to acts of violence by, among other things, "glorifying" such violence and "treating individuals who commit such violence as celebrities and heroes," a lower court applied the Brandenburg test.23 Similarly, the Eighth Circuit concluded that a municipal ordinance making it unlawful to distribute a graphically violent video game to minors without parental consent violated the First Amendment. Since such games did not involve any "imminent" incitement to violence, Brandenburg did not apply, and under standard First Amendment doctrine the state did not establish on the record that its compelling interest in protecting the psychological well-being of minors was “real, not merely conjectural.”24

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24 Interactive Digital Software Ass’n v. St. Louis Cty., Missouri, 329 F.3d 954, 958-60 (8th Cir. 2003).
§ 30.1.1.2 Cases Involving True Threats

A second kind of case involving advocacy of illegal conduct occurs where the speaker indicates an intent for the speaker to commit violence. The Court has defined these cases as involving whether the speaker’s statement indicates a “true threat” to commit violence. As stated in Virginia v. Black:

“True threats" encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats "protect[s] individuals from the fear of violence" and "from the disruption that fear engenders," in addition to protecting people "from the possibility that the threatened violence will occur." Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.25

The Court noted in Virginia v. Black26 that respondents “do not contest that some cross burnings fit within this meaning of intimidating speech, and rightly so. . . . [T]he history of cross burning in this country shows that cross burning is often intimidating, intended to create a pervasive fear in victims that they are a target of violence.” Thus a statute banning cross-burning was not facially invalid. Concerning whether this “unprotected speech” nonetheless involved viewpoint discrimination, and thus should be subjected to strict scrutiny review, the Court noted that the statute was merely a subject-matter regulation of a “particularly virulent form of intimidation. . . . Virginia may choose to regulate this subset of intimidating messages in light of cross burning's long and pernicious history as a signal of impending violence. Thus, just as a State may regulate only that obscenity which is the most obscene due to its prurient content, so too may a State choose to prohibit only those forms of intimidation that are most likely to inspire fear of bodily harm. A ban on cross burning carried out with the intent to intimidate is fully consistent with our holding in R.A.V.”

A case where a “true threat” was not found is Watts v. United States.27 This case involved a demonstrator in Washington, D.C. protesting the draft in 1966, who yelled out, “And now I have already received my draft classification as 1A – and I have got to report for my physical this Monday coming. I am not going. If they ever make me carry a rifle the first man I want to get in my sights is L.B.J.” Interpreting a statute that embodied the constitutional requirement of a “true threat” for the government to regulate, the Court stated, “But whatever the ‘willfullness’ requirement implies, the statute initially requires the Government to prove a true ‘threat.’ We do not believe that the kind of political hyperbole indulged in by petitioner fits within that statutory term. For we must interpret the language Congress chose ‘against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.’ The language of the political arena, like the language used in labor disputes, is

26 Id. at 360, 363.
often vituperative, abusive, and inexact. We agree with petitioner that his only offense here was ‘a kind of very crude offensive method of stating a political opposition to the President.’”

In applying the “true threat” test, the courts have adopted an objective test that focuses on whether a reasonable person would interpret the purported threat as a serious expression of an intent to cause a present or future harm. However, there is a split among the courts in determining from whose viewpoint the statement should be interpreted. Some courts ask whether a reasonable person standing in the shoes of the speaker would foresee that the recipient would perceive the statement as a threat, whereas others ask how a reasonable person standing in the recipient's shoes would view the threat.

Those courts who adopt the speaker’s viewpoint have noted that this “standard not only takes into account the factual context in which the statement was made, but also better avoids the perils that inhere in the ‘reasonable-recipient standard,’ namely that the jury will consider the unique sensitivity of the recipient. We find it particularly untenable that, were we to apply a standard guided from the perspective of the recipient, a defendant may be convicted for making an ambiguous statement that the recipient may find threatening because of events not within the knowledge of the defendant.”

On the other hand, if the concern is to "protect individuals from the fear of violence" and "from the disruption that fear engenders,” as stated by the Supreme Court in Virginia v. Black, the perspective of recipients seems the better perspective. Under that perspective, courts have set forth “a nonexhaustive list of factors relevant to how a reasonable recipient would view the purported threat. Those factors include: 1) the reaction of those who heard the alleged threat; 2) whether the threat was conditional; 3) whether the person who made the alleged threat communicated it directly to the object of the threat; 4) whether the speaker had a history of making threats against the person purportedly threatened; and 5) whether the recipient had a reason to believe that the speaker had a propensity to engage in violence.” Such factors should diminish the threat that the analysis will focus on a “uniquely sensitive” recipient, but rather on a reasonable recipient of the speech.

In most circumstances, of course, either test will yield the same result in practice, since both focus on objective evidence regarding the individuals’ speech. As the Eighth Circuit Court of Appeals noted, “the result will differ only in the extremely rare case when a recipient suffers from some unique sensitivity and that sensitivity is unknown to the speaker.” In addition, the Ninth Circuit has noted that even under the speaker’s viewpoint standard “‘[a]lleged threats should be considered in light of their entire factual context, including the surrounding events and the reaction of the listeners.’ (‘So long as the threat on its face and in the circumstances in which it is made is so unequivocal, unconditional, immediate and specific ... as to convey a gravity of purpose and

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28 United States v. Fulmer, 108 F.3d 1486, 1491-92 (1st Cir. 1997).

29 Doe v. Pulaski County Special Sch. Dist., 306 F.3d 616, 622-23 (8th Cir. 2002) (citations omitted).

imminent prospect of execution, the statute may properly be applied.’)\(^{31}\)

A number of cases involving “true threats” have occurred in the context of schools. Under this doctrine, a number of statements or violent images have been held to create “true threats.”\(^{32}\) In other cases, without regard to “true threat” analysis, courts have regulated such speech under the *Tinker* standard, discussed at § 29.6.2.2 nn.286-88, of a “substantial and material disruption” to the school environment.\(^{33}\) In cases outside the school context, such as threats to injure or kidnap, or speech targeting pro-choice individuals on abortion, courts have had to face whether speech represents a “true threat.”\(^{34}\)

While the issue is not without dispute, the better argument is that to constitute a “true threat” the speaker must threaten that the speaker will cause the harm, or someone with whom the speaker controls, directs, or otherwise is involved in a conspiracy. If the speaker merely advocates violence by others, that speech is governed by the *Brandenburg* test regarding the advocacy of illegal conduct, discussed § 30.1.1.1 nn.16-24. For example, in *Virginia v. Black*,\(^{35}\) the Supreme Court applied “true threat” analysis because the relevant statute made it a crime “for any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another, a highway or other public place.” This is consistent with the test for a “true threat” in *Black*, cited at § 30.1.1.2 n.25, that “the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.” This requires that the “speaker . . . commit an act,” not some third party.

Despite this analysis, it has been suggested that as long as a reasonable person would perceive a threat has been made, a true threat exists no matter who would carry out the threat. This has been

\(^{31}\) Lovell v. Poway Unified Sch. Dist., 90 F.3d 367, 372 (9th Cir. 1996) (citations omitted).

\(^{32}\) See, e.g., Doe v. Pulaski County Special Sch. Dist., 306 F.3d 616 (8th Cir. 2002); Jones v. Arkansas, 64 S.W.3d 728, 736 (Ark. 2002). See generally LaVine v. Blaine Sch. Dist., 257 F.3d 981, 988-89 (9th Cir.2001) (“In light of the violence prevalent in schools today, school officials are justified in taking very seriously student threats against faculty or other students.”); William Bird, Comment, True Threat Doctrine and Public School Speech, 26 U. Ark. Little-Rock L. Rev. 111 (2003); Fiona Ruthven, Is the True Threat the Student or the School Board? Punishing Threatening Student Expression, 88 Iowa L. Rev. 931 (2003).


\(^{34}\) See, e.g., United States v. Alaboud, 347 F.3d 1293 (11th Cir. 2003); National Organization for Women, Inc. v. Scheidler, 267 F.3d 687 (7th Cir. 2001) (true threats found); United States v. Hanna, 293 F.3d 1080 (9th Cir. 2002) (case remanded for new trial on true threat issue); United States v. Landham, 251 F.3d 1072 (6th Cir. 2001) (no true threat found). See also Planned Parenthood of Columbia/Willamette v. American Coalition of Life Activists, 244 F.3d 1007 (2001) (no true threat found), rev’d en banc, 290 F.3d 1058 (9th Cir. 2002) (true threat found).

particular suggested for threats made on the Internet because “the unique characteristics of the Internet blur the distinction between threats and incitement by allowing speakers to threaten by incitement – that is, creating fear by increasing the likelihood of ensuing violence without actually threatening to carry out the violence themselves.”

While no Supreme Court case supports this theory, a case used to support the theory is the Ninth Circuit’s *en banc* opinion in *Planned Parenthood v. American Coalition of Life Activists (ACLA)*. This case involved the posting on an Internet website the names and addresses of doctors performing abortions, with a context suggesting harm be done. While superficially this case may suggest that advocating that third persons do harm to these doctors could constitute a ‘true threat,’ in fact the Ninth Circuit did find a direct connection between the website and harm to doctors sufficient to satisfy a “harm, or caused to be harmed” analysis, as in *Black*. The *en banc* Ninth Circuit 6-5 majority opinion noted:

After a "WANTED" poster on Dr. David Gunn appeared, he was shot and killed. After a "WANTED" poster on Dr. George Patterson appeared, he was shot and killed. After a "WANTED" poster on Dr. John Britton appeared, he was shot and killed. None of these "WANTED" posters contained threatening language, either. Neither did they identify who would pull the trigger. But knowing this pattern, knowing that unlawful action had followed "WANTED" posters on Gunn, Patterson and Britton, and knowing that "wanted"-type posters were intimidating and caused fear of serious harm to those named on them, ACLA published a "GUILTY" poster in essentially the same format on Dr. Crist and a Deadly Dozen "GUILTY" poster in similar format naming Dr. Hern, Dr. Elizabeth Newhall and Dr. James Newhall because they perform abortions. Physicians could well believe that ACLA would make good on the threat.

The Justices in dissent in *Planned Parenthood* similarly noted, “Although the majority’s definition does not specify who is to inflict the threatened harm, use of the active verb ‘inflict’ rather than a passive phrase, such as ‘will be harmed,’ strongly suggests that the speaker must indicate he will take an active role in the inflicting. Recent academic commentary supports the view that this requirement is an integral component of a ‘true threat’ analysis.” Further, the Supreme Court has

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37 290 F.3d 1058 (9th Cir. 2002).

38 *Id.* at 1085.

39 *Id.* at 1089 n.2 (Kozinski, J., joined by Rehnardy, O'Scanlann, Kleinfeld & Berzon, JJ., dissenting), citing Steven G. Gey, *The Nuremberg Files and the First Amendment Value of Threats*, 78 Tex. L.Rev. 541, 590 (2000) (part of what "separates constitutionally unprotected true threats from constitutionally protected . . . political intimidation is [that] the speaker communicates the intent to carry out the threat personally or to cause it to be carried out"); Jennifer E. Rothman, *Freedom of Speech and True Threats*, 25 Harv. J.L. & Pub. Pol'y 283, 289 (2001) ("determining what is a true threat [should] require[ ] proof that the speaker explicitly or implicitly suggest that he
squarely rejected in the context of child pornography the view that different First Amendment standards should apply for speech on the Internet. After an extensive review of the Internet, the Court stated, without dissent, in *Reno v. American Civil Liberties Union*, 40 “[O]ur cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium.”

§ 30.1.1.3 **Hate Crimes Legislation**

In addition to cases involving the advocacy of illegal conduct, or cases involving true threats, another category of speech raising similar concerns involves “hate speech” made in the context of on-going illegal activity. While on-going conduct can be regulated without regard to the First Amendment, since it involves conduct, not speech, as discussed at § 29.3.1, if the government attempts to make the related “hate speech” an independent crime, that raises First Amendment concerns.

Such a law was involved in the 1992 decision in *R.A.V. v. City of St. Paul, Minnesota*. 41 An ordinance in St. Paul provided, “Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.” The Minnesota Supreme Court said that the law reached only fighting words and, thus, triggered that exception to “unprotected speech,” discussed at § 30.1.2. The only question then for Court review was whether the statute was nonetheless viewpoint discrimination, which would trigger strict scrutiny in any event. As discussed at § 30.1 nn.2-5, the Court did find the statute was viewpoint discriminatory and was unconstitutional on that basis.

In other cases, “hate crimes” statutes have gone beyond regulating mere fighting words, and thus have triggered a more extended First Amendment analysis. In many of these cases, however, courts have interpreted the statutes so that the “hate crimes” aspect of the statute only applied to “true threats,” and thus met that test for “unprotected speech.” For example, in *Lovell By and Through Lovell v. Poway United School District*, 42 the Ninth Circuit observed:

California courts have also considered the issue of First Amendment protection for threats. See, e.g., *In re M.S.*, 10 Cal.4th 698, 42 Cal. Rptr.2d 355, 896 P.2d 1365 (1995) (upholding the constitutionality of state hate crimes statutes that punish threats if the speaker has the apparent ability to carry out the threat and has reasonably induced fear of violence in the victim); *People v. Fisher*, 12 Cal. App.4th 1556, 15 Cal. Rptr.2d 889 (1993) (upholding a conviction . . . "as long as the circumstances are such that the threats are so unambiguous and have such immediacy that they convincingly express an intention of being carried out."). In these cases, the California


42 90 F.3d 367, 372 (9th Cir. 1996).
courts relied on both Orozco-Santillan and Kelner to determine whether a threat is a "true threat" and therefore may be criminalized. Thus, federal law and California state law substantially agree with respect to First Amendment protection of threats.

The Supreme Court has made it clear that if the relevant statute merely enhances the penalty for a crime based on bias-inspired conduct, rather than making that bias an independent crime, that does not trigger a First Amendment analysis. In Wisconsin v. Mitchell,43 the Court unanimously upheld a statute enhancing the penalty for an offense whenever the defendant selects the victim because of that person's race, religion, color, disability, sexual orientation, national origin or ancestry. This statute, said Chief Justice Rehnquist, is aimed at conduct unprotected by the First Amendment, whereas the ordinance struck down in R.A.V. was explicitly directed at expression. Using normal minimum rational review under the Equal Protection and Due Process Clauses, the Court held that the law satisfied rational basis review because the state may reasonably conclude that bias-inspired conduct inflicts greater individual and social harm – such as provoking retaliatory crimes, inflicting distinct emotional harm, and inciting community unrest.

The Court has never held that any “hate crimes” statute is constitutional unless it was narrowly defined to reach only other categories of “unprotected speech,” such as advocacy of illegal conduct, true threats, or fighting words. The best chance for such a statute would probably be to relate the “hate speech” to certain “secondary effects” to trigger intermediate review under standard First Amendment doctrine, as the University of Michigan attempted in Doe v. University of Michigan, discussed in the next section at § 30.1.1.4 nn.46-47.

A related issue involves the enforcement of laws, such as banning racially or sexually hostile work environments, where the hostile work environment is caused by speech. Without much extended analysis, the Court has permitted such hostile work environment cases to go forward, implicitly viewing the underlying hostile work environment as caused by discriminatory conduct, not speech.44 Regarding other kinds of issues that can arise in the employment context, alternatives to


44 See, e.g., Harris v. Forklift Systems, Inc., 510 U.S. 17, 21-22 (1993) (holding that a company president's repeated comments to an employee were sufficient under Title VII: (1) to be viewed subjectively as harassment by the victim and (2) were severe or pervasive enough that an objective reasonable person would agree that it is harassment); R.A.V. v. St. Paul, 505 U.S. 377, 389 (1992) (noting that "sexually derogatory 'fighting words,' . . . may produce a violation of Title VII's general prohibition against sexual discrimination in employment practices"); Jennie Randall, “Don’t You Say That!”: Injunctions Against Speech Found to Violate Title VII Are Not Prior Restraints, 3 U. Pa. J. Const. L. 990 (2001) (similar analysis applied to cases of racially hostile work environments under Title VII). Reflecting a Stage 6 approach toward equal concern and respect, discussed at §§ 16.2.1-16.2.3, many European countries ban any workplace speech or conduct that constitutes an insult to human dignity, or “mobbing,” in addition to the American model of workplace harassment based only on the “status” of race, gender, religion, or national origin. See generally Vicki Schultz, Gabrielle S. Friedman, Abigail C. Saguy, Tanya K Hernandez & David Yamada, Global Perspectives on Workplace Harassment Law, 8 Employee Rts. & Emp. Pol’y J. 151 (2004).
direct regulation of offensive speech might involve counter-speech promoting the opposite viewpoint; economic boycotts of companies or individuals supporting controversial causes; or adverse employment decisions, particularly for spokesperson-entertainers or radio/television commentators. Without regard to any statutory ban on employment discrimination based on race, sex, religion, or other such grounds, existing social norms pressure most employers to tolerate a wide-range of viewpoints among their workforce, even if the employer disagrees with those viewpoints, as long as the employees do their jobs well.45

§ 30.1.4 Hate Speech Legislation

In some cases, statutes or government regulations have attempted to regulate or ban certain kinds of “hate speech” where no illegal or other violent conduct was taking place. In many of these cases, courts have viewed such “hate speech” statutes as unconstitutionally vague. For example, in Doe v. University of Michigan,46 a district court concluded that words in a university policy that required the language must "stigmatize" or "victimize" are “general and elude precise definition.” Further, the "secondary effects" clause of the law required that the language in order to be sanctionable had to "involve an express or implied threat” affecting “an individual's academic efforts, employment, participation in University sponsored extra-curricular activities or personal safety.” As the court noted, “It is not clear what kind of conduct would constitute a ‘threat’ to an individual's academic efforts. It might refer to an unspecified threat of future retaliation by the speaker. Or it might equally plausibly refer to the threat to a victim's academic success because the stigmatizing and victimizing speech is so inherently distracting. Certainly the former would be unprotected speech. However, it is not clear whether the latter would.” Further, under the policy it was not clear what conduct would be held to "interfere" with an individual's academic efforts. The court noted, “The language of the policy alone gives no inherent guidance. The one interpretive resource the University provided was withdrawn as ‘inaccurate,' an implicit admission that even the University itself was unsure of the precise scope and meaning of the Policy.” Thus, the court concluded that the terms of the policy were so vague that its enforcement would violate due process.

The court also concluded in Doe v. University of Michigan that independent of the vagueness problem, the policy was substantially overbroad in reaching protected speech, such as not exempting statements made in the course of classroom discussions from the sanctions of the policy.47 A similar conclusion was reached by the Third Circuit in Saxe v. State College Area School District48 regarding a school’s anti-harassment policy that prohibited a substantial amount of non-vulgar, non-sponsored student speech that would not cause a substantial disruption of the work of the


47 Id. at 865-66.

48 240 F.3d 200, 214-17 (3rd Cir. 2001). On such hate speech statutes generally, see, e.g., Catherine B. Johnson, Note, Stopping Hate Without Stifling Speech: Re-Examining the Merits of Hate Speech Codes on University Campuses, 27 Fordham Urb. L.J. 1821 (2000).
school. As discussed at § 29.6.2.2 nn.286-88, 301-09, vulgar or school-sponsored speech could be regulated under Fraser, while speech causing a substantial disruption could be regulated under Tinker.

As with “hate crimes” statutes, discussed at § 30.1.1.3 text following n.43, the Court has never held that any “hate speech” statute is constitutional unless it was narrowly defined to reach only other categories of “unprotected speech,” such as advocacy of illegal conduct, true threats, or fighting words. The best chance for such a statute would be to relate the “hate speech” to certain “secondary effects” to trigger an intermediate scrutiny analysis, as the University of Michigan attempted in Doe. Even in that case, the government would have a difficult burden to meet. As a general matter, non-instrumentalist Justices are likely to approach “hate speech” cases from the perspective of standard First Amendment doctrine, which makes such statutes difficult to defend. Even from an instrumentalist perspective, perhaps more receptive on policy grounds to supporting certain “hate speech” statutes as part of advancing an agenda of “politically correct” speech, Justice Douglas cautioned, writing for the Court in Terminiello v. Chicago, that free speech may "best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." Even for “politically incorrect” speech, such as displays of the Confederate Flag given the history of the Confederacy in supporting slavery, the First Amendment would likely protect such display if attempts were made to make such displays unlawful, absent the particular context suggesting an advocacy of illegal conduct, true threat, or fighting words analysis.

§ 30.1.2 Fighting Words

No free speech cases involving fighting words came before the Supreme Court during the original natural law era. Further, no fighting words cases were decided during the formalist era, although the Court did state in Near v. Minnesota that "[t]he security of the community life may be protected against incitements to acts of violence," which presumably would include a regulation of fighting words. During the first part of the Holmesian era, the Court held in Cantwell v. Connecticut that the principle of freedom of speech does not sanction incitement to riot where there is a clear and present danger of riot or other immediate threat to public safety. However, a state may not unduly suppress free communication of views, religious or other, under the guise of conserving desirable conditions. Thus, a state could not convict a person of breach of the peace where there was only an

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49 337 U.S. 1, 3 (1949).

50 See, e.g., Sons of Confederate Veterans, Inc. v. Commission of Virginia Dept. of Motor Vehicles, 288 F.3d 610, 623-27 (4th Cir. 2002) (prohibition against the use of logos on specially made license plates, where the ban is to "ensure that the battle flag does not appear on the special license plate" of the Sons of Confederate Veterans, constitutes unconstitutional viewpoint discrimination). But see Alexander Tsesis, The Problem of Confederate Symbols: A Thirteenth Amendment Approach, 75 Temple L. Rev. 539 (2002) (bans on use of the Confederate flag should be constitutional under a 13th Amendment analysis as a “badge or incident” of slavery).

51 283 U.S. 697, 716 (1931).

52 310 U.S. 296, 308-11 (1940).
effort to persuade a listener to buy a book or contribute money to a religion, and there was no assault or threatening bodily harm, no truculent bearing, no intentional discourtesy, and no personal abuse.

In 1942, the Court unanimously sustained a conviction in Chaplinsky v. New Hampshire\(^{53}\) for calling a police officer a "damned Fascist," where a statute banning annoying words was construed to ban only such words as ordinary men know are likely to cause a fight – a breach of the peace. Justice Murphy said, “[I]t is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words – those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.”

In 1949, in Terminiello v. Chicago,\(^{54}\) the Court declared unconstitutional an ordinance that defined disorderly conduct to include conduct which, as put by the trial judge in his instructions to the jury, “stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance, or if it molests the inhabitants in the enjoyment of peace and quiet by arousing alarm.” This language had been approved by the Illinois Supreme Court. For the United States Supreme Court, Justice Douglas said that one function of free speech is to stir people to anger. Thus, speech is protected unless it is “likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.”\(^{55}\) Accordingly, the ordinance, as interpreted by the Illinois courts, was unconstitutional.

Two years later, in Feiner v. New York,\(^{56}\) the Court upheld a disorderly conduct conviction where the speaker, describing President Truman as a "bum" and urging blacks to "rise up in arms and fight for equal rights," refused a police request to stop speaking after the crowd became stirred up and one person threatened to stop the speaker if the police did not. The Court's opinion said the police were not censoring content, but merely preventing a breach of the peace where a speaker was undertaking incitement to riot. Justices Black, Douglas, and Minton dissented. They concluded that there was only a minimal threat of violence, and the police’s duty was to dissuade those threatening violence, not to arrest the speaker.

Reflecting their greater predisposition in favor of free speech rights, the instrumentalist Court refused to expand the doctrine regarding punishing remarks not directed at an individual which stirred the public to anger. Indeed, in 1963, the instrumentalist Court began to back away from

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\(^{53}\) 315 U.S. 568, 571-72 (1942).

\(^{54}\) 337 U.S. 1, 3 (1949).

\(^{55}\) Id. at 4.

\(^{56}\) 340 U.S. 315, 316-19 (1951); id. at 325-27 (Black, J., dissenting); id. at 330-31 (Douglas, J., joined by Minton, J., dissenting).
In Edwards v. South Carolina,\textsuperscript{57} the Court held that civil rights demonstrators on State House grounds, who were singing, but being urged by some in the audience to go to segregated lunch counters, could not be prosecuted because there were no fighting words directed at an individual and the hostile audience doctrine of Feiner did not apply. Several other cases during the instrumentalist era reached similar conclusions.\textsuperscript{58}

In 1964, Justice Brennan moved away from Chaplinsky with respect to libel, and prefaced greater constitutional protection for speakers by referring in New York Times Co. v. Sullivan\textsuperscript{59} to "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."

During the years of the Burger Court, 1969-1986, the Court avoided considering whether the Chaplinsky phrasing of what constitutes fighting words should be overruled, in part by using the vagueness and overbreadth doctrines to overturn several convictions.\textsuperscript{60} This is similar to use of the vagueness and overbreadth doctrines for hate speech, discussed at § 30.1.1.4 nn.46-48, or for other aspects of free speech cases more generally, discussed at §§ 29.6.1.4-29.6.1.5. In addition, even under the Chaplinsky phrasing, the Court found in several cases that fighting words were not used.

For example, in 1971, in Cohen v. California,\textsuperscript{61} the Court held that defendant could not be convicted of disturbing the peace by offensive conduct where he wore in a courthouse corridor a jacket bearing the plainly visible words, "Fuck the Draft," but where there was no evidence that any person had objected or that defendant intended such a result. For the Court, Justice Harlan distinguished Chaplinsky. Here, the words did not communicate a direct personal insult. And, unlike Feiner v. New York, there was no evidence that the speaker was intentionally provoking a group to hostile reaction. Harlan said that forbidding particular words ran the risk of suppressing ideas in the process. Words could be banned to protect others from hearing them only by a particularized law that protected substantial privacy interests from invasion in an essentially intolerable manner. Offended persons could simply avert their eyes.

\textsuperscript{57} 372 U.S. 229, 231-38 (1963).


\textsuperscript{59} 376 U.S. 254, 270 (1964).

\textsuperscript{60} Gooding v. Wilson, 405 U.S. 518, 524 (1972) (state law was not limited to punishing words that have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed); Lewis v. City of New Orleans, 415 U.S. 130, 133-34 (1974) (words conveying or intended to convey disgrace are not fighting words).

Two similar cases were decided in 1973. In *Norwell v. City of Cincinnati*, the Court held that one who verbally protested his arrest by saying “I don’t tell you people anything” did not utter fighting words. In *Hess v. Indiana*, the Court said that a statement during an antiwar protest that "[w]e'll take the fucking street later" was constitutionally protected where the words were not aimed at anyone in particular. Indeed, not since *Chaplinsky* has the Court sustained a conviction on the basis of fighting words alone. In 1987, the Court noted in *City of Houston v. Hill* that an ordinance that made it unlawful to "oppose, molest, abuse or interrupt any policeman in the execution of his duty" was not limited to fighting words or obscene language, and held that the Constitution does not allow such speech to be made a crime. Such a law, the Court said, is substantially overbroad.

Despite this limited use of *Chaplinsky*, a few lower federal courts and state courts have upheld convictions, or otherwise failed to protect speech by denying actions for wrongful arrest for speech or imposing civil fines, based upon a “fighting words” rationale, particularly for derogatory comments addressed to police officers, with many of those reported cases involving comments by racial minorities. Even when the defendant prevailed, time, money, and energy had to be expended on the defense. For these reasons, some commentators have argued that *Chaplinsky* continues to represent a threat to free speech values and should be overruled.

§ 30.1.3 Obscene Speech

Originally, Congress was not very active in dealing with obscenity, and did not bar the import of obscene pictorial matter until 1842. In response to publishers sending material to Union soldiers during the Civil War, that statute was extended in 1865 to barring obscene material from the mails. As recounted by the Court in *Roth v. United States*, some colonies regulated obscenity, such as Massachusetts, which had passed a statute banning obscene speech in 1712. More general regulation of obscenity in the states began in 1821. After 1868, a few states adopted the English test, found in *Regina v. Hicklin*, which involved asking whether even isolated passages in a publication had a tendency to corrupt minds open to immoral influences. However, no obscenity case came before the Supreme Court during the original natural law period.

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At the beginning of the formalist era in 1873, Congress passed the Comstock Act. It barred from the mails any “obscene, lewd, or lascivious book, pamphlet, picture, paper, print, or other publication of an indecent character, or any article or thing designed or intended for the prevention of conception or procuring of abortion, nor any article or thing intended or adapted for any indecent or immoral use or nature.” In *Ex parte Jackson*, a case involving use of the mail to support an illegal lottery, the Court noted, referring to the Comstock Act, that “the object of Congress has not been to interfere with the freedom of the press, or with any other rights of the people; but to refuse its facilities for the distribution of matter deemed injurious to the public morals.”

In 1925, the Court did assume in *Gitlow v. New York* that freedom of speech and the press, protected in the First Amendment from abridgement by Congress, were among the fundamental personal liberties protected from state action by the Due Process Clause of the Fourteenth Amendment. However, in 1931, reflecting the limited view of the First Amendment in this context, the Court indicated in *Near v. Minnesota* that protections from prior restraint do not apply to obscenity, saying that "the primary requirements of decency may be enforced even against obscene publications."

Toward the end of the formalist era in 1934, the Second Circuit rejected *Regina v. Hicklin* and, in an opinion widely followed thereafter, suggested concentrating on how the dominant theme of the work “taken as a whole” affects the “objective” reader, rather than a focus on mere “isolated passages” on particularly sensitive readers “open to immoral influences.” During the Holmesian era, the Court did not define "obscenity" any further by any specific test. In 1942, the Court did state in *Chaplinsky* that the "lewd and obscene" are among "certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem." In 1948, a divided 4-4 Court affirmed in a *per curiam* decision a New York conviction for obscenity. Justice Frankfurter, a friend of the author, did not participate in the consideration or decision of the case. In 1952, Justice Frankfurter reaffirmed that obscenity, like

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69 96 U.S. 727, 736-37 (1877).

70 268 U.S. 652, 666 (1925).

71 283 U.S. 697, 716 (1931).

72 United States v. One Book Called "Ulysses", 5 F. Supp. 182 (S.D.N.Y. 1933), *aff'd*, 72 F.2d 705, 706-09 (2nd Cir. 1934) (opinion by Judge Augustus Hand, joined by Judge Learned Hand, his cousin, with Judge Manton dissenting).


libel, is not protected speech.\textsuperscript{75}

During the instrumentalist era, the Court gave potentially obscene speech much greater protection by limiting the amount of speech that could be defined as constitutionally obscene. The Court's first effort to define obscenity for both state and federal statutes was made in 1957 by Justice Brennan, writing for the Court in \textit{Roth v. United States}.\textsuperscript{76} \textit{Roth} held that obscene material is “utterly without redeeming social importance,” and that material is obscene and without constitutional protection if "to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."\textsuperscript{77} Under \textit{Roth}, obscenity was clearly different than immorality, because New York could not refuse under \textit{Roth} to license a film on the ground that it presented adultery as a desirable, acceptable, and proper pattern of behavior.\textsuperscript{78} However, applying the \textit{Roth} standard, the petitioner’s convictions were upheld in \textit{Roth} for distributing material that would not likely be viewed as patently offensive obscene material under the current \textit{Miller} test, discussed below, at § 30.1.3 nn.88-91.

In 1959, in an opinion by Justice Brennan, the Court required in \textit{Smith v. California}\textsuperscript{79} that \textit{scienter}, \textit{i.e.}, intent or recklessness, be found before a bookseller could be convicted of possessing obscenity. In 1964, the Court created an added check in \textit{Jacobellis v. Ohio}\textsuperscript{80} by holding that appellate courts must make an independent judgment on whether materials are protected, and not defer to jury judgment on that issue. On the other hand, the Court said in \textit{Ginzburg v. United States}\textsuperscript{81} in 1966 that it may be decisive in proving material is obscene that "the purveyor's sole emphasis [is] on the sexually provocative aspects of his publications." In addition, the Court pointed out in 1974 in \textit{Hamling v. United States}\textsuperscript{82} regarding the \textit{scienter} requirement, “It is constitutionally sufficient that the prosecution show that a defendant had knowledge of the contents of the materials he distributed, and that he knew the character and nature of the materials. To require proof of a defendant's knowledge of the legal status of the materials [that is, he knew the materials were obscene] would permit the defendant to avoid prosecution by simply claiming that he had not brushed up on the law.”

\begin{itemize}
\item \textsuperscript{75} Beauharnais v. Illinois, 343 U.S. 250, 266 (1952).
\item \textsuperscript{76} 354 U.S. 476, 479-80 (1957).
\item \textsuperscript{77} \textit{Id.} at 484, 489.
\item \textsuperscript{78} Kingsley Inter. Pictures Corp. v. Regents of the Univ. of New York, 360 U.S. 684 (1959).
\item \textsuperscript{79} 361 U.S. 147, 149-55 (1959).
\item \textsuperscript{80} 378 U.S. 184, 189-90 (1964).
\item \textsuperscript{81} 383 U.S. 463, 470 (1966).
\item \textsuperscript{82} 418 U.S. 94, 123 (1974).
\end{itemize}
By 1966, there was no longer majority support for the definition of obscenity given in Roth. In the Memoirs case, Justice Douglas and Justice Black continued with their view that there could be no censorship of expression not intertwined with illegal conduct. Justices Brennan, joined by Chief Justice Warren and Justice Fortas, transformed a reason given in Roth for regulating obscenity into part of its definition, by saying that material could not be found obscene under Roth unless it was "utterly without redeeming social value." Justice Stewart, concurring, also seemed to go beyond Roth based upon his dissent in Ginzburg v. United States, which had spoken in terms of "hard core" pornography. He had said two years earlier in Jacobellis v. State of Ohio that he could not define obscenity, but "I know it when I see it." Giving some greater content to that test, Justice Stewart noted in Ginzburg that problematic materials include "photographs, both still and motion picture, with no pretense of artistic value, graphically depicting acts of sexual intercourse, including various acts of sodomy and sadism, and sometimes involving several participants in scenes of orgy-like character. They also include strips of drawings in comic-book format grossly depicting similar activities in an exaggerated fashion. There are, in addition, pamphlets and booklets, sometimes with photographic illustrations, verbally describing such activities in a bizarre manner with no attempt whatsoever to afford portrayals of character or situation and with no pretense to literary value."

Three Holmesian dissents in Memoirs indicated that each wanted continued adherence to the views they had expressed in Roth. Thereafter, in 31 cases, the Court reversed obscenity convictions when five members of the Court, applying their own tests, deemed the material not to be obscene. This was said to be the Redrup approach, after Redrup v. New York, decided in 1967.

The awkward Redrup practice finally came to an end during the years of the Burger Court, 1969-1986. Once the 5-Justice majority of extreme liberal instrumentalists on the Court came to an end with the retirements of Chief Justice Warren and Justice Fortas in 1969, discussed at § 11.2.2.2, the Court pulled back on the definition of obscenity. In 1973, a majority of the Court agreed in Miller v. California on a revised version that is more protective of free speech than Roth, but less protective than Justice Brennan’s variation of Roth in Memoirs. The Miller definition of obscenity requires the trier of fact to decide: (a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to prurient interest,
whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. Under *Miller*, the "contemporary community standards" need not be national; a jury can be instructed to apply standards of their state – but the impact of the materials will be judged by their effect on an average person, rather than one particularly susceptible or sensitive. The Court has said that prurient material is that which tends to excite lustful thoughts, including "having itching, morbid or lascivious longings; of desire, curiosity, or propensity, lewd."  

This new test differs from *Roth*, as interpreted by Brennan, in that it shifts away from requiring that the work be "utterly" without social value to requiring only that it "lack serious" value; it returns the decision on obscenity more to juries applying the majority’s definition of obscenity, rather than *ad hoc* court review as under the *Redrup* approach; and it adds the requirement that statutes regulating obscenity “specifically define” the regulated conduct to minimize possible vagueness or overbreadth problems with the statute. Soon after *Miller* was decided, the Court clarified *Miller* in *Jenkins v. Georgia* by refusing to find obscene a movie, “Carnal Knowledge,” starring Jack Nicholson, Ann Margaret, Candice Bergen, and Art Garfunkel, that did not fall within either of the two illustrations given in *Miller* of what is obscene: (a) patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated, and (b) patently offensive representations of masturbation, excretory functions, and lewd exhibitions of the genitals. The Court said that no one can be subjected to prosecution for the sale or exposure of obscene materials unless they depict or describe patently offensive, *i.e.*, "hard core" sexual conduct, such as conduct described in the *Miller* examples.

In 1973, the Court reaffirmed in *Paris Adult Theatre I v. Slaton* that states could ban obscenity even if distributed only to consenting adults. The majority held that state legislators can sanction obscenity because they may reasonably find a link between obscenity and the quality of community life; privacy interests do not prevail where there is commercial exhibition, as distinguished from private viewing at home; and not all conduct involving consenting adults is beyond state regulation. Joined by Justices Marshall and Stewart, Justice Brennan said in dissent in *Slaton* that because of problems of fair notice, chilling protected speech, and institutional stress in drawing lines, he would limit states to barring distribution to juveniles and offensive exposure to unconsenting adults. Justice Douglas continued his view not to allow the suppression of expression to consenting adults because of its sexual nature. Today's post-instrumentalist Court does not include any extreme instrumentalists who, like Justices Brennan, Marshall, and Douglas, came to believe that the First

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92 413 U.S. 49, 57-64 (1973).

93 *Id.* at 112-13 (1973) (Brennan, J., joined by Marshall, J., & Stewart, J, dissenting); *id* at 114 (Douglas, J., dissenting).
and 14th Amendments prohibit the state and federal governments from suppressing obscene materials except in the interest of protecting children or unwilling viewers. Nor does the current Court include any liberal formalists, like Justice Black, whose absolutist views would prevent any government regulation of obscenity.94

The post-instrumentalist Court has clarified Miller by holding that the community standard applies only to the first branch of the test, which relates to prurient interest. Whether the work is “patently offensive” under the second branch must be determined by reference to the examples given in Miller of patently offensive conduct, not “unbridled” jury discretion; whether the work “lacks serious value” is determined from a reasonable person perspective, not community standards.95 In 1989, the Court made clear that material which is "indecent" but not "obscene" cannot be barred from an adult audience.96 A city may require dispersal of adult theaters, as in Young v. American Mini Theatres, Inc.,97 or a city may concentrate adult theaters in one area, as in City of Renton v. Playtime Theatres, Inc.98 Such ordinances, treated as content-neutral regulations concerned with the secondary affects of adult theaters, are justified under an intermediate standard of review if they serve a substantial state interest in preserving the quality of life, provided that they are narrowly tailored and allow reasonable alternative avenues of communication, as discussed at § 29.4.4.1 nn.134-40.

In 1990, in FW/PBS v. City of Dallas,99 the Court relaxed application of the Freedman procedural tests where a city licensing official reviewed the qualifications of each license applicant to engage in a sexually oriented business, but did not pass judgment on the content of any particular speech. Under Freedman, as discussed at § 29.6.1.1 nn.215-16, the government has the burden of initiating court proceedings and the burden of proof during those proceedings. Under FW/PBS, the burdens remain with the challenger, despite the case being one of heightened scrutiny. A better approach, applied in 2002 to content-neutral government licensing and fee permit cases in Thomas v. Chicago Park District and Watchtower Bible and Tract Society of New York, Inc. v. Village of Statton, discussed at § 29.6.1.3 nn.237-42, provides that the burden remains on the government, but review should be at the intermediate level, rather than the strict scrutiny approach of Freedman.

In recent years, the number of Supreme Court cases on obscenity has declined. Perhaps not as many prosecutions are being brought. Local communities may be dealing with adult movies by zoning, as in Young and Renton, rather than by bans. Perhaps the Court feels that it has little to add to what it has already said about movies, books, and magazines, and cases on the Internet are only beginning

to be generated. In those few cases decided by the current Court, it has followed Miller. Thus, the
law regarding obscenity seems to have become stabilized. Despite this current stabilization,
Professor Tribe has predicted that over the long run the definition of obscenity will not be at a state
of rest until the Court allows regulation only in the interest of unwilling viewers, captive audiences,
young children, and beleaguered neighborhoods, but not in the interest of a uniform vision of how
human sexuality should be regarded and portrayed. 100

While Professor Tribe’s vision has not been formally adopted by the Court, as a practical matter the
amount of sexually explicit material available to consenting adults today mirrors his standard.
Whether through VHS, DVD, or Internet access, the adult pornography industry is a multi-billion
dollar industry, and even “hard-core” pornography, although officially banned, as a practical matter
is available to most who wish to acquire it, in the same manner as many illegal drugs as a practical
matter are available to those who wish to purchase them. This fact is important because, as the
Court held in Stanley v. Georgia, 101 an individual has a right under the First Amendment to possess
obscene material in the privacy of one's home, and such possession cannot be made the subject of
a criminal prosecution. For this reason, despite an occasional prosecution for obscenity involving
the sale of adult pornography to a consenting adult, the focus of constitutional law in this area has
turned principally to the issue of child pornography and keeping obscene, indecent, or patently
offensive images away from children. 102 Those topics are discussed at § 30.1.4.

Despite some arguments made to the contrary, the courts apply the same “obscenity” doctrine for
pornography depicting women in subordinate sexually explicit imagery. In American Booksellers
v. Hudnut, 103 the Seventh Circuit declared invalid an ordinance that sanctioned pornography, defined
as the subordination of women in sexually explicit ways, including various kinds of sadomasochistic
imagery in pictures or words. The statute also provided that “use of men, children, or transsexuals
in the place of women” shall constitute pornography under this section. There was no effort to fit
pornography, so defined, into the Miller definition of obscenity, because the ordinance did not refer
to prurient interests, community standards, or whether the work, as a whole, had any value. Given

100 Laurence H. Tribe, American Constitutional Law 909 (2nd ed. 1988).


102 See Clay Calvert & Robert D. Richards, Adult Entertainment and the First Amendment: A
Dialogue and Analysis with the Industry’s Leading Litigator and Appellate Advocate, 6 Vand. J. Ent.
L. & Prac. 147 (2004). For a creative, although likely impractical, proposal to evade limitations on
current prosecutions regarding adult pornography, see Tonya R. Noldon, Challenging First
Amendment Protection of Adult Films with the Use of Prostitution Statutes, 3 Va. Sports & Ent. L.J.
310 (2004). For an article bemoaning the current availability of sexually explicit material under the
Miller test, see Daniel Mark Cohen, Unhappy Anniversary: Thirty Years Since Miller v. California:
The Legacy of the Supreme Court’s Misjudgment on Obscenity, 15 St. Thomas L. Rev. 545 (2003).

103 771 F.2d 323, 324-32 (7th Cir. 1985), citing, inter alia, Catharine A. McKinnon,
(supporting constitutionality of the ordinance), cert denied, 475 U.S. 1001 (1986); id. (Burger, C.J.,
joined by Rehnquist & O’Connor, JJ., would note probable jurisdiction and set case for argument).
that the law was not limited to regulating “obscenity” as defined in Miller, the court applied standard First Amendment doctrine. Characterizing the ordinance as viewpoint discrimination, the Seventh Circuit stated that it could not find that the state had justified its ordinance under strict scrutiny. The court held that the government does not have a compelling interest in barring opinions it thinks wrong or harmful. The court noted that this is so even if the depictions of subordination of women tend to perpetuate subordination, and, like racial bigotry, anti-Semitism, or violence on television, “influence the culture and shape our socialization.” It is also true even if the speech is not directly answerable by more speech. The court said that any other approach would leave the government “in control of all of the institutions of culture, the great censor and director of which thoughts are good for us.” Of course, the government could punish the causing of injury during the course of producing such pornography. The Supreme Court summarily affirmed, with Chief Justice Burger, and Justices Rehnquist and O'Connor, saying the case should have been set for argument.

Similar issues have arisen regarding art work pushing the boundaries of societal conventions, such as Robert Mapplethorpe’s famous images of sadomasochistic sex, Andres Serrano’s “Piss Christ” (a photograph of a crucifix submerged in urine), or Karen Finley’s nude performances, where Finley "places, dabs, smears, pours and sprinkles food on her body to symbolize the violation of the female characters whose tales she shrieks” on stage. While such works are typically granted First Amendment protection, as discussed at § 29.4.2 nn.101-03, one author has noted the “potential consequences of a continued failure to afford Postmodern and Contemporary art sufficient protection, namely arbitrary law enforcement, self-censorship, and regulation based on secondary effects.”104

§ 30.1.4 Indecent Material Involving Children

Child pornography refers primarily to the use of children in the production of pornography, including live performances and depictions of children engaging in sexual acts or displays.105 Such material falls into the category of “unprotected speech” under the Court’s First Amendment doctrine, as discussed at § 30.1.4.1. A related concern involves “indecent” or “patently offensive” material that is considered harmful for children to hear or view.106 Such material is not “unprotected speech” under First Amendment doctrine, but rather is analyzed under standard First Amendment doctrine with the understanding that the state has a compelling government interest with preventing such material from being viewed by children, as discussed at § 30.1.4.2.


§ 30.1.4.1  Pornography Involving Use or Depictions of Children

Justices during both the instrumentalist era and the modern natural law era have recognized that the exploitive use of children in the production of pornographic material continues to be a serious national problem. The Court has held that child pornography is not protected speech, and although governments may not criminalize possession of obscene material depicting adult activity in the home, a state may bar the possession and viewing of child pornography even in the home. Further, the advertising or selling of child pornography can be barred to advance the state's interest in preventing sexual exploitation of children, the Court explaining that closing the channels of communication is necessary to control initial production of the material.

Given that the purpose of the ban on distribution of materials depicting sexual acts or displays of children is to protect the sexual exploitation of children, the Court held in 1982 in New York v. Ferber that the Miller test is modified so as not to require that the sexual depiction appeal to the prurient interest, or that the conduct be portrayed in a patently offensive manner, or that the material need be considered as a whole. Thus, isolated depictions of children engaging in sexual acts or displays can constitute child pornography under Ferber. Further, while under Miller, material that “does no more than arouse, ‘good, old fashioned, healthy’ interest in sex” cannot be obscene, the Court has never indicated that any form of child pornography could meet that test.

The transition to a post-instrumentalist Court has not resulted in a noticeable change in the Court’s perspective on child pornography. For example, in 1990, the Court held in Osborne v. Ohio that as long as a state's law requires proof of scienter, i.e., intent or recklessness, it may bar the possession and viewing of child pornography which involves a lewd exhibition or a graphic focus on the genitals, as long as the statute is sufficiently narrowly tailored. The statute in Osborne was narrowly tailored because it did not apply to nude photos where the person depicted is “the child or the ward of the person charged,” i.e., unobjectionable family photos, or if “the material or performance is sold, disseminated, displayed, possessed, controlled, brought or caused to be brought into this state, or presented for a bona fide artistic, medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, clergyman, prosecutor, judge, or other person having a proper interest in the material or performance.” The Court explained

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111 Id. at 764-66.


that states have a compelling interest in the physical and psychological well-being of minors, can
determine that using children in pornography is harmful, and can proscribe possession because it
is now difficult, if not impossible, to solve the child pornography problem by attacking only
production and distribution. The Court’s concern with a scienter requirement was evidenced in
United States v. X-Citement Video, Inc., where the Court emphasized that the term “knowingly”
in the statutes being reviewed extended both to the sexually explicit nature of the material and to the
age of the performer. This made it easier for the Court to uphold the statute’s constitutionality, since the scienter requirement applied to both the age of the performer and the nature of the material.

For this exception to First Amendment doctrine to apply, children must actually be involved. For
example, in Ashcroft v. The Free Speech Coalition, the Court considered whether the Child
Pornography Prevention Act of 1996 was unconstitutionally overbroad insofar as it criminalized the
production or possession of images that appear to depict minors engaged in sexual intercourse, even
though those images may have been computer images. Because no actual minors were involved in
the case, the Court rejected an analysis based on viewing the speech as “unprotected,” and instead
applied standard First Amendment analysis. Under that analysis, the Court held that the government
did not show such a strong enough connection between the thoughts that might be generated and
subsequent illegal actions that would justify a restriction based on a “secondary effects” rationale
of discouraging pedophiles from engaging in illegal conduct.

§ 30.1.4.2 Indecent or Patently Offensive Material with Children in the Audience: Standard First Amendment Doctrine Applied

Unlike obscenity, which eventually became reasonably well-defined in Miller, discussed at § 30.1.3
nn.88-98, “indecency” has no single authoritative definition. It is a very broad term, as it can relate
to anything contrary to “common propriety” or to “deprave the morals” in the direction of “impure
sexual relations.” Similarly, what is “patently offensive” speech is not subject to precise
definition. As the Court noted about the Communications Decency Act of 1996, at issue in Reno
v. American Civil Liberties Union, the term “patently offensive” is qualified only to the extent that
it involves "sexual or excretory activities or organs" taken "in context" and "measured by
contemporary community standards." The statute did not indicate whether the "patently offensive"
and "indecent" determinations should be made with respect to minors or the population as a whole.
As for any differences between “indecent” and “patently offensive” speech, the Court “assumed

114 Id. at 109-11.


by the words “offensive to common propriety; offending against modesty or delicacy; grossly
vulgar.” In Dunlop v. United States, 165 U.S. 486, 501 (1896), there is a reference to indecency as
calculated to “deprave the morals” in the direction of “impure sexual relations.”

arguendo” in Reno that the "patently offensive" standard was “synonymous” with the "indecency" standard.”

The government can make some indecency unlawful under an intermediate scrutiny approach based on the content-neutral reason of preventing its being viewed by unwilling listeners, such as public nudity. Further, with respect to broadcast regulation, which under Red Lion only triggers intermediate scrutiny for content-based regulations, not strict scrutiny, as discussed at § 30.3.1 nn.206-09, the Court was willing in FCC v. Pacifica Foundation to allow time restrictions on broadcasts that included “indecent” words because broadcasts are uniquely accessible to children. Under the secondary effects zoning line of cases, like City of Los Angeles v. Alameda Books, Inc. and Renton v. Playtime Theatres, Inc., discussed at § 29.4.4.1 nn.134-40, an intermediate test could also be used for zoning regulations related to exposure of children to indecent material.

In 1968, in Ginsberg v. New York, the Court noted that the test for what is “unprotected” obscene speech is slightly different for children, rather than adults. Thus, regulations that protect children from speech obscene to them would trigger no further First Amendment review, but merely rational review under the Equal Protection Clause or Due Process Clause. This Ginsburg doctrine in 1968 of a different test for obscenity as applied to children, as opposed to adults, has not been further developed since the Supreme Court agreed in 1973 in Miller on a general test for obscene material. In 1997, the Court focused in Reno on how the statute at issue in Ginsburg was narrowly tailored to meet intermediate scrutiny in any event, thus minimizing the rational review aspect of that case.

Even in the absence of reasons justifying less than strict scrutiny review, the Court has indicated that the government has a compelling government interest in protecting children from viewing indecent or patently offensive material. However, consistent with strict scrutiny, the government must adopt the “least restrictive alternative” in order to take steps to avoid infringing the free speech rights of adults, while protecting children from indecent and patently offensive material. Thus, even while protecting children from indecency, the state may not reduce the adult population to reading only what is fit for children. For example, wearing a jacket in a courthouse corridor that contained the

\[\text{119 Id. at 873.}\]
\[\text{120 See, e.g., Erznoznik v. City of Jacksonville, 422 U.S. 205, 206-07 (1995) (noting that the Court has been willing to permit banning public nudity to protect unwilling parties).}\]
\[\text{121 438 U.S. 726, 748-51 (1978) (The seven words part of George Carlin’s “Filthy Words” monologue involved in the case were: “sh!t, piss, fuck, cunt, cocksucker, motherfucker, and tits.”). Under Pacifica, after 6 a.m. and before 10 p.m., these words can be banned by FCC regulation.}\]
\[\text{123 390 U.S. 629, 633 (1968).}\]
\[\text{124 Reno, 521 U.S. at 864-67.}\]
\[\text{125 Butler v. Michigan, 352 U.S. 380, 382-84 (1957).}\]
phrase “Fuck the Draft” could not be the basis of a conviction for disturbing the peace, when there was no evidence of any disturbance, even if some child might read the jacket.126

The post-instrumentalist Court has reviewed indecency limits with respect to live performances and electronic communications, including a number of cases involving the Internet. The earliest of these cases was Sable Communications of California, Inc. v. FCC.127 There the Court struck down a congressional ban intended to protect children from indecent dial-a-porn telephone services because the ban also affected adults and yet was not limited to Miller-defined obscenity. The Court distinguished Pacifica on the grounds that affirmative steps would have to be taken to access the service, rather than the intrusion just coming in when the radio or television station was turned on, and thus the content-neutral, unwilling listener intermediate standard could not apply. The Court suggested, however, that if a total ban were the only effective way to protect juveniles from such calls, the law might be upheld despite its invasion of adult First Amendment rights.

More recent legislative efforts to deal with child pornography at the national level have concentrated on the Internet. The problem for lawmakers has been to erect barriers that protect children and yet do not unconstitutionally interfere with the free speech rights of adults.128 The post-instrumentalist Court has divided on the constitutionality of these efforts in five recent cases.

The first of these cases was Reno v. American Civil Liberties Union.129 There the Court struck down portions of the Telecommunications Act of 1996 that prohibited (1) the knowing transmission to a person under 18 years of age any obscene or indecent message or any patently offensive depiction of sexual or excretory activities or organs, or (2) knowingly permitting any telecommunications facility under a person’s control to be used for such activity. Justice Stevens wrote for the Court that the Act was a content-based blanket restriction on speech and, thus, could not be analyzed under an intermediate standard of review, as in Pacifica and Renton. The Act could not pass the strict scrutiny because it lacked the necessary precision and, thus, was not narrowly tailored. In support of this conclusion, Justice Stevens provided several examples. He pointed out, for example, that knowledge that one or more members of a 100-person group will be minor would burden communication among adults. And he added that the district court had found that at the time of trial existing technology did not include any effective method for a sender to prevent minors from obtaining access to its communications on the Internet without also denying access to adults. Justice Stevens explained, “In order to deny minors access to potentially harmful speech, the CDA effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another.”130 Justice O’Connor, with Chief Justice Rehnquist, agreed that the Act violated the First Amendment because with current technology a speaker could not be reasonably

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130 Id. at 874.
assured that his or her speech could be confined in an “adult zone.” However, she would uphold the Act insofar as it applied to indecent speech in communications between an adult and one or more minors.131

The second case was *United States v. Playboy Entertainment Group, Inc.*132 The Court invalidated Section 505 of the Telecommunications Act of 1996, which required cable TV operators who provide channels primarily dedicated to sexually-oriented programming either to fully scramble or otherwise block those channels or limit transmission to hours when children are unlikely to be viewing, typically defined as between 10 p.m. to 6 a.m. Because of signal bleed, cable operators had no practical choice but to curtail the targeted programming during 16 hours a day. Justice Kennedy said for the 5-4 Court that strict scrutiny applied to this content-based speech restriction. The law failed that test because a less restrictive alternative was available, *i.e.*, allow cable systems to block unwanted channels on a household-by-household basis on request of parents.

The Justices most likely to defer to the government dissented: Holmesian Chief Justice Rehnquist, and those Justices with an occasional affinity for the Holmesian approach, Justice O’Connor, as discussed at § 12.4.2, and Justice Breyer, as discussed at § 11.4 nn.107-09. Justice Breyer’s dissent was also joined by Justice Scalia. Justice Breyer said that the record shows no similarly effective, less restrictive alternative to what is provided in the Act. Thus, the Act restricted speech no more than necessary to further the compelling interest in helping parents prevent minors from accessing sexually explicit materials in the absence of parental supervision. Justice Scalia added that the Act could be upheld because it applies only when materials are marketed by emphasizing their sexually provocative aspects. He said, “[Since] the Government is entirely free to block these transmissions, it may certainly take the less drastic step of dictating how, and during what times, they may occur.”133

The third case in this series is *Ashcroft v. American Civil Liberties Union (Ashcroft I).*134 The

131 Id. at 886-87 (O’Connor, J., joined by Rehnquist, C.J., concurring in the judgment in part and dissenting in part).


133 Id. at 836-47 (Breyer, J., joined by Rehnquist, C.J., and O’Connor & Scalia, JJ., dissenting); id. at 835 (Scalia, J., dissenting). Justice Stevens, concurring, replied to Justice Scalia’s opinion by saying that the fact that programs marketed by Playboy are offensive to some viewers provides a justification for protecting, not penalizing, truthful statements about their content. Id. at 829 (Stevens, J., concurring).

134 535 U.S. 564, 566-73 (2002). The Act made illegal as harmful to minors “any communication, picture, image, graphic image, file, article, recording, writing or other matter of any kind that is obscene or that (A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appear to, or is designed to pander to, the prurient interest; (B) depicts, describes, or represents in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-
narrow holding of the Court was that in defining material that is harmful to minors and displayed on the Internet for commercial purposes, Congress could refer to the prurient interest with respect to minors in view of “contemporary community standards” without thereby violating the First Amendment. As discussed below, a variety of reasons were given by different Justices in support of that conclusion. As might be expected, views most supportive of the government were taken by Chief Justice Rehnquist and Justices Scalia and Thomas. Justices O’Connor and Breyer lent close support to their views. Justice Kennedy was more protective of free speech, in company with Justices Souter and Ginsburg. Most speech protective of all was Justice Stevens, who dissented from a judgment supported by all other members of the Court.

In his opinion, Justice Thomas, with Chief Justice Rehnquist and Justice Scalia, relied primarily on an analogy to Hamling v. United States and Sable Communications of California, Inc. v. FCC.\(^\text{135}\) In these cases the Court had held that the First Amendment is not violated by requiring a speaker to observe varying community standards when disseminating material to a national audience. In response to the argument of the court below, and of Justices Kennedy and Stevens, that these cases were distinguishable because they involved use of the mails (Hamling) and the telephone (Sable), Justice Thomas replied that the opinions in those cases took no account of ability to target the release of material, and he saw no reason to believe that the practical effect of varying community standards would be greater here than under the federal obscenity statutes. In short, a publisher’s burden does not change simply because it decides to distribute its material to every community in the nation. Finally, the challengers had failed at this stage in the litigation to prove that any overbreadth in the statute was not only real but, also, substantial as well. However, the injunction against enforcement of the statute entered by the court below should remain in effect while further action is considered by the lower courts.

Justice O’Connor agreed with the plurality that the challengers had not shown that the law is overbroad on its face simply because the Act defined what was harmful to minors in terms of local community standards. However, she foresaw future problems in evaluating the effect of using community standards, and she called for adoption of a national standard as a constitutionally permissible and reasonable basis for regulation of the Internet.\(^\text{136}\) Justice Breyer also concurred in the judgment, saying that he believed Congress intended the statutory word “community” to refer to the Nation’s adult community, taken as a whole, and that would not violate the First Amendment. He relied on a report filed in the House of Representatives.\(^\text{137}\)

Justice Kennedy concurred in the judgment, with Justices Souter and Ginsburg. He agreed that in its current state the record did not require holding the statute overbroad merely because community standards may vary across the country. However, he disagreed with Justice Thomas that the effect

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\(^{135}\) Id. at 575-78, citing Hamling, 418 U.S. 87 (1974); Sable, 492 U.S. 115 (1989).

\(^{136}\) Id. at 586-88 (O’Connor, J., concurring in the judgment and concurring in part).

\(^{137}\) Id. at 589-90 (Breyer, J., concurring in the judgment).
of using community standards should be resolved by analogy to *Hamling* and *Sable* because, said Justice Kennedy, each medium has distinctive attributes. In order to determine whether a law governing the Internet restricts substantially more speech than is justified, a number of questions must first be determined. They included how to judge material on the Internet “as a whole,” the venues in which prosecution can be brought, and the extent of speech covered, e.g., what is communication for commercial purposes, and must the material be offered for sale. Justice Kennedy was concerned with laws that have the practical effect of foreclosing an entire medium of expression, as might be true here for some speech. However, in view of Congress’ reasoned effort to comply with the *Reno* case, the judiciary should proceed with caution and identify any overbreadth with care before invalidating the Act.138

Justice Stevens, dissenting, found the Act invalid because even the narrowest version of the statute abridged a substantial amount of protected speech that many communities would not find harmful to minors. Because internet speakers cannot limit access to those specific communities, the statute is substantially overbroad regardless of how its other provisions are construed. Explaining, Justice Stevens said that the Act extends to a wide range of prurient appeals in advertisements, online magazines, internet-based bulletin boards and chat rooms, stock photo galleries, internet diaries, and a variety of illustrations encompassing a vast number of messages that are unobjectionable in most of the country and yet provide no “serious value” to minors. Concluding, Justice Stevens said, “It is quite wrong to allow the standards of a minority consisting of the least tolerant communities to regulate access to relatively harmless messages in this burgeoning market.”139

In the fourth case in this series of cases, *United States v. American Library Association, Inc.*,140 the Court rejected a facial attack on the Children’s Internet Protection Act insofar as it denied federal funds to a public library unless it installed software to block images that constitute obscenity or child pornography, and prevented minors from obtaining access to material that is harmful to them. A plurality of four Justices, Chief Justice Rehnquist, and Justices O’Connor, Scalia, and Thomas, who have typically taken a more limited view of what is a public forum versus a non-public forum, as discussed at § 29.5.2 nn.200-04, concluded that Internet access in public libraries is neither a traditional nor a designated public forum because government creates a public forum only by intentionally opening a non-traditional forum for public discourse. However, libraries are more restricted. They provide Internet access to facilitate research, learning, and recreational pursuits by furnishing materials of requisite and appropriate quality. As a non-public forum, only rational review applied since the regulations did not involve viewpoint discrimination. Insofar as adults may be concerned, an adult patron need only ask a librarian to unblock it or disable the filter.

Justice Kennedy concurred on the grounds that a patron need only ask a librarian to unblock it or disable the filter, but did not agree that the library is a non-public forum, or that only a rational review standard applied. Justice Breyer, concurring, indicated his view that intermediate scrutiny

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138 *Id.* at 591-602 (Kennedy, J., joined by Souter & Ginsburg, JJ., concurring in the judgment).

139 *Id.* at 611-12 (Stevens, J., dissenting).

should be applied based on the content-neutral reason of not interfering with “the discretion necessary to create, maintain, or select a library's 'collection.'” Justice Souter and Ginsburg dissented, applying strict scrutiny, viewing libraries as a public forum and the regulation as content-based. Justice Stevens also dissented, viewing the statute as an unconstitutional condition on users of public libraries. The unconstitutional conditions doctrine is discussed at § 27.1.2.3.

In 2004, in Ashcroft v. American Civil Liberties Union (Ashcroft II), the Court held, 5-4, that the district court did not abuse its discretion in entering a preliminary injunction against enforcement of the Child Online Protection Act. The Act imposed criminal penalties for knowingly posting on the Internet, for commercial purposes, material that is harmful to minors. Justice Kennedy wrote that when plaintiffs challenge a content-based speech restriction, strict scrutiny applies and the government must show not only a compelling interest but, also, that the challenged regulation is the least restrictive means among available, effective alternatives. In view of the existence of filters, which impose selective restrictions on speech at the receiving end, and not universal restrictions at the source, filters may well be more effective in protecting children than the criminal penalties in the statute, especially since filters can protect even against material posted in other countries, verification systems can be subject to evasion, and filters can be applied to all forms of Internet communication, including e-mail. Thus, there were factual issues for trial that the government had not established, and so it was not an abuse of discretion to issue the preliminary injunction.

Once again, Holmesian Chief Justice Rehnquist, along with Justices O’Connor and Breyer, dissented in the case. They acknowledged that strict scrutiny applied to the case, but concluded that the government had met that burden in this case. As Justice Breyer wrote in his dissent, “Nonetheless, my examination of (1) the burdens the Act imposes on protected expression, (2) the Act's ability to further a compelling interest, and (3) the proposed 'less restrictive alternatives' convinces me that the Court is wrong. I cannot accept its conclusion that Congress could have accomplished its statutory objective – protecting children from commercial pornography on the Internet – in other, less restrictive ways.” Justice Scalia also dissented in the case, arguing that strict scrutiny should not be applied. Relying on Ginzburg v. United States, a 1966 case, discussed at § 30.1.3 n.81, which predated both the Miller test for obscenity in 1973, discussed at § 30.1.3 nn.88-94, and the protection given to commercial speech after 1975, discussed at § 30.3.2, he reiterated a position he had held in other cases, stating, "[C]ommercial entities which engage in 'the sordid business of pandering' by 'deliberately emphasis[ing] the sexually provocative aspects of [their nonobscene products], in order to catch the salaciously disposed,' engage in constitutionally unprotected

\[\text{[Id. at 214-15 (Kennedy, J., concurring in the judgment); id. at 217-18 (Breyer, J., concurring in the judgment).]}

\[\text{Id. at 225-31 (Stevens, J., dissenting) (Souter and Ginsburg said they also agreed “in the main” with this rationale, id. at 231); id. at 231-33 (Souter, J., joined by Ginsburg, J., dissenting).]}

\[\text{542 U.S. 656, 666-73 (2004).]}

\[\text{Id. at 677 (Breyer, J., joined by Rehnquist, C.J., and O’Connor, J., dissenting).]}

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behavior."\textsuperscript{145}

An issue related to protecting children from viewing “indecent” material concerns the process of editing motion pictures to remove various kinds of objectionable content in terms of images or words, and then selling or renting such “sanitized” versions of the original work. A constitutional issue involved in the background of such cases could involve whether individuals have a constitutional liberty right to edit, sell, and view such material in its “sanitized” format, even if copyright protection is given to authors and producers of such work limiting such editing rights on grounds of protecting the “moral right” of authors and producers to their initial unedited work. As long as disclosure is made that the original work has been edited, thus removing concerns with misrepresentation or fraud, it seems likely that such a right to edit will be protected. Attempts by authors or producers to control the “downstream” use of their material by others is likely to be rejected, as was Alaska’s attempt to control the “downstream” activities related to timber under the dormant commerce clause market participant exception in \textit{South Central Timber Development, Inc. v. Wunnicke}, discussed at 20.3.2.2.B. nn.222-23.\textsuperscript{146}

\textbf{§ 30.2} \textbf{Content-Based Regulations That Trigger Versions of Rational Basis Review, Rather Than Strict Scrutiny}

\textbf{§ 30.2.1} \textbf{Second-Order Rational Review}

\textbf{§ 30.2.1.1} \textbf{Defamation and Related Torts}

Cases of defamation and related torts involve laws that regulate on the basis of the content of the individual’s speech. Nonetheless, these cases do not involve application of a strict scrutiny approach normally applicable to content-based regulations of speech. Instead, in cases involving defamation and related torts, the Court has developed a number of tests that balance the state’s interest in an effective tort law against the individual’s constitutional interest in the freedom of speech.

Although the Court does not make reference to this fact, the balancing done in these cases tracks in rigor the balancing done in dormant commerce clause review, discussed at § 20.3.2.2.A, where the Court similarly balances the state’s interests, in those cases the state’s interest in various kinds of economic regulations, against the constitutional interests at stake, in those cases an interest in free trade implicit in the Commerce Clause. For certain kinds of protectionist commercial regulations that greatly infringe on the constitutional interest in free trade, as under the \textit{Maine v. Taylor} test, discussed at § 20.3.2.1.D nn.194-200, sometimes there is virtual \textit{per se} rule of unconstitutionality.

\textsuperscript{145} \textit{Id.} at 676 (Scalia, J., dissenting), \textit{quoting} Ginzburg v. United States, 383 U.S. 463, 467, 472 (1966).

Similarly, under *New York Times Co. v. Sullivan*, discussed at § 30.2.1.1 nn.149-52, where the defamatory act concerns speech about a public official and the constitutional interest in freedom of speech is at its highest, there is a very difficult “actual malice” test to meet. In other cases, where the governmental interest is stronger and the constitutional interest is less strong, as in cases that do not involve public officials or matters of public concern, such as *Dun & Bradstreet*, discussed at § 30.2.1.1 nn.155-56, the constitutional test is easier for the government to meet, as is true under the *Pike v. Bruce Church* test in dormant commerce clause review, discussed at § 20.3.2.1.D nn.196, 204-08. In all defamation cases, the challenger retains the burden of establishing that the tort law is unconstitutional. Thus, under the “base plus six” model of review, discussed at § 7.2.1 text following n.42, each of these defamation cases reflects a second-order kind of rational review.

**A. Classic Defamation Cases**

There were no First Amendment decisions in the original natural law era. In 1806, a common law prosecution of newspaper editors for libel of President Jefferson and Congress was filed in a federal court. The Court avoided the First Amendment issues when it held that federal courts have no common law criminal jurisdiction. Indeed, before 1964, a speaker’s only protection as defendant in an action for defamation was provided by the common law. As with obscenity or fighting words, once the case involved defamatory speech, there was no further First Amendment review.

That changed dramatically in 1964 when the Court decided *New York Times Co. v. Sullivan*. Reflecting a liberal instrumentalist view that is very protective of free speech rights, Justice Brennan wrote for the Court that the First Amendment bars liability for defaming a public official or public figure unless there is clear and convincing proof that: (1) defamatory material was published of and concerning the plaintiff, and (2) it was published with “actual malice,” *i.e.*, it was known to be false or there was reckless disregard of whether it was false or not. This new rule had two justifications. First, Justice Brennan said, “[W]e consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials.” Second, Justice Brennan said that even error needs protection to avoid deterring speech from fear of the expense or difficulty of proving the truth.

It has been noted that to prove actual malice, the Supreme Court has enumerated:

> several kinds of evidence that may be utilized by plaintiffs, including proof that the defendant entertained serious doubts as to the truth of his or her publication, proof that the statement was fabricated by the defendant, proof that the statement was the product of the defendant's

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148 See, e.g., Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) (“There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting' words . . . .”).

imagination, or proof that there exist obvious reasons to doubt the veracity of the informant upon whom the statement is based or the accuracy of the statement being relied upon. The courts have conceded that where proof of actual malice is at issue, information and facts that would tend to shed light on the reporter's state of mind are discoverable. To balance the defamation plaintiff's necessity to prove this element with society's interest in protecting the marketplace, the U.S. Supreme Court requires that proof of actual malice be made by clear and convincing evidence.\(^{150}\)

In practice, it has been very difficult for plaintiffs to prove that defendants acted with the “actual malice” required under the *Sullivan* precedent, particularly as the decision on “actual malice,” as an “ultimate” constitutional fact, discussed at § 26.1.4 nn.101-02, is for the court to determine as a matter of law, not the jury as a trier of fact.\(^{151}\) Indeed, it has been noted that, given *Sullivan*, the law of libel “poses little serious threat to the First Amendment rights of the media.” On the other hand, “fear of the relentless deep-pocket plaintiff, who pursues a libel claim despite having only a small chance of winning; the thinly-capitalized defendant, who is only one big judgment away from bankruptcy; and the high cost of discovery” remain “threats.”\(^{152}\)

Although Justice Brennan would have preferred to adhere to the “actual malice” rule in all defamation cases, he could not long hold a majority to that view, even during the instrumentalist era. As discussed at § 11.2.2.2, between 1963-69, there was always a working 5-Justice majority on the Court that permitted the instrumentalist view to prevail in almost every case. However, with the retirement from the Court in 1969 of Chief Justice Warren and his replacement by Chief Justice Burger, that core instrumentalist period of 1963-69 came to an end.

Reflecting this change, in 1974, a 5-4 Court held in *Gertz v. Robert Welch*\(^{153}\) that where the plaintiff is a private person and the substance of a defamatory statement makes substantial danger to reputation apparent, the state need not require more than proof of fault, *i.e.*, negligence, to find liability, even though the case involves a matter of public concern. However, in recognition of danger from excessive damage awards, a state could permit recovery of presumed or punitive damages only on proof of actual malice. Justice Brennan, dissenting, said that the *Sullivan* rule should apply in all civil actions concerning media reports on the involvement of private individuals


in events of public or general interest. Justice Douglas continued his absolutist view stating that any libel law was unconstitutional. At the other extreme, Chief Justice Burger and Justice White disagreed that a negligence requirement should be imposed for cases involving private figures. However, the majority supported Justice Powell’s reasoning that private individuals need more protection than do public figures because they have less opportunity to correct a lie or error and they have not thrust themselves into the public eye, and thus they have not voluntarily exposed themselves to the increased risk of injury assumed by public figures.154

In 1985, the Court once again limited *New York Times Co. v. Sullivan*. In *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*,155 the Court addressed the protection given private individuals in a defamation action where the matter in question was not of public concern. The Court held that states can impose liability if fault is shown, and there can be recovery of presumed or punitive damages without showing actual malice. The Court explained that the First Amendment interest is less important than in *Gertz* since speech on matters of public concern is at the heart of the First Amendment. Further, defamation recovery on private matters does not pose a threat to robust debate of public issues.

This reasoning was a middle-ground between extreme positions. At one end, once again, Holmesian Justice White and formalist Chief Justice Burger thought that the negligence requirement of *Gertz* was not needed and that *Gertz* should be overruled. Justice White said that First Amendment values are not at all served by circulating false statements of fact even about public figures. The necessary “breathing room” for speakers could be insured by limitations on recoverable damages. At the other end, liberal instrumentalists Justices Brennan, Marshall, Blackmun, and Stevens thought that a plaintiff even in a case not involving a public concern should be required to show actual malice to receive presumed or punitive damages. Justice Brennan wrote that the state’s interest in protecting the reputation of private persons and deterring falsehood is insured by allowing recovery if the speaker has been at fault. Any further interest in deterring potential defamation through case-by-case judicial imposition of presumed and punitive damages awards on showing less than actual malice exacts too high a toll of First Amendment values.156

No important defamation cases have subsequently been before the Court. Thus, it remains uncertain what rule should be applied if plaintiff is a public official or public figure, but the defamation did not relate to a matter of public concern. Professor Tribe, who has criticized the Court for its retreat from the actual malice rule, has stated that the actual malice rule should be applied whenever the plaintiff is a public official or public figure.157 However, it can be argued that the *Dun & Bradstreet* rule should apply to all defamation cases involving private conduct not a matter of public concern.

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154 Id. at 354-55 (Burger, C.J., dissenting); id. at 356 (Douglas, J., dissenting); id. at 361 (Brennan, J., dissenting); id. at 369-71 (White, J., dissenting).


156 Id. at 763-64 (Burger, C.J., concurring); id. at 767 (White, J., concurring in the judgment); id. at 774-76 (Brennan, J., joined by Marshall, Blackmun & Stevens, JJ., dissenting).

since even a public person should be able to protect private matters from false public comment without having to meet the difficult “actual malice” standard.

In practice, it would be unlikely for any matter involving a public official or public figure to be viewed as not a matter of public concern, since the conduct of public persons tends to be viewed as triggering matters of public concern. More broadly, it has been noted:

The cases suggest that generally the following will be considered matters of public concern in terms of the *Dun & Bradstreet* definition: politics and campaigns; operations of financial institutions; conduct of government and public officials; illegal or questionable business practices with ramifications for the general public; public health and safety; criminality and criminal justice; recruitment methods of a religious cult; pornography; and athletics. The following matters have been held not to be of public concern: employers' allegations of wrongdoing by employees or customers without ramifications for the general public; personal disputes between businesses and disgruntled customers; job recommendations; intra-professional disputes; intra- or inter-organizational business without ramifications for the general public; a paternity claim; a recommendation on tenure at a state university; inaccurate credit reports; and aspersions made in commercial advertising.\(^{158}\)

**B. False Light Cases**

Three years after *New York Times Co. v. Sullivan*, the Supreme Court decided *Time, Inc. v. Hill*.\(^{159}\) This was an action to redress invasion of privacy based on false reports regarding matters of public interest. The Court held that truth is a complete defense and that the First Amendment bars recovery in the absence of proof that the defendant published the report with “actual malice,” the *Sullivan* standard of knowledge of its falsity or in reckless disregard of the truth. Justice Brennan explained that erroneous statements are no less inevitable in entertaining the public as in informing the public and, if innocent and merely negligent, such speech must be protected if the freedoms of expression are to have the breathing space they need to survive.

Although the Supreme Court has never ruled on the issue, lower courts have split on whether the actual malice standard must be met even if the case does not involve a public official or public figure.\(^{160}\) It can be argued that *Gertz* impliedly overruled *Time, Inc. v. Hill* for false light cases involving non-public figures, just as *Gertz* limited the *Sullivan* actual malice doctrine for cases of


\(^{159}\) 385 U.S. 374, 387-91 (1967).

\(^{160}\) See Victor A. Kovner, Suzanne L. Telsey & Camille Calman, *Newsgathering, Invasion of Privacy and Related Torts*, 810 Practicing Law Institute, Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series, PLI Order Number 2981, 499, 787-88 (2004) (“Courts applying the law of ten states have held that *Gertz* limits the actual malice standard to false light claims asserted by a public figure. . . . But courts applying the law of thirteen other states have followed *Hill* or have required an actual malice standard as a matter of state tort law.”).
defamation. Similarly, there has been no Supreme Court case on the proper standard where the false light relates to a matter of only private concern. However, using Dun & Bradstreet as an analogy suggests that a showing of fault would be sufficient for liability and that courts could permit recovery of presumed or punitive damages without a showing of actual malice. With regard to public official or public figure cases, application of the actual malice rule of Hill is clear. For example, in 1988, the Court ruled in Hustler Magazine v. Falwell\(^1\) that the First Amendment bars recovery for intentionally inflicting emotional distress by a parody cartoon on a plaintiff who is a public official or a public figure unless the cartoon contains a false statement of fact made with actual malice.

Proof of actual malice is difficult enough in ordinary circumstances. In false light cases, proof of actual malice was made more difficult by Masson v. New Yorker Magazine.\(^2\) In Masson, the Court ruled that a deliberate alteration of words in a quote does not equate with the actual malice rule unless the alteration results in a material change in the meaning conveyed by the statement.

**C. Invasion of Privacy by Truth**

The instrumentalist Court held in Cox Broadcasting Corp. v. Cohn\(^3\) that civil liability for invasion of privacy by a true publication may not be imposed on a broadcaster for accurately publishing information released to the public in official court records. This ruling was carried forward into the post-instrumentalist era when the Court protected in Florida Star v. B.J.F.\(^4\) a newspaper from liability for publishing the name of a rape victim obtained from a police report made available in the press room. Reflecting their greater predisposition toward the Holmesian deference to government approach, Justice White dissented, with Chief Justice Rehnquist and Justice O’Connor, saying that privacy was being unduly sacrificed and that Cox should be limited to judicial records.

If private information is illegally intercepted and then delivered to a broadcaster who publishes it, can the federal government sanction that broadcast? In Bartnicki v. Vopper,\(^5\) decided in 2001, the Court held that the privacy interests protected by the federal statute were not sufficient to justify its application to a broadcaster of an illegally intercepted communication containing information of public concern where the broadcaster did not illegally intercept the private communication or arrange for its interception. The Court noted that the constitutional interests at stake in Bartnicki


\(^3\) 420 U.S. 469, 490-92 (1975).

\(^4\) 491 U.S. 524, 532-42 (1989); id. at 542-46 (White, J., joined by Rehnquist, C.J., and O’Connor, J., dissenting).

concerning making public information about a public concern were similar to the interests at stake in Sullivan. The Court noted, however, that is was not deciding whether privacy interests would be strong enough to justify the application of the statute to “disclosures of trade secrets or domestic gossip or other information of purely private concern.”

In a concurrence, Justices Breyer and O’Connor underscored that this kind of case does not involve “strict scrutiny,” but rather a rational review kind of balancing of interests, asking whether “the statutes strike a reasonable balance between their speech-restricting and speech-enhancing consequences.” In determining this “reasonable” balance, Justice Breyer indicated that a court should ask whether the relevant statutes “impose restrictions on speech that are disproportionate when measured against their corresponding privacy and speech-related benefits, taking into account the kind, the importance, and the extent of these benefits, as well as the need for the restrictions in order to secure those benefits?” Reflecting that this form of review is really a form of second-order rational review, the focus on “disproportionate” burdens in Bartnicki is similar to the kind of balancing done under the Pike v. Bruce Church test in dormant commerce clause analysis, discussed at § 20.3.2.1.D nn.196, 204-08, to determine whether a burden on interstate commerce is “clearly excessive.” As with that doctrine, for Justices Breyer and O’Connor, with their occasionally affinity for the Holmesian deference-to-government approach (for Justice O’Connor, discussed at § 12.4.2; for Justice Breyer, discussed at § 11.4 nn.107-09), the Court “should avoid adopting overly broad or rigid constitutional rules, which would unnecessarily restrict legislative flexibility.”

In dissent, Chief Justice Rehnquist, joined by Justices Scalia and Thomas, accused the majority of “tacit application of strict scrutiny.” They argued that even under standard First Amendment doctrine this was a content-neutral regulation concerned with protecting privacy that should be granted intermediate review. Contrary to this view, the majority did not adopt strict scrutiny, as noted by Justices Breyer and O’Connor. The majority did indicate, however, that to prevent a newspaper from publishing truthful information on a matter of public concern when the media played no part in the unlawful recording of the information would require a reason “of the highest order.”

Such language is similar to that used in dormant commerce clause cases, where there is the virtual per se rule of invalidity for burdens against interstate commerce under Maine v. Taylor, discussed at § 20.3.2.1.D nn.194-200, which can be overcome by strong state interests. The scrutiny in Bartnicki is best viewed as second-order rational review, rather than the third-order rational review of Taylor, because the challenger in Bartnicki bore the burden of proving the statute unconstitutional.

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166 Id. at 536-37, 541 (Breyer, J., joined by O’Connor, J., concurring).

167 Id. at 544-45 (Rehnquist, C.J., joined by Scalia & Thomas, JJ., dissenting).

D. Miscellaneous Other Tort or Contract Theories

Courts have had to struggle with the interplay between the First Amendment and a number of other tort causes of action. For example, in *Zacchini v. Scripps-Howard Broadcasting Co.*, the Court allowed a defendant to be found liable for videotaping 15 seconds of the plaintiff’s human cannonball act and playing it on the nightly news. The Court held this was a form of unlawful appropriation of plaintiff’s property. Justice Powell, joined by Justices Brennan and Marshall, dissenting, would have held that “the First Amendment protects the station from a ‘right of publicity’ or ‘appropriation’ suit, absent a strong showing by the plaintiff that the news broadcast was a subterfuge or cover for private or commercial exploitation.” Justice Stevens would have remanded the case to permit the lower state court to clarify whether its opinion rested on federal constitutional grounds or state common law tort grounds.

Post-instrumentalist decisions have also allowed liability to be imposed for speech under the contract doctrine of promissory estoppel and the tort doctrine of negligence. For example, in *Cohen v Cowles Media Co.*, the Court held that the First Amendment does not bar damages against a newspaper for breaching a promise of confidentiality to a source who relied on the promise in providing information to the paper, even for matters of public concern relating to a candidate in the upcoming election. A four-Justice dissent would have held “the State's interest in enforcing a newspaper's promise of confidentiality insufficient to outweigh the interest in unfettered publication of the information revealed in this case.” The Fourth Circuit held in *Rice v. Paladin Enterprises* that there can be liability for negligence if a defendant author publishes methods for doing illegal things, e.g., how to be a hit man, and that publication results in others using the methods to injure someone.

In cases where the Court has allowed liability to be imposed for speech that injured another, the facts did not suggest to a majority of the Court that allowing recovery would seriously intrude on the press’ right to make judgments regarding printing or broadcasting matters in which the public might be interested. Regarding possible constitutional protection of the press where it intruded on privacy by truthful matters obtained from sources other than official records, Justice White pointed out in *Cox Broadcasting Corp. v. Cohn* that the Court has left open the question whether the Constitution requires that truth be recognized as a defense in a defamation action brought by a private person. Also open is the question whether truthful publication of very private matters unrelated to public affairs may be proscribed by the Constitution.

\[\text{\textsuperscript{169}}\quad 433 U.S. 562, 569-78 (1977); id. at 581 (Powell, J., joined by Brennan & Marshall, JJ., dissenting); id. at 583 (Stevens, J., dissenting).\]


\[\text{\textsuperscript{171}}\quad 128 F.3d 233, 243-50 (4th Cir. 1997).\]

\[\text{\textsuperscript{172}}\quad 420 U.S. 469, 490 (1975).\]
§ 30.2.1.2 First Amendment Rights of Prisoners

In *Beard v. Banks*, a majority of the Supreme Court extended the second-order rational basis scrutiny used in *Turner v. Safley*, which involved burdening a prisoner’s fundamental right to marry, discussed at § 27.3.3.1.A n.183, to a case involving burdening a prisoner’s access to newspapers, magazines, and photographs while in the prison's long-term segregation unit. Such second-order review involved standard means/end reasoning balancing: (1) the government’s legitimate interest in effective prison management (*Turner* factor one); (2) the manner in which the regulation achieved its benefits for prison guards and other inmates, including considering less burdensome alternatives (*Turner* factors three and four), and (3) the burdens imposed on the prisoner, including alternative means of exercising First Amendment rights (*Turner* factor two), with the ultimate burden on the prisoner to establish that the government’s regulation was unreasonable. This approach is consistent with the Court’s earlier decision in *Thornburgh v. Abbott*, which involved the rights of prisoners to receive publications.

While application of *Turner v. Safley*’s second-order rational review was the appropriate standard to apply in the case, probably the better analysis would have been to recognize that prisons are “non-public” forums, and thus under standard First Amendment doctrine, discussed at § 29.5.1 nn.76-80, some version of rational review should have been applied anyway. As noted at § 29.2 text following n.55, while the Court’s precedents have not been clear on this issue, for content-neutral regulations of speech in a non-public forum, the Court typically the phrases the analysis in terms of whether or not the regulation is “reasonable,” similar to the 2nd-order rational review of *Turner v. Safley*. Under this approach, the intermediate review standard used for regulations of prisoners’ out-going mail, adopted in *Procunier v. Martinez*, is still appropriate to use, since those regulations affect mail being sent to a public forum or private property. Thus, content-neutral regulations adopted for prison management reasons in such fora should trigger intermediate review.

§ 30.2.2 Third-Order Rational Review: The Government as Employer

§ 30.2.2.1 Government Attempts to Regulate Speech of Public Employees

In the original natural law period there were no Supreme Court decisions on the extent to which the government, as employer, could regulate the speech of its employees. In 1892, during the formalist era, Justice Holmes, then on the Supreme Court of Massachusetts, explained in *McAuliffe v. Mayor of New Bedford* why a policeman had no constitutional claim after being fired for public remarks critical of his department. Holmes said, “The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. There are few employments for hire

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175 29 N.E. 517, 518 (Mass. 1892).
in which the servant does not agree to suspend his constitutional right of free speech, as well as of idleness, by the implied terms of his contract. The servant cannot complain, as he takes the employment on the terms which are offered him.”

Holmes’ analysis was widely adopted prior to the instrumentalist era. For example, in *Scopes v. State*, the famous “Monkey Trial” case, the court said, “In dealing with its own employees engaged upon its own work, the State is not hampered by the limitations of the Fourteenth Amendment to the Constitution of the United States.” Even during the formalist era, however, statements appeared in some Supreme Court cases which foretold limits on government power to condition employment on the giving up of rights to speech or association. For example, in *Frost & Frost Trucking Co. v. Railroad Commission*, Justice Sutherland wrote for the Court, “It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege the state threatens otherwise to withhold.”

As with the law regarding defamation, the shift on the Court during the 1960s reflected in *New York Times Co. v. Sullivan* altered the constitutional doctrine regarding speech of government employees on matters of public concern, just as it altered defamation doctrine, particularly on matters of public concern. As noted at § 30.2.1.1 n.149, the Court had stated in *Sullivan*, “[W]e consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.” That commitment was cited and relied upon in 1968, when Justice Marshall delivered the Court’s opinion in *Pickering v. Board of Education of Will County, Illinois*. There the Court held that the problem in any case involving retaliation by a government employer against a teacher is “to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.” Justice Marshall continued that because of the enormous variety of fact situations it was not appropriate or feasible to lay down a general standard on when a school board could discharge a teacher for speaking out on a matter of public interest. However, Justice Marshall did note that where the fact of employment as a teacher is only tangentially and insubstantially involved in the subject matter of a public communication made by the teacher critical of the school board, the teacher must be regarded as a member of the general public and, absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his or her right to speak on issues of public importance may not furnish the basis for his dismissal from public employment. On the other hand, the result might be different if the speaker had a close kind of working relationship with the Board where personal loyalty and confidence are necessary.

The facts considered by Justice Marshall suggested categories that might be applied in a wide variety of retaliation situations. They included:

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176 289 S.W. 363, 364-65 (Tenn. 1927).

177 271 U.S. 583, 593-94 (1926).

1. Whether the teacher made false statements knowingly or recklessly;
2. Whether the statements are so without foundation as to call into question the teacher's fitness to perform;
3. Whether the teacher's relationships with the board or the superintendent are such that personal loyalty and confidence are necessary to their proper functioning;
4. Whether the speech would interfere with discipline by immediate superiors or harmony among coworkers;
5. Whether the remarks are detrimental to the school system or whether they concern matters of public interest vital to informed decision making by the electorate; and
6. Whether the teacher has carelessly made false statements about matters so closely related to the day-to-day operations of the schools that any harmful impact on the public would be difficult to counter because of the teacher's presumed greater access to the facts.179

Justice Marshall added that the Court found the teacher's statements were not knowingly or recklessly false. And he expressly left open the question of whether the teacher could be fired if actual malice were shown. However, actual malice had not been shown, and the Court could not reasonably presume that the speech had any harmful effects.180 Reflecting his Holmesian predisposition to defer to government, Justice White, concurring, took a position that a teacher may be fired for knowingly or recklessly making false statements regardless of their harmful impact on the schools.181

As developed in cases after Pickering, to establish a claim of unlawful First Amendment retaliation a public employee must show that he or she suffered an adverse employment action that was causally connected to participation in a protected activity, i.e., speaking out on an issue of public concern. Once the employee satisfies this initial burden, the burden shifts to the government employer to show a legitimate nondiscriminatory reason for the action, e.g., that the interest of the government in the efficient delivery of its services outweighs the interest of the employee in speaking out, or that the adverse action would have been taken even without the employee’s speech having been made. If the government meets this burden, the burden shifts back to the employee to show that the employer’s actions were in fact a pretext for illegal retaliation.182

Because the government has the primary burden under Pickering of defending its decision once the plaintiff has established a prima facie case, this kind of balance reflects what the “base plus six” model of standards of review, discussed at § 7.2.1 text following n.42, describes as third-order rational review. Under third-order rational review, there is a balancing of governmental interests versus individual constitutional rights, with the burden on the government to justify the constitutionality of its action. Where there is a similar balancing of governmental interests versus

179 Id. at 568-74.
180 Id. at 574-75.
181 Id. at 584 (White, J., concurring in part and dissenting in part).
182 See generally Duffy v. McPhillips, 276 F.3d 988, 991 (8th Cir. 2002) (citations omitted).
individual interests, but the burden is placed on the challenger to prove the statute is unconstitutional, the “base plus six” model describes the level of scrutiny as second-order rational review.

Cases decided since 1973 have fleshed out *Pickering* in terms of its application to wide variety of government employers and to various speech situations. For example, in *Mt. Healthy City School District Board of Education v. Doyle*, a district court judgment had reinstated a teacher with back pay on the ground that the Board's decision not to renew was based in substantial part on the teacher having communicated to a local television station the principal's memo on teacher dress and appearance. Justice Rehnquist’s opinion for the Court began by saying that since the communication did not violate an established policy of the Board it was protected by the First and 14th Amendments. This being so, the teacher was entitled to win if he showed that his expressive conduct was a motivating factor in the decision not to rehire provided, however, that the Board did not show by a preponderance of the evidence that it would have reached the same decision even in the absence of the protected conduct. Since the Court could not tell what conclusion the lower courts would have reached if they had applied these principles, the judgment was vacated and the case remanded for proceedings consistent with the Court's opinion.

The effect of speaking in private about a matter of public concern was dealt with in *Givhan v. Western Line Consolidated School District*. There the Court held that a public school teacher, dismissed for criticizing the school's employment policies as racially discriminatory in private meetings with her principal, had engaged in expression protected by the First Amendment. Thus, the teacher was entitled to be reinstated unless the Board could show, in accord with *Mt. Healthy*, that the decision not to rehire would have been made even absent consideration of her criticism.

How to determine whether speech relates to a matter of public concern was the main focus in the 1983 case of *Connick v. Myers*. Justice White wrote for the Court that a district attorney could fire an assistant district attorney without regard to the *Pickering* balance test for circulating a questionnaire to co-workers that could most accurately be characterized as an employee grievance concerning internal office policy if the district attorney reasonably believed that the questionnaire would disrupt the office, undermine his authority, or destroy close working relationships. Justice White said government officials should be given wide latitude in managing their offices without intrusive oversight, even if the reasons for dismissal are mistaken or unreasonable, if the speech was not on a matter of public concern. Whether a speech addresses a matter of public concern must be determined by the content, form, and context of a given statement. Here, the focus was to gather information for continued debate with supervisors over the employee's transfer to another section.

The Court noted, however, that with respect to one aspect of the speech First Amendment review was required. This involved determining whether the discharge was justified because one question touched on a matter of public concern, i.e., did assistant district attorneys "ever feel pressured to

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work in political campaigns on behalf of office supported candidates.\footnote{186}{Id. at 149.} On this issue, the Court concluded that while there was no showing that the questionnaire impeded the employee's ability to perform her responsibilities, weight must be given to the supervisor's reasonable belief that the questionnaire, arising from an employment dispute, was an act of insubordination that interfered with working relationships essential to fulfilling public responsibilities.

Justice Brennan dissented with Justices Marshall, Blackmun and Stevens. Justice Brennan said that the questionnaire addressed matters of public concern because it discussed subjects that could reasonably be expected to be of interest to persons seeking to develop informed opinions about the manner in which the district attorney, an elected official, was discharging his responsibilities, especially with regard to the impact of transfer policies. With regard to the one question regarded by the majority as addressing a public concern, Justice Brennan said the Court was wrong to hold that a public employer's apprehension that speech will be disruptive justifies suppression of that speech "when all the objective evidence suggests that those fears are essentially unfounded."\footnote{187}{Id. at 166 (Brennan, J., joined by Marshall, Blackmun & Stevens, JJ., dissenting).} That was so because the employee did not violate a rule of confidentiality or office policy, most copies were distributed during lunch, and no evidence showed that the employee's work performance was adversely affected by her expression. Analogizing the case to student speech at school, Justice Brennan called for applying the \textit{Tinker} standard of allowing regulation only if the expression causes material and substantial interference with the requirements of discipline in the operation of the enterprise. He thought that an undesirable result of the Court's decision would be the public's deprivation of valuable information with which to evaluate the performance of elected officials. Had Justice Brennan's views prevailed, the intermediate scrutiny standard of \textit{Tinker} would be applied in these cases, rather than the third-order rational review standard of the existing \textit{Pickering} doctrine.

Decisions since 1986 have followed \textit{Pickering} for the speech activities of government employees and their rights to expressive association. For example, in \textit{Rankin v. McPherson},\footnote{188}{483 U.S. 378, 379-92 (1987).} the Court held that a deputy constable was not properly discharged even though she remarked, after hearing of the attempted assassination of President Reagan, "If they go for him again, I hope they get him." For the Court, Justice Marshall repeated the \textit{Pickering} test, stating: "The determination whether a public employer has properly discharged an employee for engaging in speech requires a balance between the interests of the employee, as citizen, in commenting on matters of public concern, and the interest of the state, as employer, in promoting the efficiency of the public services it performs through its employees." Here, coming on the heels of a news bulletin on a matter of heightened public attention, the statement dealt with a matter of public concern. Pertinent factors in the balance included whether the statement impaired discipline by superiors or harmony among co-workers, had a detrimental affect on close working relationships for which personal loyalty and confidence are necessary, impeded the performances of the speaker's duties, or interfered with the regular operation of the enterprise. Here, there was no evidence of interference with discipline, nor danger of discrediting the office, and the employee served no confidential, policy-making, or public contact role. She was purely clerical and worked in a room to which the public did not have access. Justice

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\item \footnote{186}{Id. at 149.}
\item \footnote{187}{Id. at 166 (Brennan, J., joined by Marshall, Blackmun & Stevens, JJ., dissenting).}
\item \footnote{188}{483 U.S. 378, 379-92 (1987).}
\end{itemize}
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Powell, concurring, said it was unnecessary to engage in any extensive analysis where the statement was made to a co-worker who was her boyfriend, with no intention or expectation it would be overheard or acted on by others. It “borders on the fanciful” to think that this single, offhand comment would lower morale, disrupt the work force, or otherwise undermine the mission of the office. 189

Reflecting a formalist literal viewpoint, and a Holmesian deference-to-government posture, Justice Scalia dissented with Chief Justice Rehnquist and Justices White and O’Connor. Justice Scalia first said that the statement does not literally constitute speech on a matter of “public concern.” He supported that conclusion by making a comparison with statements found to fit that description in prior cases involving public employees: Pickering (criticism of the board for financing school construction; Connick (did co-workers ever feel pressured to work in a political campaign); Mt. Healthy (memo given to radio station on teacher dress and appearance); and Givhan (complaints about school board policies and practices). Even if it was speech on a matter of public concern, the issue is whether the employer's interest in preventing the expression of such statements in his agency outweighed the employee’s First Amendment interest in making the statement. Justice Scalia said that "it boggles the mind" to think that she had a right to make such a statement, particularly working in a constable’s office devoted to law enforcement. 190

Moving into the 1990s, the Court faced in Waters v. Churchill191 a situation in which a school superintendent had fired a teacher who had sent a letter of public interest to the local newspaper, but the superintendent, relying on a mistaken report about the letter, thought it was on a private matter, i.e., alleged personal mistreatment. The teacher sued for reinstatement. The Court split on how the Pickering test should be applied. Justices Scalia, Kennedy, and Thomas approached the question of retaliation as a matter of the literal intent of the government actor. Because of the mistake, the decision here was not retaliatory from a subjective literal intent perspective. At the other extreme, Justice Stevens and Blackmun said that Pickering applies to protect the employee since, but for the exercise of First Amendment rights, the employee would not have suffered any injury. In the decisive middle-ground opinion, Justice O’Connor, joined by Chief Justice Rehnquist, and Justices Souter and Ginsburg, said that Pickering does not apply if the decision-maker acted in good faith and reasonably, but that was not done here since the decision-maker did not make a reasonable inquiry before acting. This issue of subjective versus objective approaches to the intent issue in Waters is discussed at § 7.2.4 nn.70-72.

A case involving whether speech was worked-related occurred in City of San Diego v. Roe. In this case, a police officer has been discharged for selling videos over the Internet which showed him stripping off a police uniform and masturbating. The Ninth Circuit had held that, because the tape

189 Id. at 393-94 (Powell, J., concurring).

190 Id. at 397-400 (Scalia, J., joined by Rehnquist, C.J., and White & O’Connor, JJ., dissenting) (citations omitted).

191 511 U.S. 661, 677-79 (1994) (plurality opinion of O’Connor, J., joined by Rehnquist, C.J., and Souter & Ginsburg, JJ.); id. at 689-92 (Scalia, J., joined by Kennedy & Thomas, JJ., concurring); id. at 694-99 (Stevens, J., joined by Blackmun, J., concurring).
was not an internal workplace grievance and took place while he was off-duty, away from his employer’s premises, it was unrelated to employment. The Ninth Circuit analogized the case to *United States v. National Treasury Employees Union*, a case where the Supreme Court struck down a ban on honoraria being received by lower-level federal employees, even as to speeches not related to their work responsibilities.\(^{192}\)

The Supreme Court reversed.\(^{193}\) The Court held in *San Diego* that the speech was linked to his official status as a police officer and designed to exploit his employer’s image. Thus, the speech was viewed as work-related, and therefore different than *Treasury Employees*. Because the video was widely distributed, it was harmful to the proper functioning of the police department. The Court then held that because the speech was not on a matter of public concern the *Pickering* balance test did not apply. Thus, the officer had no First Amendment protection from being fired. In defining what is a matter of public concern, the Court noted: “Public concern is something that is a subject of legitimate news interest; that is, a subject of general interest of value and concern to the public at the time of publication.”

In 2006, the Court considered whether the First Amendment protects a government employee from discipline based upon speech made pursuant to the employee’s official duties. In *Garcetti v. Ceballos*,\(^{194}\) a 5-4 Court held that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communication from employer discipline. The case involved a deputy district attorney who received adverse job consequences after complaining to his superiors that an affidavit used to obtain a critical search warrant contained serious misrepresentations. In an opinion joined by Chief Justice Roberts, and Justices Scalia, Thomas, and Alito, Justice Kennedy said the employee was acting as a prosecutor fulfilling a responsibility to advise his superiors about how best to proceed with a pending case. Justice Kennedy noted that various whistle-blower statutes, labor codes, and other codes of professional conduct provide individuals with various kinds of statutory protection, but that to constitutionalize this kind of protection would be to demand permanent judicial intervention in the conduct of governmental operations to a degree inconsistent with sound principles of federalism and the separation of powers.

Reflecting a more instrumentalist policy perspective, Justice Stevens said in dissent that it was perverse to fashion a new rule that provides employees with an incentive to voice their concerns publicly before talking frankly to their superiors. Justice Souter, joined by Justices Stevens and Ginsburg, noted that private and public interests in addressing official wrongdoing and threats to health and safety can outweigh the government’s stake in the efficient implementation of policy, and


\(^{193}\) City of San Diego v. Roe, 543 U.S. 77, 80-84 (2005). See also Communications Workers of America v. Ector County Hosp. Dist., 2006 WL 2831142 (5th Cir. 2006) (13-4 en banc) (employee wearing “Union Yes” button assumed to be a matter of public concern, but public hospital’s interest in maintaining a tranquil and peaceful atmosphere outweighed employee’s First Amendment rights).

when they do, public employees who speak on these matters in the course of their duties should be eligible for First Amendment protection. Souter then drew an outside border on this protection, saying that an employee commenting on subjects in the course of duties should not prevail unless the comments relate to official dishonesty, deliberately unconstitutional action, other serious wrongdoing, or threats to health and safety. He feared that the majority rule would lead to excessively broad job descriptions and might interfere with academic freedom in public universities. Justice Breyer, dissenting, placed himself between the majority and Justice Souter. He said that the majority’s rule denying First Amendment protection to all “official duty” speech did not sufficiently protect employees, while Justice Souter’s approach did not sufficiently protect the government. Breyer noted that there may be circumstances with a special demand for constitutional protection where government justifications may be limited, as here, because the deputy prosecutor’s speech was subject to both professional and special constitutional obligations, such as to communicate with the defense about exculpatory and impeachment evidence in the government’s possession.195

Responding to criticisms in Justice Souter’s dissent, Justice Kennedy said that the Court rejected the view that employers can restrict employees’ rights by creating excessively broad job descriptions, and he said that the Court was not deciding whether its analysis would apply in the same manner to a case involving speech related to scholarship or teaching. On balance, Justice Kennedy’s approach in Garcetti to all “official duty” speech is consistent not only with a formalist desire for categorical “bright-line” rules, Holmesian deference-to-government considerations, and conservative deference to the executive, but also with a Stage 6 natural law approach to protecting core constitutional rights, but not constitutionalizing every aspect of regulation where democratic balancing of competing interests – “play in the joints” – might be more appropriate, as discussed at § 16.4 nn.97-105).

§ 30.2.2.2 Government Attempts to Regulate Political Activities of Government Employees

Prior to the 1960s, the government was given wide latitude to regulate the political activities of government employees under a minimum rational review kind of approach. For example, in 1947, in United Public Workers of American (C.I.O.) v. Mitchell,196 the Court upheld the Hatch Act which bars federal employees from active participation in political management and political campaigns. The Act was upheld on its face and as applied to a federal employee who wanted to engage in political activity when not at work. Justice Reed said, “[T]his Court must balance the extent of the guarantees of freedom against a congressional enactment to protect a democratic society against the supposed evil of political partisanship by classified employees of government. . . . [I]t is not necessary that the act regulated be anything more than an act reasonably deemed by Congress to interfere with the efficiency of the public service.”

195 Id. at 1963 (Stevens, J., dissenting); id. at 1963-68 (Souter, J., joined by Stevens & Ginsburg, JJ., dissenting); id. at 1973-75 (Breyer, J., dissenting). On First Amendment rights and academic freedom in universities, see Damon L. Kreiger, Comment, May Public Universities Restrict Faculty From Receiving or Transmitting Information Via University Computer Resources? Academic Freedom, the First Amendment, and the Internet, 59 Maryland L. Rev. 1398, 1412-30 (2000).

196 330 U.S. 75, 96 (1947); id. at 115 (Black, J., dissenting); id. at 126 (Douglas, J., dissenting in part).
Justice Black, dissenting, said that the First Amendment leaves people at liberty to speak their own thoughts about government and to work for their own candidates and parties. Justice Douglas, also dissenting, said that free speech rights are “too basic and fundamental in our democratic political society to be sacrificed or qualified for anything short of a clear and present danger to the civil service system.” These dissenting views have not found their way into majority status.

After *Pickering* in 1968, legislative barriers to participation in partisan political campaigns by lower-level government employees have been analyzed under *Pickering*. In some cases, the Court has decided that the restrictions met the *Pickering* test. For example, in 1973, in *United States Civil Service v. National Association of Letter Carriers*, the Court upheld against facial attack a provision of the Hatch Act that prohibits federal employees from taking an "active part in political campaigns." Each plaintiff claimed standing on the ground that they wished to engage in activity that would violate the Act, and the Civil Service Commission was enforcing or threatening to enforce the Act regarding the activity in which they wished to engage. For a 6-3 Court, Justice White wrote that Congress has power, in seeking the goal of effecting an efficient public service, to forbid partisan activity of federal personnel deemed offensive to efficiency, and he listed examples of such activity: holding a party office; organizing a political party, managing a partisan campaign, and the like. Responding to allegations that the law was vague and overbroad, Justice White said that the power of the Commission was limited to the acts of political management or campaigning prohibited by Commission rules in effect before July 19, 1940. Further, there was a procedure by which an employee in doubt could obtain advice from the Commission and thereby remove doubt as to its views. Nor is the law made overbroad by Commission constructions in 1970 of terms in the earlier rules that made them apply to endorsements in advertising, broadcasts, and literature, and speaking at political party meetings in support of partisan candidates for public or party office. These are political acts normally performed only in the context of partisan campaigns.

Reflecting greater instrumentalist protection for free speech, Justice Douglas dissented, with Justices Brennan and Marshall. Justice Douglas said the vague provisions of the Act had a chilling effect. He saw as pregnant with ambiguity a provision allowing federal employees to "participate fully in public affairs, except as prohibited by law, in a manner which does not materially compromise his efficiency or integrity as an employee or the neutrality, efficiency, or integrity of his agency."198

In other cases, the government regulations have not met the *Pickering* test. In 1976, the Court held in *Elrod v. Burns* that public employees may not be discharged or threatened with discharge solely because of their partisan political affiliation or nonaffiliation. Justice Brennan delivered an opinion in which Justices White and Marshall joined. Justice Brennan said the individual's ability to act according to his beliefs and to associate with others of his political persuasion is constrained by the patronage system. Yet the First Amendment protects political association as well as expression, as noted at § 31.2.1. Infringing First Amendment rights by a threat of retaliation triggers strict scrutiny, said Justice Brennan, so the government must show that a compelling interest is served by a means

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198 *Id.* at 596 (Douglas, J., joined by Brennan & Marshall, JJ., dissenting).

that is the least restrictive of freedom of belief and association. He then considered three different goals suggested for preserving the spoils system and explained why reference to those goals did not justify the spoils system:

1. The need to insure effective government and the efficiency of public employees: The alleged lack of incentive of persons not members of the party in control is offset by the inefficiency of wholesale replacement; there’s no assurance that replacements will be more qualified; it’s doubtful that difference of political persuasion motivates poor performance; and means less intrusive than patronage are available: discharge for cause and the availability of merit systems.

2. The need for political loyalty of employees: Limiting patronage dismissals to policymaking positions is sufficient to achieve this goal.

3. Preserve democratic process: Patronage may hamper the democratic process and parties can be nurtured by less intrusive and equally effective means.

Justices Stewart and Blackmun concurred in the judgment, but limited themselves to one question: whether a non-policymaking, nonconfidential government employee can be discharged or threatened with discharge from a job he is satisfactorily performing on the sole ground of his political beliefs. They did not join in the strict scrutiny review of the Brennan plurality opinion.

Justice Powell dissented with Chief Justice Burger and Justice Rehnquist. Beneficiaries of a patronage system should not be heard to challenge the system when it comes their turn to be replaced. Justice Powell agreed that the constitutional issue is determined by balancing, i.e., whether the hiring practices sufficiently advance important state interests to justify the consequent burdening of First Amendment interests. But he said that patronage hiring promotes important state interests in stimulating political activity and strengthening parties, particularly in obscure elective offices.

During the last part of the instrumentalist era, the result in Elrod was followed and extended. In 1980, in Branti v. Finkel, the Court held that the First Amendment protects an assistant public defender who is satisfactorily performing his job from discharge solely because of his political beliefs. The public defender sought to defend the discharge on the grounds that: (1) Elrod v. Burns is limited to situations where employees are coerced into pledging allegiance to a party they would not voluntarily support and does not apply where, as here, the employee is only required to be sponsored by the party in power, and (2) even if party sponsorship is an unconstitutional condition for employment of clerks, deputies, and janitors, it is acceptable for an assistant public defender.

Writing for the Court in response to the first contention, Justice Stevens first sought to establish that the second of Justice Brennan's two reasons for finding discharges prohibited in Elrod v. Burns did not require that employees have been coerced into changing their political allegiance. He noted that

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200 Id. at 374-75 (Stewart, J., joined by Blackmun, J., concurring in the judgment).

201 Id. at 376 (Powell, J., joined by Burger, C.J., and Rehnquist, J., dissenting).

Justice Brennan said that a patronage system has an inevitable tendency to coerce employees into compromising their true beliefs, and Stevens added that even requiring sponsorship would have that tendency. Second, the First Amendment protects a person from the denial of a benefit because of that person's beliefs. Analogizing the case to the unconstitutional conditions doctrine, discussed at § 27.1.2.3, Justice Stevens wrote that unless the government can demonstrate a “vital interest” such as “maintaining government effectiveness and efficiency” requiring that a person's private beliefs conform to those of the hiring authority, the individual cannot be fired for those beliefs. It might be true for “the Governor of a State” who might “appropriately believe that the official duties of various assistants who help him write speeches, explain his view to the press, or communicate with the legislator.” In such a case, the an employee could be discharged if his or her private beliefs would interfere with the discharge of official duties. Justice Stevens noted it was a fact-sensitive inquiry and might be true even though the position was neither confidential nor policymaking in character.

Applying his test to the facts, Justice Stevens concluded that the continued employment of an assistant public defender cannot be conditioned upon allegiance to the political party in control of the county government. He said that it would undermine rather than promote the effective performance of an assistant public defender to make tenure depend on allegiance to the dominant political party. The assistant public defender's primary responsibility is to the client and so any policymaking must relate to the needs of clients and not political concerns, and confidential information arising from representing clients has no bearing on partisan political concerns.

Justice Stewart, dissenting, said that Elrod v. Burns does not apply since the respondents are confidential employees because of the necessity of mutual confidence and trust in the kind of professional association that occurs in the public defender's office – analogous to a firm of lawyers in the private sector. Justice Powell, dissenting with Justices Rehnquist and Stewart, said that the Court had largely ignored the substantial interests served by patronage, and that the Court's standard would create uncertainty. Regarding patronage interests, Justice Powell added that the implementation of policy often depends on the cooperation of public employees who do not hold policymaking posts. Further, the decision may impair the right of local voters to structure their government because here they had delegated to the public defender the power to choose his assistants. The decision to place certain governmental positions within a civil service system is a sensitive political judgment that should be left to the voters and to elected representatives of the people.203

The Stewart and Powell dissents in Branti v. Finkel have not been transformed into majority views during the post-instrumentalist years. Instead, in 1990, in Rutan v. Republican Party of Illinois,204 the modern Court extended Elrod to hirings, promotions, and transfers of government employees. In 1996, in Board of County Commissioners v. Umbehr and O'Hare Truck Service, Inc. v. City of

203    Id. at 520-21 (Stewart, J., dissenting); id. at 521-26 (Powell, J., joined by Rehnquist, J., and Stewart, J., as to Part I, dissenting).

Northlake, independent contractors were protected under the First Amendment from retaliatory
government action. In the independent contractor decisions, the natural law Justices O’Connor,
Kennedy, and Souter, joined instrumentalist Justices Stevens, Ginsburg, and Breyer, to create a solid
majority on the Court for applying Pickering-style balancing to these cases. Although he had
typically dissented in earlier cases, Chief Justice Rehnquist joined the majority in the independent
contractor cases, perhaps viewing this line of cases as now “settled law.”

§ 30.3 Content-Based Regulations That Trigger Versions of Intermediate
Scrutiny, Rather Than Strict Scrutiny

§ 30.3.1 Basic Intermediate Scrutiny: The Government as Trustee of the Airwaves
Regarding Radio and Television Regulation

In the beginning of broadcast regulation, the Court distinguished sharply between the freedom
guaranteed to newspapers and the need for government regulation of the airwaves, based on the
rationales of scarcity of broadcast stations and public ownership of the airwaves. Over time, scarcity
has become less of an issue, and the Court has tended to treat broadcasters more like newspapers.

The Court’s concern about scarcity in the public airwaves was used to justify a standard of review
less than strict scrutiny for a content-based regulations of speech. For example, in Red Lion
Broadcasting Company v. FCC, decided in 1969, the Court held that under the then-existing
“fairness doctrine” broadcasters could be required to allow free reply time to persons who have been
personally attacked on their station. The Court said that because of limited frequencies, the persons
licensed to broadcast have no constitutional right to monopolize a radio frequency. The government
could require sharing by all who wish to use the public airwaves. To the argument that allowing free
reply time would force broadcasters into self-censorship and limited coverage of public issues, the
Court pointed to the FCC’s opinion that this was at best speculative. In 1987, the FCC repealed the
fairness doctrine (both the right of reply provisions at issue in Red Lion and the provision requiring
“balanced coverage” of issues) on grounds they “chilled” the free speech rights of broadcasters.

The Red Lion decision can be contrasted with access regulation applied to newspapers. In 1974, in
Miami Herald Publishing Co. v. Tornillo, the Court held that a law requiring newspapers to grant
political candidates equal space in which to reply to criticism or to attacks on their personal
character or official record was an invalid content-based restriction on editorial judgment. The

205 Umbehr, 518 U.S. 668, 673-85 (1996); id. at 670 (O’Connor, J., opinion for the Court)
(Rehnquist, C.J., joins all but Part II-B-1 of this opinion); id. at 686 (Scalia, J., joined by Thomas,
J., dissenting); O’Hare Truck Service, 518 U.S. 712, 714-26 (1996) (Kennedy, J., opinion for the
Court); id. at 686 n.* (Scalia, J., joined by Thomas, J., dissenting).


207 See generally Radio-Television News Directors Ass’n v. FCC, 229 F.3d 269 (D.C. Cir. 2000)
discussing history of the “fairness doctrine” and its demise.

reasoning in the two cases was different, since in *Tornillo* the Court applied standard First Amendment doctrine adopting strict scrutiny for a content-based regulation of speech.

In 1984, the Court clarified that the lower standard of review for content-based regulations of speech on radio and television in *Red Lion* involved intermediate scrutiny. In *FCC v. League of Women Voters*, the Court was faced with a statute that forbade any noncommercial educational broadcasting station that received a grant from the Corporation for Public Broadcasting to engage in editorializing. Faced with this content-based regulation, the district court in the case had applied strict scrutiny review. However, relying upon *Red Lion* and other cases which had held that a different standard applied to radio and television, the Court held that the correct standard was whether the regulation was “narrowly tailored to further a substantial governmental interest, such as ensuring adequate and balanced coverage of public issues.” Applying this intermediate scrutiny test resulted in the government’s ban on editorializing still being declared unconstitutional because “the specific interests sought to be advanced by [the ban] are either not sufficiently substantial or are not served in a sufficiently limited manner to justify the substantial abridgement of important journalistic freedoms which the First Amendment jealously protects.”

In considering the regulation of cable television, the rationales about scarcity of channels and ownership of the medium by which the communication is delivered is less compelling. Thus, cases involving regulation of cable television have posed difficult problems for the Court in determining whether standard First Amendment doctrine or *Red Lion* doctrine should apply. A majority of the Court has avoided a fixed decision on this issue, typically by finding that the government regulation was content-neutral based either on secondary effects grounds, or that it was a time, place, or manner regulation, and thus, under standard First Amendment doctrine, intermediate scrutiny applied anyway. Justices in dissent, however, who have viewed some cable regulations before the Court as content-based, have indicated their view that normal strict scrutiny should apply.

For example, in *Turner Broadcasting System, Inc. v. FCC* (*Turner I*), the Court considered the constitutional validity of a federal statute that required cable systems with more than 12 active channels to set aside up to one-third of their channels for commercial broadcast stations that request carriage. For the Court, Justice Kennedy said that the radio and television cases do not apply because cable does not have the limits of the broadcast medium. On the other hand, a cable operator can silence the voice of competing speakers with a flick of the switch, raising some access concerns. Nevertheless, some degree of heightened scrutiny is required, although strict scrutiny need not apply because the must-carry provisions do not impose burdens or benefits with reference to the content of speech. Instead, they are based on the manner in which the speakers transmit their messages, and the purpose was to preserve access to free television programming for the 40 percent of Americans without cable. Thus, even under standard First Amendment doctrine, a content-neutral regulation would only trigger intermediate scrutiny. Applying intermediate scrutiny, Justice Kennedy noted the lack of evidence that local stations had fallen into bankruptcy, turned in licenses, curtailed broadcasting, or suffered a reduction in operating revenues. Nor was there evidence on the

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availability of less restrictive means. Thus, there were factual issues to be resolved and it was error to enter summary judgment for the defendant FCC.

Justice O'Connor, concurring in the judgment, joined by Justices Scalia, Thomas, and Ginsburg, said that Congress' reasons for preferring broadcasters over cable programmers rest in part on the content of the broadcaster's speech and, thus, strict scrutiny should be applied. The interest in localism is not compelling, and the Act is not sufficiently tailored to protect an interest in public affairs programming or educational programming. Further, the rules impose an impermissible restraint on cable operator's editorial discretion. The provisions fail content-neutral scrutiny as well because they restrict speech that does not implicate interests in fair competition and the preservation of free television. She continued that the cable operator and not Congress should have control over who gets to speak over cable, though Congress could take steps to foster competition and encourage the creation of new media. In a separate concurrence, Justice Ginsburg agreed with Justice O'Connor that the regulations were content-based and, thus, they triggered strict scrutiny, which they failed because the government had not established that broadcast television was in jeopardy.

In *Turner Broadcasting System, Inc. v. FCC (Turner II)*,212 the Court again rejected the comparison of a cable television company with a newspaper and, applying an intermediate scrutiny, upheld requiring cable broadcasters to set aside up to one-third of their channels for use by local, over-the-air commercial broadcasters. By a similar 5-4 vote as in *Turner I*, with Justice Breyer, who had replaced Justice Blackmun on the Court, taking Blackmun's place in the majority, the Court held that the record showed that the government had an important interest unrelated to the suppression of free speech – the preservation of free, over-the-air broadcasting. The majority said that Congress' judgment was supported by substantial evidence in the record before Congress. Justice O'Connor's dissent concluded that even under intermediate scrutiny the regulations should fail. Her dissent underscored the fact that, unlike the substantial deference given to government at minimum rational review, at intermediate scrutiny the Court has “an independent duty to identify with care the Government’s interests supporting the scheme, to inquire into the reasonableness of congressional findings regarding its necessity, and to examine the fit between its goals and its consequences.”213

When Congress has stepped in to regulate indecent material being distributed over cable networks, the Court has found it difficult to reach consensus or even to cobble together a majority view. This was nowhere more clear than in *Denver Area Educational Telecommunications Consortium v. FCC*.214 There, the Court considered three provisions in federal law seeking to regulate the

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211 *Id.* at 674-75 (O'Connor, J., joined by Ginsburg & Scalia, JJ., and Thomas, J., as to Parts I and III, concurring in part and dissenting in part); *id.* at 685-86 (Ginsburg, J., concurring in part and dissenting in part).


213 *Id.* at 229 (O'Connor, J., joined by Scalia, Thomas & Ginsburg, JJ., dissenting).

broadcast of "patently offensive" sex-related material on cable television. All three restrictions were considered valid by Chief Justice Rehnquist and Justices Scalia and Thomas. All three were invalid according to Justices Kennedy and Ginsburg. All these five Justices agreed, however, that standard First Amendment doctrine should apply to cable stations, and that the lesser Red Lion standard for radio and television should not apply. Since these five Justices split on the result in the case, however, that left the result in the hands of Justices Stevens, O’Connor, Souter, and Breyer. In an opinion by Justice Breyer, these Justices refused to articulate any fixed standard of review in the case as between intermediate scrutiny or strict scrutiny. The votes were distributed as follows:

1. 10(a) (which gave cable system operators the power to bar the transmission of patently offensive sex-related material on leased channels, i.e., channels reserved for commercial lease by unaffiliated third parties – about 10-15 percent of the total).
   
   Valid, as a way to protect children: Breyer, Stevens, O’Connor, Souter.
   
   Valid, since these channels are not “government-owned” fora, and challengers have no First Amendment rights to challenge private cable operator choices on what to transmit: Rehnquist, Scalia, Thomas.
   
   Invalid, since cable is a public forum, and strict scrutiny should apply: Kennedy and Ginsburg.

2. 10(b) (which required cable operators to place "patently offensive" leased channel programming on a separate channel blocked except on subscribers' written request).
   
   Invalid, as overly restrictive in light of present and forthcoming technical developments: Stevens, O’Connor, Souter, Breyer.
   
   Invalid, as cable is a public forum: Kennedy and Ginsburg
   
   Valid, as narrowly tailored regulation advancing compelling government interest of protecting children, thus satisfying strict scrutiny applicable to regulating private speech: Rehnquist, Scalia, and Thomas.

3. 10(c) (which allowed cable operators to bar "patently offensive" material from public access channels).
   
   Invalid, as not necessary in view of local supervisory controls: Stevens, Souter, Breyer.
   
   Invalid, as cable is a public forum: Kennedy and Ginsburg
   
   Valid, as a way to protect children and not overly restrictive: O’Connor
   
   Valid, since these channels are not “government-owned” fora, and challengers have no First Amendment rights to challenge private cable operator choices on what to transmit: Rehnquist, Scalia, Thomas.

__215__ Id. at 732, 740-53 (Justice Breyer announced the judgment of the Court and delivered the opinion of the Court with respect to Part III, an opinion with respect to Parts I, II, and V, in which Justice Stevens, Justice O’Connor, and Justice Souter join, and an opinion with respect to Parts IV and VI, in which Justice Stevens and Justice Souter join); id. at 779 (O’Connor, J., concurring in part and dissenting in part); id. at 780 (Kennedy, J., joined by Ginsburg, J., concurring in part, concurring in judgment in part, and dissenting in part); id. at 812-31 (Thomas, J., joined by Rehnquist, C.J., and Scalia, J., concurring in judgment in part and dissenting in part).
In light of the viewpoints represented in the case, it is likely that eventually the Court will state more clearly that cable television providers, like newspapers, are entitled to full standard First Amendment protection. The arguments regarding scarcity and distribution through the public airways, which justified the lower standard of review in Red Lion and League of Women Voters, do not apply in any meaningful way to cable television as it has evolved. This is true even for satellite cable systems that technically do use the public airways, or even cable television whose cable access is regulated by the government. Arguments regarding the ability of cable television to intrude into the privacy of one’s home, like radio and television intruding as in FCC v. Pacifica, discussed at § 30.1.4.2 n.121, can be dealt with under standard First Amendment doctrine viewing the privacy rationale as a content-neutral justification for regulation, triggering the intermediate scrutiny standard of Pacifica.

In some cases, the Court has made it relatively easy for a state to create a communications forum that will be characterized as a non-public forum, in which case under standard First Amendment doctrine non-viewpoint discriminatory regulations will be given only rational basis review. For example, in Arkansas Educational Television Commission v. Forbes,216 the Court held that a state agency that operated TV stations had opened a non-public forum rather than a designated public forum when it sponsored a political debate among candidates for Congress. Justice Kennedy said that the public forum doctrine should not be extended in a mechanical way to the very different context of public television. He added that the government does not create a designated public forum when it does no more than reserve eligibility for access to a particular class of speakers, whose members must then, as individuals, obtain permission. Accordingly, it was valid to exclude candidate Forbes for lack of public interest because this was not based on the speaker's viewpoint and was otherwise reasonable in light of the purpose to which the property was being put. Justice Stevens, dissenting with Justices Souter and Ginsburg, said that the importance of avoiding viewpoint-based decisions relating to political debates indicates that the state agency should be required to use and adhere to pre-established, objective criteria for determining who among qualified candidates may participate.

§ 30.3.2 Intermediate Scrutiny with Bite: Regulations of Commercial Speech

Commercial speech relates to economic transactions, including promotional ads as well as offers.217 It is not converted into noncommercial speech by occurring in educational, political, or religious contexts (e.g., an ad for a church), but educational, political, or religious speech is analyzed under standard First Amendment doctrine, as discussed at § 30.3.2 nn.231-32. Until 1975, commercial speech received no First Amendment protection. Thus, under Equal Protection and Due Process Clause analysis, only rational basis scrutiny was given to the regulation of ads, as they involved economic regulation of business triggering rational review, as in 1942 in Valentine v. Chrestensen.218 Similar treatment was given to offers made by door-to-door magazine sellers, and a ban on ads for

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216 523 U.S. 666, 677-83 (1998); id. at 983-84 (Stevens, J., joined by Souter & Ginsburg, JJ., dissenting).


optical appliances.\textsuperscript{219} The result was that barriers to commercial speech were easily erected.

At first, the change in perspective came in small increments. In 1972, health concerns allowed a ban on the broadcast of cigarette ads in \textit{Capital Broadcasting Co. v. Acting Attorney General}.\textsuperscript{220} In 1973, in \textit{Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations},\textsuperscript{221} a state was allowed to ban gender discrimination in help-wanted newspapers ads based on \textit{Valentine v. Chrestensen}, but four Justices dissented from that result. However, the cases indicated some First Amendment concerns might be applicable. The transitional case was \textit{Bigelow v. Virginia},\textsuperscript{222} decided in 1975. The Court said \textit{Chrestensen} did not hold that all ads are unprotected \textit{per se}. Justice Blackmun wrote that even commercial ads deserve some First Amendment protection when, unlike the ads in \textit{Chrestensen} and \textit{Pittsburgh Press}, they contain factual information with a clear public interest. Only Justices White and Rehnquist, two deference-to-government Holmesians, were in dissent.

The decisive case was \textit{Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council},\textsuperscript{223} decided in 1976. There the Court held that a state cannot bar licensed pharmacists from publishing truthful information on drug prices. Justice Blackmun said there is a public interest in the flow of truthful information concerning lawful activities, including speech that merely proposes a commercial transaction. If information is not in itself harmful, the best means for persons to perceive their own best interests is to open the channels of communication. Less than strict review can be applied to commercial speech, however, because truth may be more easily verified by the disseminator and there is little likelihood of chill because ads lead to commercial profits. Thus, under \textit{Virginia State Board}, content regulation of commercial speech that is not misleading or related to unlawful activity must directly advance a substantial governmental interest and not be more extensive than necessary. Only Justice Rehnquist dissented.

\textit{Virginia State Board} was soon extended to permit price advertising for routine legal services in \textit{Bates v. State Bar of Arizona}, and a letter from a civil rights group to potential class action plaintiffs in \textit{In re Primus},\textsuperscript{224} although in-person solicitation by a lawyer at a hospital bedside could still be


\textsuperscript{220} 405 U.S. 1000 (1972) (holding that Congress may ban cigarette ads in any medium because of its power to regulate commerce).

\textsuperscript{221} 413 U.S. 376, 383-91 (1973) (such an ad created a threat of unlawful employment discrimination); \textit{id.} at 393 (Burger, C.J., dissenting); \textit{id.} at 400 (Stewart, J., joined by Douglas, J., dissenting); \textit{id.} at 404 (Blackmun, J., dissenting).

\textsuperscript{222} 421 U.S. 809, 818-26 (1975); \textit{id.} at 831-36 (Rehnquist, J., joined by White, J., dissenting).


sanctioned in *Ohralik v. Ohio State Bar Association.* In other decisions on commercial speech by lawyers, the instrumentalist Court held in *In re R.M.J.* that it was an invalid time, place, and manner restraint to bar attorneys from advertising their areas of practice in unapproved words, or to bar mailing cards to others than lawyers, clients, former clients, personal friends, and relatives. The Court said that the law at issue in the case was a more extensive restriction on commercial speech than reasonably necessary to further a substantial governmental interest in preventing deception. In 1977, *Virginia State Board* was extended to real estate sales; however, this did not bar a state from preventing misleading commercial speech.

More important, perhaps, than such results was the creation of an analytical methodology for dealing with regulation of commercial speech. That approach was summarized in 1980 by Justice Powell in *Central Hudson Gas & Electric Corp. v. Public Service Comm’n,* when he wrote:

> In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within the provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquires yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Four aspects of the *Central Hudson* test are important. First, under this approach, minimum rational review would be given to regulations of unlawful, false, or misleading ads, since, without any special First Amendment protection, they would be viewed as standard economic regulations subject to rational review under the Equal Protection and Due Process Clauses. Second, as phrased, the test for commercial speech is more stringent than regular intermediate scrutiny, since the test requires that the regulation directly advance the government’s interest, rather than merely substantially advance the government’s interest. This increase in review is what makes the *Central Hudson* test an example of intermediate review with bite as described in the “base plus six” model of review, discussed at §§ 7.2.1 nn.36-37. Third, commercial speech cases do involve a less rigorous form of scrutiny than traditional First Amendment doctrine for content-based regulations of speech, which ordinarily trigger strict scrutiny. Fourth, the *Central Hudson* test lowers First Amendment

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227 Linmark Associates, Inc. v. Township of Willingboro, 431 U.S. 85 (1977) (states cannot bar "For Sale" or "Sold" signs on real estate to reduce panic selling by white owners in a racially integrated neighborhood because the state cannot suppress facts to keep people from acting in ways the government thinks irrational); Friedman v. Rogers, 440 U.S. 1 (1979) (upholding a state ban on the use of trade names by optometrists).

228 447 U.S. 557, 566 (1980).

protection only for content-based regulations of commercial speech. Content-neutral time, place, and manner restrictions of commercial speech, like content-neutral regulations of fully protected speech, are still tested under basic intermediate scrutiny, which requires only that they substantially serve a significant public interest, and that they leave open ample alternative channels for communication, with no requirement of direct advancement.

Applying the *Central Hudson* standard of review, Justice Powell held that a state violated the First and 14th Amendments when, to conserve energy, it completely banned promotional advertising by electrical utilities. Such communications might include ads for electric devices that produce overall energy conservation. Thus, the regulation was more extensive than necessary. Disagreeing with the standard of review applicable to the case, Justices Brennan and Blackmun wanted strict scrutiny of restrictions on commercial speech that is accurate and concerns lawful activity.\(^\text{230}\) Today, however, the majority still applies the test of *Central Hudson*.

In applying *Central Hudson*, care must be taken to distinguish commercial from non-commercial speech. For example, it was held in *Consolidated Edison Co. of New York, Inc. v. Public Service Commission of New York*\(^\text{231}\) that a state may not bar a utility from including a political message with its bills. Justice Powell distinguished *Central Hudson* because the speech here involved a political message, rather than commercial speech. Thus, under standard First Amendment doctrine, a restriction on the content of noncommercial speech, i.e., a content-based restriction, triggered strict scrutiny. In *Board of Trustees of the State University of New York v. Fox*,\(^\text{232}\) the Court concluded that those aspects of university regulations that banned corporations from doing product demonstrations in campus dormitory rooms, such as “tupperware parties,” were targeting commercial speech. Both the majority and the dissent noted, however, that to the extent the regulation also prohibited a wide range of fully protected speech, e.g., speech in a dormitory room, such as consultation with a lawyer or doctor, even though it was speech for which the speaker received a profit, standard First Amendment doctrine would apply to that part of the regulation. The majority remanded the case for determination of whether the statute could be held constitutional as applied to non-commercial speech, while the dissent concluded that the statute was unconstitutional on that ground.

Unlike use of the “substantial overbreadth” doctrine in other areas of First Amendment law, discussed at § 29.6.1.5, a statute whose overbreadth consists of unlawful restriction of commercial speech will not be facially invalidated on that ground. As the Court noted in *Bates v. State Bar of Arizona*,\(^\text{233}\) if a person has standing to challenge the application of a commercial speech regulation to himself or herself, that person can naturally also challenge the facial validity of the regulation

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\(^{230}\) *Central Hudson*, 447 U.S. at 566-72; *id.* at 574-79 (Blackmun, J., joined by Brennan, J., concurring in the judgment).

\(^{231}\) 447 U.S. 530, 537-40 (1980).

\(^{232}\) 492 U.S. 469, 482-86 (1989); *id.* at 487-88 (Blackmun, J., joined by Brennan & Marshall, JJ., dissenting).

insofar as it might apply to noncommercial speech in which that person is also engaged. But an individual cannot use the overbreadth doctrine to challenge overbreadth as to other individuals engaging in other kinds of speech. The Court explained that because commercial speech is “hardy,” since individuals have an economic incentive to engage in such speech, the overbreadth doctrine is not needed to ensure such speech is not chilled.

The post-instrumentalist Court has given commercial speech at least as much protection as did the instrumentalist Court. And several Justices continue to insist that commercial speech deserves the same high level of protection given to non-commercial speech. The recent cases illustrate that the current Court has been increasingly vigilant in applying the *Central Hudson* test.

With respect to professionals, a state cannot ban all certification claims. However, as in *Peel v. Attorney Registration & Disciplinary Commission of Illinois*, a state may ban a letterhead as misleading, such as "Certified specialist by National Board of Trial Advocacy." Although a ban on in-person solicitation by attorneys can be valid, as in *Ohrlik v. Ohio State Bar Association*, discussed at § 30.3.2 n.225, a ban on in-person solicitation by accountants was declared unconstitutional in *Edenfield v. Fane*. The Court distinguished *Ohrlik* on the ground that lawyers are trained in persuasion so there is a danger of overreaching, whereas the typical client of an accountant is a person experienced in business and so solicitation by a CPA is not inherently conducive to overreaching. In another case dealing with lawyer advertising, *Florida Bar v. Went For It, Inc.*, Justice O'Connor wrote for a 5-4 Court that a rule forbidding solicitation of accident victims during a 30-day period after the accident was valid under the *Central Hudson* test. Justice Kennedy's dissent, with Justices Stevens, Souter, and Ginsburg, said the rule prejudiced victims to vindicate a desire for more dignity in the legal profession. Distinguishing *Florida Bar* on grounds that the need for immediate counsel is more pressing for criminal defendants than for accident victims, courts have ruled that a 30-day ban on direct-mail solicitation of criminal defendants is unconstitutional.

In some cases the Court has upheld a government regulation as meeting the *Central Hudson* test. For example, in 1986, in *Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico*, the Court held that Puerto Rico may restrict ads for casino gambling aimed at residents. Justice Rehnquist said the law related to commercial speech that concerned a lawful activity in Puerto Rico and was not misleading or fraudulent. However, he rejected the idea that the legislature had to


235 507 U.S. 761, 768-77 (1993). See also Speaks v. Kruse, 445 F.3d 396, 400-02 (5th Cir. 2006) (statute barring direct mail or phone solicitation by health care providers to potential patients who are “vulnerable to undue influence” unconstitutional as not being sufficiently narrowly tailored).

236 515 U.S. 618, 624-35 (1995); id. at 635-37 (Kennedy, J., joined by Stevens, Souter & Ginsburg, JJ., dissenting).

237 See, e.g., Ficker v. Curran, 119 F.3d 1150, 1151-56 (4th Cir. 1997).

promulgate additional speech which discourages gambling rather than suppress speech designed to encourage it. If gambling could be prohibited, said Justice Rehnquist, the government could allow the conduct, but reduce the demand through restrictions on ads. As Rehnquist stated, “In our view, the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling.”

This aspect of Posadas is inconsistent with standard doctrine under the First Amendment, Equal Protection Clause, Due Process Clause, and other clauses in the Constitution. Under standard doctrine, even if the government can completely ban some conduct, if the means chosen to regulate the conduct violate free speech rights, or equal protection rights, or other constitutional prohibitions, the government action is unconstitutional. For example, as discussed at 26.3.1.2 nn.363-67, in Craig v. Boren, the government could engage in the “greater power” of banning all persons less than 21 years old from buying alcohol, but could not engage in the “lesser power” of banning only males below 21 from buying alcohol, but permit women 18-21 years old to buy low-alcohol beer, as that constituted gender discrimination. Following Posadas, commentators almost uniformly criticized this aspect of the decision. The Supreme Court followed suit, rejecting this aspect of Posados ten years later in 44 Liquormart, Inc. v. Rhode Island, discussed at § 30.3.2 nn.246-48.

While the doctrine as phrased in Posadas is inconsistent with standard constitutional principles, one author has argued that it may reflect an insight useful to keep in mind when applying the Central Hudson test. Where (1) the state could ban the sale of some product, like cigarettes, but (2) the state has reasons to allow the sale, but with misgivings, and if (3) speech by the seller could exacerbate those legitimate governmental concerns, then (4) the state might reasonably think to offer permission to sell the product on condition that the seller not engage in the damaging speech. The author noted, “This is the core insight behind the Court's assertion in Posadas that ‘the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling.’ . . . It might be truer . . . to say that a power to withhold legal authority to engage in a particular sort of commercial transaction entails the power to permit such transactions on the condition that the participants not promote the transaction in specified ways, so long as the purpose for imposing the speech-restrictive condition is the same as the purpose the state would have for barring the transaction entirely, and so long as imposing the speech-restrictive condition does not unduly harm interests of the speech's audience.”

Dissenting in Posadas, Justice Brennan, with Justices Marshall and Blackmun, said that when Central Hudson is applied, the state should be required to prove each element, e.g., that substantial harmful effects will result if residents engage in gambling, that the ban on ads will directly advance an interest in controlling those effects, and that alternative measures would inadequately serve the state's interests in controlling the harmful effects allegedly associated with casino gambling. Justice Brennan did not believe that the government had met its burden in this case. Since Central Hudson


240 Id. at 795-96.
is a version of an intermediate scrutiny approach, the government does have the burden on making each of these showings, as Justice Brennan indicated. In his dissent, Justice Stevens, joined by Justices Marshall and Blackmun, concluded the regulation on speech was a prior restraint, and unconstitutional for that reason. The majority opinion did not consider the prior restraint issue since it was not raised in the courts below or in arguments to the Supreme Court.241

One year after Posadas, in 1987 in San Francisco Arts & Athletics v. Olympic Committee,242 the Court upheld a congressional grant to the United States Olympic Committee of the right to prohibit commercial and promotional uses of the word "Olympic" because the commercial value of the word was the product of the Committee's talents and energy. Justice Brennan, in dissent, said the statute was overbroad in creating exclusive rights that limited non-commercial speech, such as using the term to promote non-profit events.

A third case upholding bans on commercial speech was decided in 1993. In United States v. Edge Broadcasting Co.,243 the Court sustained a congressional ban on the broadcast of lottery advertisements, except as to ads for their own state's lottery, as applied to a station in North Carolina, which had no lottery, but over 90% of whose listening audience was located in Virginia, which did have a lottery. One majority – Justices White, joined by Chief Justice Rehnquist, and Justices O'Connor, Scalia, and Thomas – said that the government's interest was directly served when the entire broadcast industry in North Carolina was considered. A different majority – Justice White, joined by Chief Justice Rehnquist, and Justices Kennedy, Souter, and Thomas – said that the government’s interest was directly served even when only Edge Broadcasting was considered because its audience accounted for 11% of all radio listening among a potential audience of 127,000. Justice Stevens, dissenting with Justice Blackmun, said that the change in public attitudes toward state-run lotteries undermined any claim that the state's interest in discouraging citizen participation outweighed the station's First Amendment right to play the advertisement, and the public’s right to receive truthful, non-misleading information about a perfectly legal activity conducted in a neighboring state.

In 1993, however, the Court began a string of cases in which it struck down regulations of commercial speech. In City of Cincinnati v. Discovery Network,244 the Court held that a city violated the First Amendment when it refused for reasons of safety and aesthetics to allow the distribution of commercial publications through free-standing newsracks on public property, although it allowed

241 Posadas, 478 U.S. at 351-58 (Brennan, J., joined by Blackmun & Marshall, JJ., dissenting); id. at 359-60 (Stevens, J., joined by Marshall & Blackmun, JJ., dissenting); id. at 348 n.11 (prior restraint issue not raised by appellant in courts below or to the Supreme Court).


244 507 U.S. 410, 418-31 (1993); id. at 431-38 (Blackmun, J., concurring); id. at 438-46 (Rehnquist, C.J., joined by White & Thomas, JJ., dissenting).
newspapers to be distributed in that manner. Applying *Central Hudson*, Justice Stevens wrote that the city failed to establish a reasonable fit between its legitimate interests in eliminating clutter and its choice of a limited and selective prohibition of newsracks as the means chosen to serve those interests. Justice Stevens said the distinction between commercial and non-commercial speech bears no relationship whatsoever to the particular interests of the city. Nor can the regulation be upheld as a content-neutral time, place, or manner restriction because the basis for the regulation was the difference in content between ordinary newspapers and commercial speech. Justice Blackmun, concurring, would give full First Amendment protection to commercial speech. Chief Justice Rehnquist, dissenting with Justices White and Thomas, said that a city may stop short of fully accomplishing its objectives in relation to commercial speech, and this law directly advanced the city's interests because it would decrease the number of newsracks on city corners.

In 1995, the Court held in *Rubin v. Coors Brewing Co.*\(^{245}\) that the federal government's ban on beer labels that display alcohol content violates the First Amendment because the government failed to meet its burden of showing under *Central Hudson* that the ban advanced the government's interest in a direct and material way. The government's interest was in preventing strength wars. However, the ban was limited so that brewers remained free to disclose alcohol content in ads, and though they had to disclose content for wines and spirits, brewers could signal high alcohol content by using the term "malt liquor." Thus, there was little chance that the ban could directly and materially advance its aim, while other provisions of the same act directly undermined and counteracted its effects. Indeed, said the Court, there was an overall irrationality in the government's regulatory scheme. Justice Stevens, concurring, said the First Amendment bars the government from restricting the flow of accurate information because of a perceived danger of that knowledge. Congress could directly limit the alcoholic content of malt beverages, but Congress may not accomplish that purpose through a policy of consumer ignorance, at the expense of the free-speech rights of both sellers and purchasers.

In 1996, an even more significant case occurred. In *44 Liquormart, Inc. v. Rhode Island*\(^{246}\), the Court clarified the interpretation and application of *Central Hudson*, and by doing so repudiated one aspect of the *Posadas* case. The Liquormart had challenged a Rhode Island law that barred advertising the price of alcoholic beverages offered for sale in the state. The state sought to justify its law on the ground that it directly advanced the state's interest in promoting temperance, and was no more extensive than necessary. The judgment of the Court was first that the 21st Amendment does not allow states to ignore their obligations under other provisions, such as the First Amendment. Part IV of the opinion of Justice Stevens, joined by Justices Kennedy and Ginsburg, stated that to sustain a blanket ban on commercial speech, the state must show that its restrictions advance a substantial interest to a material degree – here, that a price-ad ban would significantly reduce alcohol consumption – and that its restriction on speech is no more extensive than necessary. Of course, in this context "necessary" does not mean the least restrictive means. It requires only that the state must justify its restrictions as reasonable in the intermediate scrutiny sense of "narrowly

\(^{245}\) 514 U.S. 476, 483-91 (1995); id. at 491-92 (Stevens, J., concurring in the judgment).

\(^{246}\) 517 U.S. 484, 501-16 (1996) (Stevens, J., announcing the judgment of the Court, in Part IV of which was joined by Kennedy & Ginsburg, JJ.).
tailored to achieve the desired objective." The Court also noted that the doctrine of overbreadth does not apply to commercial regulations because commercial speech is regarded as a hardy plant.

In the case at bar, there was no fact finding or evidentiary support to show that the ban on price-ads would significantly advance the state's interest in promoting temperance, and impermissible speculation or conjecture would be required to reach that conclusion. Justice Stevens said that even under the less than strict standard usually applied in commercial speech cases, the state had failed to establish a "reasonable fit" between its speech ban and its temperance goal. Justice Stevens noted that a state legislature does not have the broad discretion to suppress truthful, non-misleading information for paternalistic purposes that the Posadas majority was willing to tolerate. Speech restrictions cannot be treated as simply another means that the government may use to achieve its ends. Rejecting Posadas on this point, he concluded that a power to ban alcoholic beverages does not include a lesser power to burden the freedom of speech by restricting ads offering them for sale.

Justice Thomas expressed an even more speech-protective view. He said that an attempt to keep the legal users of a product or service ignorant in order to manipulate their choices in the marketplace is per se illegitimate and there is no need to apply the balancing test of Central Hudson.247

Justice O'Connor, concurring in the judgment with Chief Justice Rehnquist and Justices Souter and Breyer, took a more moderate position. She said that the law failed the final prong of Central Hudson in that it was more extensive than necessary to serve the state's interest. She said that if the target is higher prices to reduce consumption, the regulation imposed an unnecessary bar on speech to achieve it because the fit between ends and means is not narrowly tailored since other means are available, such as minimum prices and/or increased taxes. She observed that subsequent to Posadas, the Court has taken a closer look at the fit between a state's professed goal and the speech restriction put into place to further it, requiring, as is appropriate at intermediate scrutiny, a substantial relationship between means and ends, not merely a rational relationship, as suggested by the Court's opinion in Posadas.248

In Greater New Orleans Broadcasting Association, Inc. v. United States,249 the Court held that Congress could not bar the broadcast advertising of lotteries and casino gambling in Louisiana, where such gambling is legal. Justice Stevens wrote for the Court that the federal law contained so many exceptions, such as for gambling by Indian casinos, lotteries run by government or non-profit organizations, and "occasional and ancillary" commercial casinos, that the regulation failed the third and fourth part of the Central Hudson test. Specifically, the speech restriction was not shown directly and materially to advance the government's interest in reducing the social cost of gambling or assist states in restricting gambling within their borders.

247 Id. at 518 (Thomas, J., concurring in part and concurring in the judgment).

248 Id. at 529-32 (O'Connor, J., joined by Rehnquist, C.J., and Souter & Breyer, JJ., concurring in the judgment).

In *Thompson v. Western States Medical Center*, a 5-4 Court held that a ban on advertising or promoting particular compounded drugs (drugs tailored to the needs of an individual patient) failed the *Central Hudson* test because it was more extensive than necessary to service the government’s interests. The government said it was trying to prevent large-scale manufacturing of compound drugs and that advertising was serving as a proxy. The Court replied that there were non-speech-related means of drawing that line, including a ban on commercial scale manufacturing, capping the amount of compounded drugs druggists may sell in a given period of time, barring offering the drugs at wholesale, or requiring a prescription or a history of receiving a prescription. The dissent concluded that the government had met their burden, and was composed of deference-to-government Holmesian Chief Justice Rehnquist, and Justices Stevens, Ginsburg, and Breyer, liberal instrumentalists who might support on policy grounds this kind of government drug regulation.

§ 30.4 Content-Based Regulations That Trigger Their Own Kind of Strict Scrutiny

§ 30.4.1 Loose Strict Scrutiny Standards: The Racial Redistricting Cases and Possibly Cable/Satellite Television Regulation

As discussed at § 7.2 nn.38-42 & Table 7.2, under the “base plus six” model, there is a version of strict scrutiny that adopts the strict scrutiny requirement of a compelling government interest and a direct relationship between means and ends, but rejects the strict scrutiny requirement of a least restrictive alternative in favor of the intermediate requirement of the regulation merely having to be not substantially more burdensome than necessary. Because this level adopts two of the three levels of strict scrutiny, but waters down element three to an intermediate level of inquiry, this additional level can be called "loose" strict scrutiny. As discussed at § 26.2.1.5 nn.278-81, a recent use of this standard of review by the Supreme Court occurred in the Equal Protection case of *Bush v. Vera*. In that case, though generally applying a strict scrutiny compelling governmental interest analysis, the majority, per 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.’” Instead, the Court adopted the intermediate prong three requirement that racial redistricting not be "substantially more [burdensome] than is ‘reasonably necessary.’”

The Court has never applied this standard directly in any First Amendment case. However, as noted at § 30.3.1 nn.210-15, the Court’s recent opinions regarding the proper standard of review to apply to regulations of cable television are problematic. The Court’s recent cases have failed to produce

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252 Id. at 977, 979.
any clear standard of review in cable television cases.\textsuperscript{253} Part of the problem may lie in the Court’s focus upon basic intermediate review or strict scrutiny as the only two heightened scrutiny choices. Some members of the Court perhaps think that strict scrutiny, applicable to newspapers and books,\textsuperscript{254} is too rigorous,\textsuperscript{255} while other members of the Court may feel that intermediate review, applicable to over-the-air radio and television,\textsuperscript{256} is simply not rigorous enough.\textsuperscript{257}

Under the “base plus six” model of levels of review, perhaps this impasse can be resolved. Like regulations of commercial speech, cable television regulation may be an appropriate area for intermediate review with bite. Alternatively, it might be an area appropriate for loose strict scrutiny, following the model of Justice O’Connor’s opinion in \textit{Bush v. Vera}. For example, Justices Kennedy and Ginsburg might be able to reach a compromise with the plurality in \textit{Denver Area}, including Justices Breyer, Stevens, and Souter, discussed at § 30.3.1 nn.214-15, to command a majority for loose strict scrutiny review. Or perhaps Justices Kennedy and Ginsburg will unite with Justices Scalia and Thomas, and perhaps either new Chief Justice Roberts or Justice Alito, to command a majority for traditional strict scrutiny. In either event, a majority of the Court adopting some level of scrutiny for cable television regulation would aid predictability and certainty in the law.

\section*{§ 30.4.2 \hspace{1em} Basic Strict Scrutiny: Campaign Finance and Speech Regarding Elections}

In the realm of speech regarding elections, the Court has focused on three situations: regulations of contributions and expenditures, disclosure requirements, and regulating the process of nominating and electing candidates. Fundamental First Amendment interests are implicated in each area, and the government thus has the burden of justifying its restrictions, which typically are reviewed by applying strict scrutiny. These cases have their own special “feel,” however, and, beginning with the foundational modern case in 1976 of \textit{Buckley v. Valeo},\textsuperscript{258} resort to explicit strict scrutiny

\begin{multicols}{3}


\textsuperscript{255} See Denver Area, 518 U.S. 727, 739-41 (1996) (Breyer, J., joined by Stevens, J., O’Connor, J., & Souter, J., plurality opinion); \textit{id}. at 777-78 (Souter, J., concurring).


\textsuperscript{257} See Denver Area, 518 U.S. at 820-23 (1996) (Thomas, J., joined by Rehnquist, C.J., & Scalia, J., concurring in the judgment in part and dissenting in part) (criticizing adoption of an intermediate standard of review for cable television regulation, rather than strict scrutiny.); \textit{id}. at 784-87 (Kennedy, J., joined by Ginsburg, J., concurring in part and dissenting in part) (suggesting strict scrutiny is the proper standard to use, at least in the context of “public and leased access programmers whose speech is put at risk nationwide by these laws.”).

\end{multicols}
language has not been a priority in the Court’s opinions. Further, as the cases have developed, the Court has drawn a distinction between limitations on expenditures versus limitations on contributions in terms of the level of scrutiny to be applied. As discussed at § 30.4.2.1 nn.294-303, this development reached a climax in 2003, with a 5-Justice majority of the Court in *McConnell v. Federal Election Commission*\(^{259}\) clearly holding that a lower level of scrutiny, some version of intermediate scrutiny, should be used for limitations on contributions, while strict scrutiny was still appropriate for limitations on expenditures.

Cases involving disclosure requirements were dealt with in *Buckley* under a strict scrutiny, direct relationship, least restrictive alternative approach, as discussed at § 30.4.2.2. Even under this standard, however, the disclosure requirements were viewed as constitutional. Thus, the level of review for disclosure requirements has not been a matter of much debate, as disclosure requirements tend to survive strict scrutiny anyway. Under the reasoning of the 5-Justice majority in *McConnell*, however, since disclosure requirements are only minimal burdens on free speech rights, an argument can be made that they should also trigger the intermediate scrutiny used for contribution limitations.

Cases involving speech relating to nominating and electing candidates reflect standard strict scrutiny language. However, as discussed at § 30.4.2.3 (electing members of the legislative and executive branches) and § 30.4.2.4 (electing state court judges), the Court has tended to defer in these cases more to legislative predictions of potential future consequences than is typical under a strict scrutiny approach. For this reason, these elections cases, as well as the contribution, expenditure, and disclosure cases, are included here as a special category of First Amendment doctrine, rather than included at § 29.6 as merely another specific substantive area of standard First Amendment review. These cases all involve in practice something less rigorous than a traditional strict scrutiny approach.

As the cases have been decided, there have been substantial differences among the Justices in terms of what they think is going on in the political process. Overall, liberal Justices have been more willing to find that regulations in these areas are narrowly tailored to advance compelling interests, such as preventing fraud and corruption. Further, the more liberal Justices have been the ones more willing to apply intermediate review to certain regulations in this area. More conservative Justices have typically ruled in favor of free speech interests held by the people, candidates, political parties, and other political groups. Usually they have identified less speech-infringing ways for dealing with the concerns that have led to the government restrictions. For example, while *Buckley v. Valeo* upheld limits on contributions to candidates, a call for overruling that case was made in 2000 by Justices Scalia, Kennedy, and Thomas in *Nixon v. Shrink Missouri Government PAC*\(^{260}\). In 2003, in *McConnell v. Federal Election Commission*,\(^{261}\) Chief Justice Rehnquist joined Justice Kennedy’s dissent, joined also in part by Justices Scalia and Thomas, again rejecting the *Buckley* framework.

\(^{259}\) 540 U.S. 93 (2003).


§ 30.4.2.1 Speech Relating To Campaign Financing: Contributions and Expenditures

Most constitutional law relating to limits on campaign contributions and expenditures grows directly from *Buckley v. Valeo.*262 The Court’s *per curiam* opinion in that case began by pointing out that the federal statutory limits on contributions have not been shown to prevent candidates and political committees from amassing the resources needed for effective advocacy. Thus, the limitation on contributions could be regarded as a less severe restriction on freedom of expression than limits on expenditures. The Court then noted:


This sentence has been the source of much confusion ever since. Each of the freedom of association cases cited by the Court as an example of the kind of scrutiny appropriate for a “significant interference” with protected rights is typically regarded as a strict scrutiny case. *Cousins* involved a burden on the freedom of association rights of the Democratic Party, with the Court stating that the “interest of the State must be compelling” to justify the regulation.264 *Button* involved a case burdening the freedom of association of the NAACP, with the Court stating that the government must regulate with “narrow specificity” and “precision of regulation.”265 *Shelton* involved the associational rights of teachers, with the Court applying a least restrictive alternative approach to hold the regulation unconstitutional because “the end can be more narrowly achieved.”266 Yet, because each case was decided before the Court’s more careful attention to precise language regarding the standards of review, which began in 1976 with clear adoption of the intermediate scrutiny standard for cases of gender discrimination in *Craig v. Boren,* discussed at § 26.3.1 nn.363-67, some loose language in the opinions, on the pages cited in the *Buckley* quote above, occasionally talked of “significant” government interests, not “compelling interests,” and of “closely drawn” statutes, not “narrow tailoring,” *i.e.*, intermediate scrutiny language, not strict scrutiny.

In *Buckley,* the contribution limit of $1,000 to any single candidate per election, which has since been amended to $2,000, and the various other limits, such as an overall annual limit of $25,000 by any contributor, were justified by the government’s compelling interest in limiting the actuality and appearance of corruption resulting from large individual financial contributions. Regarding the narrowly tailoring requirement, the Court decided that Congress was entitled to conclude that

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263 *Id.* at 25.


disclosure of contributions was only a partial measure and that contribution ceilings were a "necessary" concomitant, focused "precisely" on the problem of corruption, thus satisfying the strict scrutiny overinclusiveness test of having no unnecessary overinclusiveness, and did not undermine to "any material degree" the ability for "robust" political debate, satisfying the restrictiveness aspect of strict scrutiny review. The "overinclusiveness" and "restrictiveness" aspects of First Amendment review are discussed at § 29.4.4.3 nn.149-53. Thus, in Buckley, the contribution limits were actually upheld not because a lower standard of scrutiny was applied, but because the burdens on the rights of contributions could survive "the rigorous standard of review established by our prior decisions."267

The expenditures limits were not upheld under strict scrutiny. Interpreting the Act to bar more than $1,000 spent annually for communications in express terms that advocate the election or defeat of a clearly identified candidate for federal office, the opinion concluded that the government’s compelling interests in preventing corruption and the appearance of corruption were not adequately advanced by the statute’s means. The Act was not narrowly tailored because there was no limit on persons and groups spending as much as they wished to promote a candidate and the candidate’s views, so long as they did not in express terms advocate his or her election. Further, the law limited expenditures for express advocacy of candidates made totally independently of the candidate and his or her campaign. This was a problem because, as the Court noted, “Advocacy of the election or defeat of candidates for federal office is no less entitled to protection under the First Amendment than the discussion of political policy generally or advocacy of the passage or defeat of legislation.”268

The federal Act also sought to limit expenditures by a candidate from his or her own funds. The Court said that the government’s primary interest in the prevention of actual and apparent corruption of the political process did not support this limitation. Further, the Court rejected the proposition that the government may restrict the speech of some elements in our society in order to enhance the relative voice of others.269 Thus, general limits on campaign expenditures must also fall.

The opinion continued by upholding required public disclosure of contributions to candidates, even as to minor parties and independents, where the record did not reflect the kind of focused and insistent harassment that existed in NAACP v. Alabama.270 This aspect of Buckley regarding disclosure requirements is discussed at § 30.4.2.2 nn.307-12. The opinion concluded by upholding the public financing of presidential election campaigns, including provisions that require candidates who accept public financing not to incur expenses in excess of a specified amount and not to accept private contributions except to the extent that the fund produced by income tax returns is insufficient to provide the full financial entitlement. The Act created a Presidential Election Campaign Fund, financed from individual taxpayers who on their income tax returns may authorize payment to the

267 424 U.S. at 25-29.
268 Id. at 48.
269 Id. at 48-49.
fund of one dollar of their tax liability in the case of an individual return or two dollars in the case of a joint return, which was subsequently amended to three dollars for each individual.

Justice White dissented from striking down expenditure limitations, saying they were necessary to prevent evasion of the contribution limits and, with respect to individual expenditures, help assure that only individuals with a modicum of support from others will be viable candidates. Justice Marshall would allow the government to pursue an interest in promoting both the reality and the appearance of equal access to the political arena by placing a limit on the amount a candidate may contribute to his or her own campaign. Justice Blackmun was not persuaded that the Court made a principled distinction between the contribution limitations and the expenditure limitations. Chief Justice Burger dissented from sustaining provisions for the disclosure of small contributions, for limitations on contributions, and for public financing of President campaigns, which he called an impermissible intrusion into the traditionally political process. Justice Rehnquist said the eligibility requirements for minor parties to participate in public financing of presidential elections discriminate so favorably to the two major parties that they violate both the First and Fifth Amendments.271

Given five Justices questioning aspects of *Buckley*, the stage was set for further decisions on government restrictions relating to campaign contributions and expenditures. The first such case was *First National Bank of Boston v. Bellotti*.272 There the Court struck down a Massachusetts statute that forbade banks and business corporations from making contributions or expenditures for the purpose of influencing the vote on any question submitted to the voters, other than one materially affecting the property, business, or assets of the corporation. Applying strict scrutiny, Justice Powell noted that there had been no showing that the voice of corporations had been overwhelming or even significant in influencing referenda in Massachusetts. With respect to protecting shareholders from the use of corporate resources with which they disagree, the law was underinclusive in reaching only referenda and not legislation or expression of views, and it was overinclusive in prohibiting expenditures even if the shareholders unanimously authorized the contribution or expenditure.

Justice White dissented, with Justices Brennan and Marshall. He said the law substantially advances an overriding interest in preventing corporate domination of the referendum process and it helps assure that shareholders are not compelled to support and financially further beliefs with which they disagree where the issue does not materially affect the business, property, or other affairs of the corporation. Justice Rehnquist dissented on the grounds that while corporations have due process rights regarding their property, the liberty part of due process should be limited to natural persons, not corporations, and thus there is “no basis for concluding that the liberty of a corporation to engage in political activity with regard to matters having no material effect on its business is necessarily incidental to the purposes for which the Commonwealth permitted these corporations to be

\[271\] *Id.* at 235 (Burger, C.J., concurring in part and dissenting in part); *id.* at 257 (White, J., concurring in part and dissenting in part); *id.* at 286 (Marshall, J., concurring in part and dissenting in part); *id.* at 760 (Blackmun, J., concurring in part and dissenting in part); *id.* at 760 (Rehnquist, J., concurring in part and dissenting in part)

organized or admitted within its boundaries.” This analysis that corporations have only limited First Amendment rights against states, because of this liberty limitation on what rights are incorporated through the Due Process Clause, has not been adopted by any other Justice on the Court in modern times, although it does reflect an aside made, as Justice Rehnquist noted, in an old 1906 case,273 and the view has some historical support, and legislative and executive practice support, as noted at § 27.4.2.1 n.306.

Two cases on contribution limits were decided in 1981. In California Medical Association v. Federal Election Commission,274 the Court upheld the federal Act’s $5000 limitation on contributions by a political committee, as applied to a contribution by the medical association to its multi-candidate political action committee. Four Justices said that the Act’s limitations on contributions were constitutional under Buckley. Justice Blackmun said the Act was constitutional applying a clear strict scrutiny approach. Four Justices dissented on grounds that under the Act Congress had not authorized plaintiffs to sue in a declaratory judgment action where such an action would delay or disrupt on-going enforcement proceedings and impose extra burdens on the court system, and thus the case should have been dismissed on jurisdictional grounds.

In Citizens Against Rent Control v. Berkeley,275 the Court struck down an ordinance that limited to $250 the contribution that a person could make to a committee in support of, or in opposition to, a ballot measure. The Court said that placing this limit on individuals wishing to band together to advance their views on a ballot measure, while placing no limit on individuals acting alone, was a clear restraint on the right of association. It was not supported by the Buckley case, said Chief Justice Burger on behalf of the Court, because Buckley applies only to the perception of undue influence of large contributions to a candidate. He said there is no significant state or public interest in curtailing debate and discussion of a ballot measure.

In 1982, returning to election-related actions by corporations and labor unions, the Court held in Federal Election Commission v. National Right to Work Committee,276 that Congress could forbid corporations and labor unions from making contributions and expenditures in connection with federal elections unless they established separate segregated funds for political purposes to which shareholders or labor union members could make contributions. Even regarding the limitation on contribution, the opinion referred to the standard of review as involving “the closest scrutiny.” In applying the test, however, the Court noted that the statute was “sufficient tailored” under Buckley to be constitutional, rather than clearly applying a strict scrutiny, narrowly tailored analysis. The

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273  Id. at 802-06, 812 (White, J., joined by Brennan & Marshall, JJ., dissenting); id. at 822-28 (Rehnquist, J., dissenting), citing Northwestern Nat. Life Ins. Co. v. Riggs, 203 U.S. 243, 255 (1906).

274  453 U.S. 182, 193-201 (1981); id. at 201-04 (Blackmun, J., concurring in part and concurring in the judgment); id. at 208-09 (Stewart, J., joined by Burger, C.J., and Powell & Rehnquist, JJ., dissenting).


opinion also spoke of deference given to Congress’ judgment regarding the need to regulate corporate and union activity. As the Court noted, this bar could be applied even to solicitation by corporations and labor unions that did not have great financial resources because the court would not second guess the legislative determination on a need for prophylactic measures where corruption is the evil feared. This deference to the government is unusual for the Court to give at strict scrutiny, suggesting that some looser form of strict scrutiny was being applied in the case.

The Court considered regulations that limited political action committees in Federal Election Commission v. National Conservative Political Action Committee,277 decided in 1985. The Court held that Section 9012(f) of the Presidential Election Campaign Fund Act was invalid in barring independent political action committees from spending more than $1,000 to further the election of a candidate who decided to receive federal funding. Speaking for the Court, Justice Rehnquist said that in contrast to California Medical Ass’n, discussed above, at § 30.4.2.1 n.274, the present case involved limits on expenditures by PACs, and thus strict scrutiny clearly applied. He said that in Buckley and Citizens Against Rent Control the only compelling interests recognized by the Court were preventing corruption and the appearance of corruption. Here there was no clear indication of what any “corruption” might consist. The fact that candidates and elected officials may alter or reaffirm their own position on issues in response to political messages paid for by PACs cannot be called corruption. Further, this law was overbroad in response to any evil regarding corruption because it was not limited to large war chests; its terms applied equally to informal discussion groups that solicit neighborhood contributions.

Justice White, dissenting, continued his assault on Buckley insofar as it refused to uphold expenditure limits. He said it was pointless to limit contributions to a candidate without also limiting the amounts that can be spent on behalf of the candidate. In any event, the transformation of contributions into political debate involves speech by someone other than the contributor, and the limit involved here is a necessary, narrowly drawn means to make public financing workable. Justice Marshall, also dissenting, said that he now believed the distinction between contributions and independent expenditures has no constitutional significance. His view was that it “simply belies reality to say that a campaign will not reward massive financial assistance provided in the only way that is legally available. And the possibility of such a reward provides a powerful incentive to channel an independent expenditure into an area that a candidate will appreciate.”278

In 1986, in Federal Election Commission v. Massachusetts Citizens for Life, Inc.,279 the Court struck down a federal statute that required corporations to make independent political expenditures only through special segregated funds, as applied to a small nonprofit corporation that would face organizational and financial hurdles in establishing a segregated political fund. However, in 1990, a 6-3 Court in Austin v. Michigan Chamber of Commerce280 distinguished Citizens and upheld a state

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278 Id. at 507-12 (White, J., dissenting); id. at 519-20 (Marshall, J., dissenting).

279 479 U.S. 238, 251-65 (1986).

bar on corporations using corporate treasury funds for independent expenditures in support of or in opposition to any candidate for election to state office.

Delivering the opinion of the Court, Justice Marshall said that strict scrutiny clearly should be applied since the regulation involved expenditures. He noted, however, that the state had a compelling interest in preventing expenditures that may not reflect actual public support for the political ideas espoused, and the law was sufficiently narrowly tailored because it permitted corporations to make independent political expenditures through separate segregated funds. Justice Marshall explained, “Because persons contributing to such funds understand that their money will be used solely for political purposes, the speech generated accurately reflects contributors’ support for the corporation’s political views.” 281 Justice Marshall distinguished Citizens on the ground that there the organization was formed for the express purpose of promoting political ideas, it had no persons with a claim on its assets or earnings, and it was independent from the influence of business corporations. That is not true of the Chamber of Commerce because more than three-quarters of its members are business corporations. Justice Marshall continued that the law was not underinclusive for not regulating unions because they lack the significant state-conferred advantages of the corporate structure. Nor was the Equal Protection Clause violated by exempting media corporations because of their unique societal role. 282

Dissenting were Justices Scalia, O’Connor, and Kennedy. Justice Scalia said that Buckley, which was entirely correct on the point, held that independent expenditures to express the political views of individuals and associations do not raise a sufficient threat of corruption to justify prohibition. Further, the government cannot be trusted to establish restrictions on speech for the purpose of assuring fair political debate. Justice Scalia said, “The premise of our system is that there is no such thing as too much speech – that the people are not foolish but intelligent, and will separate the wheat from the chaff.” 283 Justice Kennedy, dissenting with Justices O’Connor and Scalia, added that the majority’s attempt to distinguish Citizens rested on the fallacy that the source of a speaker’s funds is somehow relevant to the speaker’s right of expression or society’s interest in hearing what the speaker has to say. The state’s interest in protecting members from the use of funds to support candidates whom they may oppose is not here a compelling interest, just as it was not in Buckley. Finally, the First Amendment provides no basis for excluding media corporations from the ban, considering the tangled ownership links between media and nonmedia corporations. 284

In another case, decided in 2000, a divided Court upheld in Nixon v. Shrink Missouri Government PAC 285 a Missouri campaign contribution law which, like the federal law, included a per election contribution limit ($1,000). The Court held that a public perception of potential harm was sufficient

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281 Id. at 660-61.
282 Id. at 666-69.
283 Id. at 679-80 (Scalia, J., dissenting).
284 Id. at 695-96 (Kennedy, J., joined by Scalia & O’Connor, JJ., dissenting).
to justify a contribution limit under *Buckley*, although the majority acknowledged that *Buckley* review was not as flexible as the *O’Brien* test or time, place, or manner tests of intermediate scrutiny. Justices Scalia, Kennedy, and Thomas dissented. They again urged that *Buckley* be overruled. Justice Kennedy was especially concerned that *Buckley* had led to the unintended consequence of “soft money” and “issue advocacy” campaigns that escape contribution limits through subterfuge. He said that overruling *Buckley* would allow legislatures to look at new options and would allow courts to consider other constitutional tests.286

The above cases involved contributions and expenditures by individuals, candidates, and political action committees. Two cases considered the application of *Buckley* to political parties. The first of the two cases was *Colorado Republican Federal Campaign Committee v. Federal Election Commission (Colorado I).*287 There, in 1996, the Court struck down federal limits on expenditures by a political party that were made independently, without coordination with any candidate. Announcing the judgment of the Court, and joined by Justices O’Connor and Souter, Justice Breyer said that the independent expression of a political party’s views is “core” First Amendment activity no less than the independent expression of individuals, candidates, or other political committees. It is protected in the absence of record evidence or legislative findings suggesting a special corruption problem.

Justice Thomas concurred in the judgment, but said that *Buckley* should be overruled because contribution limits infringe as directly and seriously upon free of political expression and association as do expenditure limits. In remarks also joined by Chief Justice Rehnquist and Justice Scalia, Justice Thomas added that there is only a minimal threat of corruption from party spending because parties and candidates have traditionally worked together.288 Justice Kennedy, with Chief Justice Rehnquist and Justice Scalia, also concurred in the judgment, but went further to express the opinion that even coordinated spending should be protected because, as said in *New York Times Co. v. Sullivan*, the First Amendment embodies “a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open.”289

In dissent, Justice Stevens, joined by Justice Ginsburg, said that all money spent by a political party to secure the election of its candidate for Senator should be considered a “contribution” to his or her campaign. Justice Stevens pointed to three interests which he said provide a sufficient constitutional predicate for the challenged federal spending limits: (1) such limits help avoid both the appearance and the reality of corrupt political process via abuse by the party of its influence over candidates,

286 Id. at 405-10 (Kennedy, J., dissenting); id. at 410 (Thomas, J., joined by Scalia, J., dissenting).


288 Id. at 631 (Thomas, J., joined by Rehnquist, C.J., and Scalia, J., as to Parts I and III, concurring in the judgment and dissenting in part).

(2) the limits supplement other spending limitations, and (3) the government has an important interest in leveling the electoral playing field by constraining the cost of federal campaigns. 290

The case was remanded to the Court of Appeals, which held that even closely coordinated party expenditures could not be limited by Congress. The case reached the Court again in 2001 in *Federal Election Commission v. Colorado Republican Federal Campaign Committee (Colorado II).* 291 A majority, comprised of Justices Stevens, O'Connor, Souter, Ginsburg, and Breyer, reversed. Writing for the Court, Justice Souter rejected a facial challenge to congressional limits on coordinated spending by a political party. Noting that the Act treats such expenditures as contributions, Justice Souter said that in this regard political parties are no different from other political speakers and, thus, have no claim that a generally higher standard of scrutiny be applied to limits on coordinated spending. Although the majority did not define with any precision what this lower level of scrutiny was, the Court noted that the different results between contributions and expenditures meant that a different standard of scrutiny was being applied to contribution cases, less than strict scrutiny. Since spending above the limits, even of independent amounts, was not permitted until the 1996 decision in *Colorado I,* political parties cannot claim that coordinated spending beyond statutory limits is essential to their functions. Further, parties receive money from people who seek to produce obligated officeholders. Applying the scrutiny appropriate to a contribution limit, the Court found a serious threat of abuse by candidates diverting contributions to the party in order to avoid the limits on individual contributions to candidates.

Justice Thomas dissented. He was joined by Justices Scalia and Kennedy and, in Part II, by Chief Justice Rehnquist. In Part I, Justice Thomas again called for overruling *Buckley.* In Part II, assuming that *Buckley* survived, Justice Thomas said that party expenditures are not the equal of contributions. But even if they were, a restriction on contributions by a party does not entail only the “marginal restriction” that is said to be suffered by individuals and political committees. The reason is that political parties and their candidates are inextricably intertwined in the conduct of an election. The restrictions have a stifling effect on the ability of the party to do what it exists to do. Breaking the connection between parties and their candidates inhibits promotion of the party’s message. Finally, even if the government had presented evidence of corruption, there are better tailored alternatives such as bribery law, disclosure laws, treating earmarked contributions as contributions to the candidate, and lowering the cap on total contributions that an individual can make to a party. 292

In 2003, a majority of the Court more clearly applied intermediate scrutiny to contributions in *Federal Election Commission v. Beaumont.* 293 The Court majority once again stated that different

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290 *Id.* at 648-49 (Stevens, J., joined by Ginsburg, J, dissenting). This third interest was expressly rejected as a compelling government interest in *Buckley,* 424 U.S. 1, 48-49 (1976).


292 *Id.* at 465-66 (Thomas, J., joined by Scalia & Kennedy, JJ., and as to Part II by Rehnquist, C.J., dissenting).

results in contribution versus expenditure cases since Buckley meant that a different standard of review was implicit ever since Buckley. The Court noted, "[T]he basic premise we have followed in setting First Amendment standards for reviewing political financial restrictions [is that] the level of scrutiny is based on the importance of the 'political activity at issue' to effective speech or political association."

The most significant campaign finance case since Buckley was decided in the Fall of 2003. In McConnell v. Federal Election Commission, in a series of opinions written by different Justices, with shifting majorities for the various issues decided, the Court upheld the major provisions of the Bipartisan Campaign Reform Act of 2002 (BCRA). Specifically, the Court upheld a ban on political parties using “soft money,” that is, money not subject to the reporting requirements and limits specified in BCRA. The Court noted, “We are also mindful of the fact that in its lengthy deliberations leading to the enactment of BCRA, Congress properly relied on the recognition of its authority contained in Buckley and its progeny. Considerations of stare decisis, buttressed by the respect that the Legislative and Judicial Branches owe to one another, provide additional powerful reasons for adhering to the analysis of contribution limits that the Court has consistently followed since Buckley was decided.” Although the Court’s statement that “we have consistently applied less rigorous scrutiny to contribution restrictions aimed at the prevention of corruption and the appearance of corruption” is of questionably accuracy for the cases before 2000, it is true that the case results have been different, and the standard was clearly different in Colorado II and Beaumont.

As for what the difference in scrutiny was in Buckley until McConnell, Justice Kennedy noted in his dissent in McConnell that it was not standard intermediate scrutiny, but maybe what is referred to in this book as either loose strict scrutiny, or intermediate scrutiny with bite. Justice Kennedy noted that in Buckley the Court required the government to support regulation even of contributions by the compelling government interest of preventing corruption. As Kennedy noted, “Thus, though Buckley subjected expenditure limits to strict scrutiny and contribution limits to less exacting review, it held neither could withstand constitutional challenge unless it was shown to advance the anticorruption interest. In these consolidated cases, unless Buckley is to be repudiated, we must conclude that the regulations further that interest before considering whether they are closely drawn or narrowly tailored. If the interest is not advanced, the regulations cannot comport with the Constitution, quite apart from the standard of review.”

Further, as Kennedy noted, the Court required in Buckley that the regulations regarding contributions had to be directly related to advancing the interest in preventing corruption. As Kennedy noted, it had to prevent direct quid pro quo concerns. As Kennedy stated, “To ignore the fact that in Buckley the money at issue was given to candidates, creating an obvious quid pro quo danger as much as it led to the candidates also providing access to the donors, is to ignore the Court's comments in

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295 Id. at 137-38.
296 Id. at 138 n.40.
297 Id. at 291-92 (Kennedy, J., dissenting).
Buckley that show quid pro quo was of central importance to the analysis. . . . And it ignores that in Colorado II, the party spending was that which was coordinated with a particular candidate, thereby implicating quid pro quo dangers. In all of these ways the majority breaks the necessary tether between quid and access and assumes that access, all by itself, demonstrates corruption and so can support regulation.298

Even from the majority’s perspective, a direct relationship requirement is apparent from the cases between Buckley and McConnell. A majority of the Court since Buckley has acknowledged that preventing the appearance of corruption is also a compelling government interest. Thus, regulations directly related to dealing with the appearance of corruption can also survive that aspect of a strict scrutiny approach. Thus, the Court noted in Shrink Missouri, "[W]e spoke in Buckley of the perception of corruption 'inherent in a regime of large individual financial contributions' to candidates for public office . . . as a source of concern 'almost equal' to quid pro quo impropriety."299

To the extent that Buckley has a lower standard of scrutiny for contributions, this analysis would suggest that Buckley adopted the level of scrutiny called in this book loose strict scrutiny, which involves a compelling government interest, direct relationship analysis, but not the “least restrictive alternative” test of strict scrutiny. As a matter of terminology, however, the majorities in Colorado II, Beaumont, and McConnell have rejected this understanding of Buckley, by only requiring “significantly important” government interests to regulate contributions – the intermediate standard of review – not compelling government interests, although the usual interests used by the government to regulate, corruption and the appearance of corruption, are viewed as compelling government interests anyway.

Alternatively, based on an analogy between regulations of financial contributions and regulations of commercial speech, both “hardy” kinds of speech, in the language of the commercial speech cases, discussed at § 30.3.2 n.233, one could argue that the best way to consider the standard for scrutiny used for contributions in Buckley is intermediate scrutiny with bite, like Central Hudson. As discussed at § 30.3.2 nn.228-30, this is a higher standard of scrutiny than standard intermediate scrutiny used in O’Brien for content-neutral regulations of speech in a public forum, or for time, place, or manner regulations. This understanding would be consistent with Shrink Missouri, which stated that the Buckley test is more vigorous than O’Brien.300

Such a view is also consistent with the actual analysis applied in McConnell. In McConnell, the Court noted that “there was substantial evidence to support Congress’ determination that large soft-money contributions to national political parties give rise to corruption and the appearance of corruption.” Thus, banning such contributions would be “directly related” to dealing with the government interest in preventing corruption and the appearance of corruption, the standard required under Central Hudson. Of course, a “least restrictive alternative” test would not be used. Rather, the intermediate standard of “not substantially more burdensome than necessary,” which requires

298 Id. at 295-96, citing, Buckley, 424 U.S. at 26-27.

299 Shrink Missouri, 528 U.S. at 390 (citations omitted).

300 Id. at 386.
“ample alternative channels of communication” would be applied. This is the approach adopted by the majority’s focus in McConnell, citing Shrink Missouri, on whether any regulation was “so radical in its effect as to . . . drive the sound of [the recipient’s] voice below the level of notice.”

The majority also approved in McConnell a ban on corporations and unions using funds in their treasuries to finance ads expressly advocating the election or defeat of candidates in federal elections made within 60 days before a general election or 30 days before a primary. Because this involved a regulation of expenditures, it triggered strict scrutiny. The Court did strike down as overbroad a provision that prohibited persons 17 years old or younger from making contributions to candidates or political parties. The regulation was unconstitutional because there was no showing of significant fraud by parents using their children as conduits for evading contribution limitations, and thus no important government interest to advance under intermediate scrutiny applicable to contribution limitations. Also, the regulation was substantially more burdensome than necessary in any event. Rather than an absolute ban, the government could have adopted counting the contributions given by a minor against the limitations on the family unit in order to prevent fraud by the adult.

In 2006, in Randall v. Sorrell, the Court struck down Vermont’s contribution limits on the amount any single individual can contribute to the campaign of a candidate for state office during a "two-year general election cycle." Those limits were: “governor, lieutenant governor, and other statewide offices, $400; state senator, $300; and state representative, $200.” Applying the intermediate scrutiny approach adopted in McConnell, a plurality, composed of Chief Justice Roberts, and Justices Breyer and Alito, said such limitations failed the third prong of intermediate scrutiny by being substantially too burdensome, and not leaving individuals ample alternative ways to exercise their First Amendment right to fund candidates of their choice. The plurality noted that the Vermont limitations were “substantially lower than both the limits we have previously upheld and comparable limits in other States.” Justices Scalia, Kennedy, and Thomas concurred only in the judgment, with each indicating a continuing willingness to depart from McConnell’s less than strict scrutiny approach for contribution limitations, and apply strict scrutiny instead.

Justice Souter, joined by Justices Stevens and Ginsburg, would have upheld the contribution limitations under McConnell’s intermediate review. Justice Souter stated, “Low though they are, one cannot say that ‘the contribution limitation[s are] so radical in effect as to render political association ineffective, drive the sound of a candidate's voice below the level of notice, and render contributions pointless.’” In a separate dissent, Justice Stevens indicated that he would now depart from Buckley’s strict scrutiny approach to expenditure limitations, and apply intermediate scrutiny instead.

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301 McConnell, 540 U.S. at 154, 173.

302 Id. at 204-11, discussing Citizens United v. FEC, 130 S. Ct. 876 (2010).

303 Id. at 231-32.

304 126 S. Ct. 2479, 2486-87, 2491-94 (2006); id. at 2501 (Kennedy, J., concurring in the judgment); id. at 2501-02 (Thomas, J., joined by Scalia, J., concurring in the judgment).
to both expenditure and contribution limitations, like Justice White’s approach in \textit{Buckley}.  

A case involving a contribution ban by candidates occurred in \textit{Minnesota Citizens Concerned for Life, Inc. v. Kelley}.\footnote{\textit{Id.} at 2508 (Stevens, J., dissenting), citing \textit{Buckley}, 424 U.S. at 264 (White, J., concurring in part and dissenting in part), discussed at \S\ 30.4.2.1 n.261; \textit{id.} at 2512-13 (Souter, J., joined by Stevens & Ginsburg, JJ., dissenting), citing \textit{Shrink Missouri}, 528 U.S. at 377.} In this case, the Eighth Circuit considered the constitutionality of a state statute than banned religious, charitable, and educational organizations from soliciting contributions from candidates or their committees, except for business advertisements, regular payments by candidates who were members of an organization for more than six months before becoming a candidate, or ordinary contributions at church services. The court concluded that the statute was not narrowly drawn because the statute “bans such requests for any amount even when the organization has no knowledge that the prospective donor is a candidate or committee, or the solicitation otherwise has no potential to affect voting behavior.”

\textbf{\S\ 30.4.2.2 Disclosure Requirements in Contributions, Expenditures, and the Choice and Election of Candidates}

Cases involving disclosure requirements were dealt with in \textit{Buckley} under a strict scrutiny, direct relationship, least restrictive alternative approach. As the Court noted in \textit{Buckley}, even those who challenge aspects of contribution and expenditure limitations agree that “narrowly drawn disclosure requirements are the proper solution to virtually all the evils Congress sought to remedy” concerning corruption and the appearance of corruption.\footnote{\textit{Id.} at 60.} The main issues regarding disclosure have thus tended to involve application of disclosure requirements to very small amounts of contributions, and to minor or independent party candidates, where concerns of power corruption by the entrenched two major parties is not a factor.

As with respect to contributions, the \textit{Buckley} test for disclosures was not stated with much care. Each of the cases relied upon by the Court for the proper standard of review, such as \textit{NAACP v. Alabama} and \textit{Gibson v. Florida Legislative Investigation Committee}, involved a compelling government interest test.\footnote{\textit{Id.} at 64-65, citing \textit{NAACP v. Alabama}, 357 U.S. 449, 463 (1958); \textit{Gibson v. Florida Legislative Investigation Commission}, 372 U.S. 539, 546 (1963).} In applying the test in \textit{Buckley}, the Court concluded that the disclosure requirements did “directly serve” the government interests in preventing corruption and the appearance of corruption, and were “an essential means of gathering data necessary to detect violations of the contribution limitations,” a least restrictive alternative approach.\footnote{\textit{Id.} at 67-68.} A blanket exemption for minor parties was not needed, even though their associational interests were more at risk, since they would be entitled to an exemption on evidence showing a reasonable probability that
compelled disclosure of contributor names would subject them to threats, harassment, or reprisals from either Government officials or private parties. In 1982, this principle had been applied to excuse enforcement of disclosure requirements for candidates of the Socialist Workers Party, which had been subjected to harassment by both government officials and private parties.310 Nevertheless, based upon the same kind of loose language used in cases prior to 1976 regarding the standard of review as occurred with respect to the contribution limitations, discussed at § 30.4.2.1 nn.263-66, the Court also talked in Buckley about the disclosure requirements serving “substantial government interests” and there being a “substantial relation[ship]” between means and ends.311

The Court in Buckley also upheld the requirement of disclosure by persons who make contributions or expenditures aggregating over $100 in a calendar year for communications that expressly advocate the election or defeat of a clearly identified candidate. The Court stated this disclosure requirement also triggered the “same strict standard of scrutiny” as applied to groups. The Court admitted that this low limit might discourage participation by some citizens, but said that where to draw the line is a judgmental decision, best left to congressional discretion, and was not “wholly without rationality.”312 Why the Court chose to use such rational basis kind of language at this point in the opinion was left unexplained. That line has since been amended to $200.

A different kind of required disclosure was struck down in 1995 in McIntyre v Ohio Elections Commission.313 In that case a 7-2 Court invalidated an Ohio statute that prohibited the distribution of anonymous campaign literature dealing with a proposed school tax levy. Relying on Talley v. California,314 which had held that the First Amendment protects the distribution of unsigned handbills urging a boycott, Justice Stevens said that the reasoning in that case was broad enough to cover a respected tradition of anonymity in the advocacy of political issues. Where a law burdens core political speech, the Court applies “exacting” scrutiny, presumably strict scrutiny. The Court noted that Ohio’s interest in providing the electorate with relevant information is no stronger here than with respect to other components of content that an author is free to include or exclude. Ohio’s interest in preventing fraudulent and libelous statements carries special weight during election campaigns and might justify a limited identification requirement. However, this prohibition is not Ohio’s principal weapon against fraud, and it is not narrowly tailored since the prohibition encompasses documents not arguably false or misleading and not closely connected to an election.

Justice Thomas concurred only in the judgment because he believed that freedom of speech or the press, as originally understood, protected anonymous political leafletting, as evidenced by the Framers universal practice of publishing anonymous articles and pamphlets. Justice Thomas recognized that there was a recent tradition of barring anonymous publications, but said that the

311 424 U.S. at 64, 68.
312 Id. at 74-76, 83-84.
historical evidence from the framing outweighs that recent tradition.\footnote{514 U.S. at 358-59 (Thomas, J., concurring in the judgment).} Justice Ginsburg, concurring, said that Court had not held that a state, “in other, larger circumstances,” may not require the speaker to disclose its interest by disclosing its identity.\footnote{Id. at 358 (Ginsburg, J., concurring).}

Justice Scalia dissented, with Chief Justice Rehnquist. Justice Scalia said that frequent use of anonymous electioneering did not establish that it was a constitutional right. Instead, the Court should respect the universal and long established American legislative practice of barring anonymous electioneering, begun in 1890, and since adopted by all states except California, a practice that does not go to the heart of free speech. Even if he were to forget practice and reason deductively from case law, Justice Scalia said he would reach the same result because the Court has not established a clear rule of law. Expressing concern about “large circumstances” leaves unclear whether states could ban anonymity with respect to parade permits, theater presentations, letters to the editor, or municipal public-access cable performers.\footnote{Id. at 317-78 (Scalia, J., joined by Rehnquist, C.J., dissenting).}

A later case in this series is \textit{Buckley v. American Constitutional Law Foundation},\footnote{525 U.S. 182, 201-05 (1999). See also ACLU of Nevada v. Heller, 378 F.3d 979, 987-1002 (9th Cir. 2004) (Nevada statute requiring groups publishing “material or information relating to an election, candidate or any question on the ballot” to disclose on publication names and addresses of its financial sponsors is not narrowly tailored to state’s interests in helping voters evaluate information, combating fraud, or enforcing election disclosure and contribution laws).} decided in 1999. There the Court invalidated a number of Colorado laws regulating the process of soliciting signatures to quality initiatives for the ballot, chief among them a requirement that petitioner circulators wear identification badges and be registered voters. The laws also required the names and addresses of circulators to be reported, along with the amount paid to each circulator. The Court said the restrictions significantly inhibited communication and were not justified by state interests in fraud detection, informing voters, and administrative efficiency. Justice O’Connor, joined by Justice Breyer, concurring in the judgment and dissenting in part, said that requiring circulators to be registered voters only indirectly and incidently burdens communication, and that the reporting requirements were incremental and insubstantial. Justice Rehnquist, also dissenting, was concerned that striking down the requirement that circulators be registered voters threatened a host of historically established regulations.\footnote{525 U.S. at 215-16 (O’Connor, J., joined by Breyer, J., concurring in the judgment in part, and dissenting in part); \textit{id.} at 226 (Rehnquist, C.J., dissenting).}

Where the issue involves anonymity in the context of candidates for office, many lower courts have distinguished \textit{McIntyre} and \textit{American Constitutional Law Foundation} and upheld the state
regulations. For example, in Majors v. Abell, per Judge Posner, the Seventh Circuit upheld an Indiana statute requiring political advertising that "expressly advocate[s] the election or defeat of a clearly identified candidate" contain "a disclaimer that appears and is presented in a clear and conspicuous manner to give the reader or observer adequate notice of the identity of persons who paid for . . . the communication." The court noted that when dealing with elections for office, rather than referenda or other ballot initiatives, "‘disclosure protects the integrity of the electoral process by ensuring that the words of an independent group are not mistakenly understood as having come from the mouth of a candidate’ [and it] also deters corruption by identifying large contributors who may be seeking a quid pro quo and – a related point – it provides information helpful to the enforcement of the provisions of election campaign law, both also being purposes that had been emphasized in Buckley.” In an unusual opinion dubitante (neither concurrence nor dissent), Judge Easterbrook noted that given the lack of clarity in the law based on Buckley, McConnell, McIntyre, and American Constitutional Law Foundation, he could not “be confident that my colleagues are wrong in thinking that five Justices will go along” with upholding this statute. However, since “Indiana contends that it is entitled to regulate all electioneering by every speaker in order to avoid drawing lines,” he did not understand “how that position can be reconciled with established principles of constitutional law” applying narrow tailoring analysis.

§ 30.4.2.3 Speech Regulating the Choice and Election of Candidates for Legislative and Executive Offices

Most cases involving the choice and election of candidates have involved some aspect of primary elections. The White Primary cases, begun during the formalist era, and continuing during the Holmesian era, established that a private political group involved in primary elections is a state actor for purposes of the 14th and 15th Amendments, as discussed at §§ 21.1.2.2-21.1.2.3. Thus, the party could not engage in racial discrimination in violation of the 14th and 15th Amendments. At some point, however, state regulation of the process of selecting candidates violates a party’s rights to free speech and political association. The problem has been to find the lines.

320 361 F.3d 349, 351-55 (7th Cir. 2004), citing, inter alia, Federal Election Comm’n v. Public Citizen, 268 F.3d 1283, 1287-91 (11th Cir. 2001) (per curiam); Gable v. Patton, 142 F.3d 940, 944-45 (6th Cir. 1998); Kentucky Right to Life, Inc. v. Terry, 108 F.3d 637, 646-48 (6th Cir. 1997); Majors, 361 F.3d at 355-58 (Easterbrook, J., dubitante).

321 See, e.g., Nixon v. Herndon, 273 U.S. 536 (1927) (statute excluding blacks from primaries was invalid racial discrimination under the 14th Amendment); Nixon v. Condon, 286 U.S. 73 (1932) (same result where the state delegated selection power to a party’s central committee, making it a state agent); Grovey v. Townsend, 295 U.S. 45 (1935) (exclusion of blacks from a political party, by its own action, was private action). In 1944, Grovey was overruled in Smith v. Allwright, 321 U.S. 649 (1944) (state delegation to party to fix the qualifications for primary election is a delegation of state functions that makes the party’s action that of the state under the 15th Amendment). Where the party sought to avoid Smith by holding a non-binding “Jaybird” primary, the Court held that such exclusion of blacks also violated the 15th Amendment. Terry v. Adams, 345 U.S. 461 (1953).
In 1975, in *Cousins v. Wigoda*, the instrumentalist Court upheld the right of a party to identify the people who comprise the party and to determine seating at its convention. The case involved application of a strict scrutiny approach, with the Court stating that the “interest of the State must be compelling” to justify state regulation of how a political party selects its delegates.

In 1981, also using a “compelling government interest” analysis, the Court held in *Democratic Party of United States v. Wisconsin* that a state could not compel a national party to seat a delegation that was bound under state law to vote for candidates according to the results of an open primary where that would violate rules of the party, which here limited participation in the delegate selection process to voters who publicly declare their party preference. Justice Powell’s dissent, joined by Justices Blackmun and Rehnquist, said that the state’s interest in open participation in primary elections outweighed the minimal interest of the party in requiring voters to identify formally with the party before voting and justified the infringement involved in requiring delegates to vote according to the results of the open primary.

The post-instrumentalist Court has returned to this issue. In *Tashjian v. Republican Party of Connecticut*, the Republican party had adopted a rule that permitted independent voters to vote in Republican primaries for federal and statewide offices. The purpose of the rule was to broaden the base of the party. However, state law required voters in any party primary to be registered members of that party. The Court held that the state law impermissibly burdened the First Amendment rights of the party and its members. For the Court, Justice Marshall noted that the Constitution in Art. I, § 4, cl. 1 grants states a broad power to prescribe the “Times, Places and Manner of holding Elections for Senators and Representatives.” However, this must be exercised within the limits established by the First Amendment. The state law did not pass strict scrutiny because the four state interests asserted in its defense were insubstantial. First, concern about possible future increases in administrative costs have never been held to constitute a compelling government interest. Second, the state interest in preventing a party from being raided by persons in sympathy with another party is not implicated. Third, party nominees will not be selected by an “amorphous” group because a statute not challenged in the case required that primary candidates have obtained at least 20% of the vote at a party convention. Finally, a state cannot very well by law protect the integrity of a party when the party itself does not want that protection. Justice Scalia, dissenting with Chief Justice Rehnquist and Justice O’Connor, said that a voter who casts a vote in a Republican primary, but refuses to register as a Republican, forms no more meaningful association with a party than a person who responds to a pollster. Nor need a state permit its primary system to be used as a way of identifying the relative popularity of potential candidates among independents.

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325 *Id.* at 234-37 (Scalia, J., joined by Rehnquist, C.J., and O’Connor, J., dissenting).
In *Tashjian* the state had sought to impose an closed primary. In 2000, however, the reverse situation came before the Court in *California Democratic Party v. Jones*. There, California’s Proposition 198 sought to impose a “blanket primary,” wherein any person entitled to vote could vote for any candidate regardless of the candidate’s political affiliation. By 7-2 vote the Court struck down Proposition 198. Justice Scalia wrote that in no area is a political association’s right to exclude more important than in selecting its nominee. Yet California’s blanket primary forces political parties to associate with those who refuse to affiliate with the party and who may be affiliated with a rival. Thus, the prospect of having a party’s nominee determined by adherents of an opposing party is a clear and present danger. Further, it is likely that candidates will be forced into taking different positions than the party – an intended outcome, as Proposition 198 was promoted largely as a measure that would ease the way for moderate problem-solvers.

Applying strict scrutiny, Justice Scalia found that none of the seven interests forwarded by the state were compelling, and that in any event the law was not narrowly tailored. He brushed aside alleged interests in electing officials who better represent the electorate, expanding debate beyond partisan concerns, and protecting interests of minorities in “safe” districts. As for fairness, he said it is less unfair not to permit nonparty members in safe districts to determine a party nominee than permitting nonparty members to hijack the party. Affording voters greater choice is a nonstarter because the avowed purpose of Proposition 198 was to produce more centrist candidates. An interest in increasing voter participation is a variation of the same theme. And, finally, any state interest in preserving the privacy of one’s party affiliation is not compelling. With respect to tailoring, all of the alleged interests could better be protected by resorting to a nonpartisan blanket primary.

Justice Kennedy, concurring, observed that the law had the improper purpose of forcing a political party to accept a candidate it may not want. He noted that if the case were decided otherwise, and the Court continued to allow legislative control of expenditures that are coordinated with candidates, the states could control political parties at two vital points in the election process.

Justice Stevens, dissenting with Justice Ginsburg, said that states have the power to require parties to use the primary format in selecting their nominees because the general election and the primary are quintessential forms of state action. The First Amendment affords protection to the internal processes of a political party, but that does not include a right to exclude nonmembers from voting in a state-required state-financed primary election. There is not much practical content to the Court’s reliance on a political party’s “right not to associate” if a registered Democrat or an independent can vote in a Republican primary merely by asking for a Republican ballot. Justice Scalia’s opinion attempted to answer this point by observing that such a voter must at least formally become a member of the party, and at that point the voter is then limited to voting for candidates of that party.

326 530 U.S. 567, 572-86 (2000). *See also* Washington State Republican Party v. Washington, 460 F.3d 1108 (9th Cir. 2006) (primary system whereby candidates’ self-identify their party status, whether or not approved by the party, violates associational rights of political parties).

327 Id. at 586-90 (Kennedy, J., concurring).

328 Id. at 590-601 (Stevens, J., joined by Ginsburg, J., dissenting).
These cases all involved serious burdens on free speech and association rights. As discussed at § 31.2.1, lesser burdens on associational rights trigger less exacting review, and a state's "important regulatory interests' will usually be enough to justify 'reasonable, nondiscriminatory restrictions.'"  

§ 30.4.2.4 Speech Regulating the Choice and Election of Judges

Speech made during the course of election campaigns by judges raise special First Amendment problems. As Justice Ginsburg has noted, this is because judges perform a function:

fundamentally different from that of the people's elected representatives. . . . Unlike their counterparts in the political branches, judges are expected to refrain from catering to particular constituencies or committing themselves on controversial issues in advance of adversarial presentation. Their mission is to decide "individual cases and controversies" on individual records, neutrally applying legal principles, and, when necessary, "stand[ing] up to what is generally supreme in a democracy: the popular will." A judiciary capable of performing this function, owing fidelity to no person or party, is a "longstanding Anglo-American tradition," an essential bulwark of constitutional government, a constant guardian of the rule of law. The guarantee of an independent, impartial judiciary enables society 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." "Without this, all the reservations of particular rights or privileges would amount to nothing." The Federalist No. 78, p. 466 (C. Rossiter ed.1961).  

The ability of the judiciary to discharge its unique role rests to a large degree on the manner in which judges are selected. The Framers sought to advance the judicial function in the federal courts through the protections of Article III, which provide for the selection of judges by the President on the advice and consent of the Senate. In many states, however, citizens choose judges directly in elections, and this poses special problems of electoral accountability versus judicial independence. As of 2005, "fourteen states [Alaska, Colorado, Connecticut, Delaware, Hawaii, Iowa, Maryland, Massachusetts, Nebraska, New Mexico, Rhode Island, Utah, Vermont, and Wyoming] and the District of Columbia use a merit selection process [where the Governor selects from a slate of judges (typically 3-5) recommended by an independent commission, with a retention election some years after service on the bench]. Another six states have opted to appoint their state judiciaries directly [with four (California, Maine, New Jersey, and New Hampshire) appointed by the Governor, while two (Virginia and South Carolina) appointed by the state legislature]. Eight states [Alabama, Illinois, Louisiana, Michigan, Ohio, Pennsylvania, Texas, and West Virginia] use partisan elections and thirteen [Arkansas, Georgia, Idaho, Kentucky, Minnesota, Mississippi, Montana, Nevada, North Carolina, North Dakota, Oregon, Washington, and Wisconsin] use nonpartisan elections. The other nine states [Arizona, Florida, Indiana, Kansas, Missouri, New York, Oklahoma, South Dakota, and


Recognizing that the election of judges poses special problems, many states have sought to preserve the integrity of its judiciary by either making judicial elections nonpartisan, or by preventing candidates for judicial office from publicly making known how they would decide issues likely to come before them as judges. In Republican Party of Minnesota v. White, the Supreme Court considered such a regulation and declared it unconstitutional. In White, the Court decided that an “announce” clause in the Minnesota Code of Judicial Conduct, as interpreted by the Minnesota Supreme Court, “prohibits a judicial candidate from stating [i.e., announcing] his views on any specific nonfanciful legal question within the province of the court for which he is running, except in the context of discussing past decisions – and in the latter context as well, if he expresses the view that he is not bound by stare decisis.” Because the clause prohibited speech on the basis of its content and burdened a category of speech that is “at the core” of First Amendment freedoms, speech about the qualifications of candidates for public office, strict scrutiny applied to the regulation.

The government argued that the announce clause served the compelling governmental interest in ensuring the impartiality, or at least the appearance of impartiality, of judges. The Court responded:

One meaning of "impartiality" in the judicial context – and of course its root meaning – is the lack of bias for or against either party to the proceeding. Impartiality in this sense assures equal application of the law. That is, it guarantees a party that the judge who hears his case will apply the law to him in the same way he applies it to any other party. This is the traditional sense in which the term is used. . . .

We think it plain that the announce clause is not narrowly tailored to serve impartiality (or the appearance of impartiality) in this sense. Indeed, the clause is barely tailored to serve that interest at all, inasmuch as it does not restrict speech for or against particular parties, but rather speech for or against particular issues. To be sure, when a case arises that turns on a legal issue on which the judge (as a candidate) had taken a particular stand, the party taking the opposite stand is likely to lose. But not because of any bias against that party, or favoritism toward the other party. Any party taking that position is just as likely to lose.

In dissent, Justice Stevens noted that the announce clause "serves the State's interest in maintaining both the appearance of this form of impartiality and its actuality." The majority acknowledged that some of the speech prohibited by the clause “may well exhibit a bias against parties – including

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333 Id. at 775-76 (citations omitted).
Justice Stevens’ example of an election speech stressing the candidate's unbroken record of affirming convictions for rape.” However, the Court noted that the question under strict scrutiny is not whether the announce clause serves this interest at all, but whether it is narrowly tailored to serve this interest as the least burdensome effective alternative, which it was not.\footnote{Id. at 777 n.7; \textit{id.} at 800-01 (Stevens, J., joined by Souter, Ginsburg & Breyer, JJ., dissenting).}

The Court then noted a second possible meaning of impartiality. The Court stated:

It is perhaps possible to use the term "impartiality" in the judicial context (though this is certainly not a common usage) to mean lack of preconception in favor of or against a particular legal view. This sort of impartiality would be concerned, not with guaranteeing litigants equal application of the law, but rather with guaranteeing them an equal chance to persuade the court on the legal points in their case. Impartiality in this sense may well be an interest served by the announce clause, but it is not a compelling state interest, as strict scrutiny requires. A judge's lack of predisposition regarding the relevant legal issues in a case has never been thought a necessary component of equal justice, and with good reason. For one thing, it is virtually impossible to find a judge who does not have preconceptions about the law. As then-Justice Rehnquist observed of our own Court: "Since most Justices come to this bench no earlier than their middle years, it would be unusual if they had not by that time formulated at least some tentative notions that would influence them in their interpretation of the sweeping clauses of the Constitution and their interaction with one another. . . . Indeed, even if it were possible to select judges who did not have preconceived views on legal issues, it would hardly be desirable to do so. "Proof that a Justice's mind at the time he joined the Court was a complete tabula rasa in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias."\footnote{Id. at 700.}

The Court then noted a third possible meaning of impartiality. The Court stated:

This quality in a judge demands, not that he have no preconceptions on legal issues, but that he be willing to consider views that oppose his preconceptions, and remain open to persuasion, when the issues arise in a pending case. This sort of impartiality seeks to guarantee each litigant, not an equal chance to win the legal points in the case, but at least some chance . . . .

Respondents argue that the announce clause serves the interest in open-mindedness, or at least in the appearance of openmindedness, because it relieves a judge from pressure to rule a certain way in order to maintain consistency with statements the judge has previously made. The problem is, however, that statements in election campaigns are such an infinitesimal portion of the public commitments to legal positions that judges (or judges-to-be) undertake, that this object of the prohibition is implausible. Before they arrive on the bench (whether by election or otherwise) judges have often committed themselves on legal issues that they must later rule upon. . . . More common still is a judge's confronting a legal issue on which he has expressed
an opinion while on the bench. Most frequently, of course, that prior expression will have
occurred in ruling on an earlier case. But judges often state their views on disputed legal issues
outside the context of adjudication – in classes that they conduct, and in books and speeches.
Like the ABA Codes of Judicial Conduct, the Minnesota Code not only permits but encourages
this. See Minn. Code of Judicial Conduct, Canon 4(B) (2002) ("A judge may write, lecture,
teach, speak and participate in other extra-judicial activities concerning the law . . ."). 336

In contrast to this analysis, some commentators have argued that statements made in campaigns for
judicial office may have a greater tendency to pressure judges to decide later cases consistent with
those comments, and that would undermine judicial independence. Such comments thus cause
special problems that do not exist in campaigns for legislative and executive branch offices, since
those office-holders are expected to act in political ways consistent with their campaign promises.
Further, the amount of money flowing to judicial elections is likely to increase given reduced
limitations on the kinds of advertisements that can be run for candidates for judicial office. Indeed,
after White, spending on judicial campaign ads more than doubled between 2002 and 2006. 337

Reflecting this difference between the two kinds of positions, Justice Stevens, joined by Justices
Souter, Ginsburg and Breyer, stated in dissent in White, “I do not agree with the unilocular, ‘an
election is an election,’ approach.” Instead, consistent with an instrumentalist focus on policy
considerations playing a meaningful role in constitutional decisionmaking, Justice Stevens stated,
“I would differentiate elections for political offices, in which the First Amendment holds full sway,
from elections designed to select those whose office it is to administer justice without respect to
persons. Minnesota's choice to elect its judges, I am persuaded, does not preclude the State from
installing an election process geared to the judicial office.” 338

Based on the natural law refusal to embrace policy considerations, and respect for precedent, this
instrumentalist approach will not likely command the support of a majority of natural law Justices
in the future, just as it did not attract a majority of natural law Justices in White. 339 Lower court
cases since White are consistent with this view. After White, a number of states amended their
Codes of Judicial Conduct to forbid judicial candidates only from making “pledges or promises” or
“committing to issues” likely to come before the court. Many states, like Minnesota, already had
such provisions in place. Such limitations have typically been ruled unconstitutional under White.

336 Id. at 778-80.

337 See generally Caufield, supra note 331, at 636-47, and sources cited therein.

338 536 U.S. at 805-06 (Ginsburg, J., joined by Stevens, Souter & Breyer, JJ., dissenting).

339 On the issue of free speech rights for judges after White, see generally David Schultz,
985 (2006); Howland W. Abramson & Gary Lee, The ABA Model Code Revisions and Judicial
For example, in *Kansas Judicial Watch v. Stout,* a district court held as overbroad a “pledges or promises” clause in the context of chilling free speech rights of candidates who feared discipline for answering candidate questionnaires distributed by political action committees asking the candidate for views on a range of “hot-button” social issues which might come before the court for review. The court noted, however, that if the clause were narrowly drawn to ban only pledges, promises, or commitments to decide an issue in a particular way, rather than limiting any pledge or promise regarding conduct in office other than the faithful and impartial performance of duties, it would likely be constitutional as directly related to advancing the compelling interest identified in *White* of ensuring judges are impartial in the third sense of “open-mindedness” in the performance of judicial duties. As the court noted, "A campaign promise to rule a certain way on a legal issue likely to come before the court is so uniquely destructive of open-mindedness and confidence in the judiciary that recusal might not satisfactorily protect the state's interest in maintaining judicial open-mindedness." As example of the difference, the court noted that it would be legitimate for a candidate to say "I promise to be tough on crime," or "I promise to uphold the First Amendment." It would violate “open-mindedness” to say, "I promise to never invalidate a search on Fourth Amendment grounds." Only the latter statement could be proscribed by a Code of Judicial Conduct.

In contrast, some state courts after *White* have upheld generic “pledges or promises” clauses against First Amendment attack to discipline judicial candidates for statements such as I pledge “to assist our law enforcement officers as they aggressively work towards cleaning up our city streets" or I promise “to help law enforcement by putting criminals where they belong – behind bars." 

Free speech rights also apply to the issue of judicial statements that can lead to recusal from the bench. As has been noted:

> Pursuant to Canon 3 (E)(1) of the ABA Model Code of Judicial Conduct, a judge must disqualify himself when his impartiality might reasonably be questioned. Thus, the question is "[w]ould a person of ordinary prudence in the judge's position knowing all of the facts known to the judge find that there is a reasonable basis for questioning the judge's impartiality?" Under this test, proof of actual bias is not required. The test can be satisfied if a reasonable person might reasonably surmise the existence of bias or prejudice under the particular circumstances of the case. Accordingly, in some instances, a judge who would, in fact, try a case fairly could be barred under the test if a reasonable person might reasonably question his ability to do so.

Although the reasonable person standard of review appears to favor litigants insofar as proof of actual judicial bias is not required, in practice, a variety of evidentiary factors tend to sustain the presumption of impartiality. Facts presented as evidence of judicial bias must be "substantial." Prejudice cannot be asserted on the basis of unsupported facts; nor do adverse

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341 In re Watson, 794 N.E.2d 1, 4-8 (N.Y. 2003); In re Kinsey, 842 So.2d 77, 85-87 (Fla. 2003).
rulings alone establish bias. Absent bad faith, erroneous rulings do not call for discipline.342

An additional evidentiary hurdle is created by the so-called “extra-judicial source” doctrine. Under this doctrine:

"[r]ulings on issues of law or attitudes concerning legal issues' do not establish bias or prejudice requiring recusal unless those rulings or attitudes are the product of bias and prejudice of an extra-judicial source." This doctrine generally limits evidence of judicial bias to external factors standing apart from the judge's participation in the case. Judicial bias, therefore, cannot typically be pled based on facts the judge learned while handling the case. Nor does judicial bias encompass the judge's views in relation to the nature of the crime for which the defendant stands charged. Judicial speech reflecting the community's views of the crime also falls beyond the parameters of bias delineated by the extra-judicial source doctrine. Accordingly, to demonstrate judicial prejudice, the litigant generally must show the bias is "personal in nature," directed toward the litigant himself, and the product of factors arising outside the judicial function.

The extra-judicial source doctrine is not, however, absolute. An exception to it is made when otherwise protected conduct or speech becomes so markedly impartial that the ability to judge fairly is demonstrably impossible. The exception will apply only in those rare instances when objection to the conduct is made at trial or the conduct was so "grossly improper" as to affect the outcome.343

In Liteky v. United States,344 the Court held that the extrajudicial source doctrine applies to 28 U.S.C. § 455(a) of the United States Code governing trials in federal courts. It has been noted, “The Court's twin assertions – that judicial rulings alone will almost never provide a sufficient basis for partiality motions, and that opinions formed on the basis of past or present courtroom events will also be insufficient unless a deep-seated antagonism or favoritism could be shown that would render fair judgement impossible – provide judges with powerful weapons with which to defend themselves from meritless attacks upon their integrity.”345 Further, even when the litigant is able to present admissible evidence of judicial impropriety, such evidence still must be strong enough to overthrow the presumption of the judge's integrity. It has been noted:

As might be expected, given the prevailing reasonable person standard, the point at which judicial conduct is deemed to have overstepped that line is extremely subjective and remarkably


343 Id. at 276-77 (citations omitted).


fluid from case to case. In addition, the presumption of integrity is so strong that, typically, a
single remark made during the course of proceedings, although acknowledged to be improper,
will not, in itself, be sufficient to require recusal. Time and again, reviewing courts note that,
while a judge's comments "would have been better left unsaid," those comments fail to make
the showing necessary to undermine the presumption of impartiality. The burden of proof in
judicial bias actions is difficult for any litigant to surmount.\textsuperscript{346}

\textsuperscript{346} Sparling, \textit{supra} note 342, at 277-78
CHAPTER 31: FREEDOM OF ASSEMBLY AND ASSOCIATION

The text of the First Amendment provides, in part, “Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” From this text, the Court has inferred a related First Amendment right of freedom of association. As stated in NAACP v. Alabama ex rel. Patterson:

Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly. . . . [F]reedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the “liberty” assured by the Due Process Clause of the Fourteenth Amendment.¹

Thus, under both a First Amendment analysis against the federal government, and a 14th Amendment analysis against state or local action, there is a right to freedom of assembly and a right to petition the government for grievances, discussed at § 31.1, and a freedom of association, discussed at § 31.2.

§ 31.1 Freedom to Assemble and Petition the Government for Grievances

Particularly beginning in the 1830s, many Southern states before the Civil War limited the rights of anti-slavery Southerners to freedom of speech and the right to petition the federal government on matters related to slavery.² Because the Supreme Court held in 1833 in Barron v. Baltimore that the Bill of Rights applied only to the federal government, as discussed at § 27.2.1 n.95, these limitations did not violate the First Amendment. As discussed at § 25.3 nn.55-58, part of the purpose behind the 14th Amendment’s Privileges or Immunities Clause was to make unconstitutional any such future limitation on free speech and the right to petition the federal government. That result is in force today as part of the First Amendment’s incorporation into the 14th Amendment Due Process Clause.

Except for the pre-Civil War actions in the South, rarely have federal, state, or local governments tried to limit the right of individuals “peaceably to assemble” or petition for “a redress of grievances.” Thus, the Court has had few opportunities to consider this right. In 1867, in Crandall v. Nevada,³ the Court did note that the Constitution protects the right of a person “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 to 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.”

¹ 357 U.S. 449, 460-61 (1958).
³ 73 U.S. (6 Wall.) 35, 44 (1867).
Following up on *Crandell* in 1873, the Court included in the *Slaughter-House Cases* this set of rights, along with others, such as the right “to demand the care and protection of the Federal government over his life, liberty, and property when on the high seas or within the jurisdiction of a foreign government,” as among the rights of United States citizenship protected by the Privileges or Immunities Clause of the 14th Amendment, discussed at § 25.3 nn.59-60. This “right to petition” is also applicable against the states as an aspect of the incorporation of the First Amendment under 14th Amendment substantive due process analysis, discussed at § 27.2.2 nn.111-12.

§ 31.2  Freedom of Association

§ 31.2.1  General Considerations

As the Court noted in *NAACP v. Alabama ex rel. Patterson*, “Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association.” Thus, persons have a right to express themselves not only by what they say, the freedom of speech, but also by what groups they join, a freedom of association. As this right is fundamental, cases involving “severe” or “substantial” or “undue” burdens on associational rights trigger strict scrutiny review, as the Court noted in *Timmons v. Twin Cities Area New Party*. However, the “freedom of association” is an unenumerated right, merely related to the textually specific right of “freedom to assemble,” discussed at § 31.1. Thus, as is true for an increasing number of unenumerated fundamental rights in the modern, post-instrumentalist era, discussed at § 27.3.3 nn.175-79, less severe burdens trigger a form of rational basis review.

As discussed at § 21.2.3 nn.64-73, this lesser form of scrutiny is best understood as a second-order rational review analysis, which adopts an overall balancing of benefits versus burdens without giving substantial deference to the government’s judgment concerning means and ends. Although the Court has used the intermediate level requirement of an “important” government interest in some of these freedom of association cases, such as *Burdick v. Takushi* and *Timmons v. Twin Cities Area New Party*, discussed at § 21.2.4.2 nn.88-93, the majority’s language in cases like *Timmons* about the government needing “important” regulatory interests, rather than merely “legitimate” interests, appeared to be completely unnecessary to the case, and to serve no useful purpose. When cataloguing the state’s interests, the majority noted in *Timmons* that “[s]tates certainly have an interest in protecting integrity, fairness, and efficiency of their ballots and election processes,” without any further finding that those interests were important or substantial. The language in the *Timmons* opinion about the state’s interests needing to be “correspondingly weighty” given the statute’s burdens underscores that the *Timmons* analysis is really a second-order rational review.

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4 83 U.S. (16 Wall.) 36 (1873).


7 *Id.* at 364.
factor balancing test focusing on the “reasonableness” of the regulation, and attempting to ensure that burdens are not “clearly excessive.” Thus, the Timmons analysis is not an intermediate scrutiny element balancing test. In particular, the Court refused in Timmons to adopt an intermediate level of scrutiny for these less than severe burdens on associational rights, leaving Justices Stevens, Souter, and Ginsburg in dissent to press for standard intermediate scrutiny in this kind of case.\(^8\)

Similarly, the Court noted in Burdick v. Takushi\(^9\) that lesser burdens on associational rights trigger less exacting review, and a state's "important regulatory interests" will usually be enough to justify "reasonable, nondiscriminatory restrictions." In Burdick, the Court weighed the "character and magnitude" of the burden the State's rule imposes on those rights against the interests the State contends justify that burden, and considers the extent to which the State's concerns make the burden necessary.” Further, the Court “rejected the petitioner’s argument” in Burdick, thus suggesting that the challenger had the burden of proof. As in Timmons, this language also mirrors a second-order rational review balance, as in the Contracts Clause case of United States Trust Co. v. New Jersey,\(^10\) discussed at § 22.1.4 nn.29-30.

Cases involving government limitations on individuals’ freedom of association can arise in numerous contexts. In a number of such cases, the freedom of association right will be paired with another constitutional right, such as the Equal Protection Clause and the freedom of association in the ballot access cases, discussed at § 26.5.3, or the freedom of speech versus compelled association, as in using union fees or fees on businesses to promote certain kinds of speech, discussed at § 29.6.2.1, or freedom of speech and association regarding campaign finance, discussed at § 30.4.2. In addition, the freedom of association can come into conflict with other government policies, such as eliminating discrimination against certain groups of people, discussed at § 31.2.2, or regulating groups that may pose a threat of violent action or other harmful conduct, discussed at § 31.2.3, or regulating political parties to help ensure free and fair elections, discussed at § 31.2.4.\(^11\)

§ 31.2.2 Policies Aimed at Eliminating Discrimination

The basic principles regarding limits on government power to pursue an anti-discrimination policy by imposing membership requirements on private groups were developed during the instrumentalist era. In 1984, in Roberts v. United States Jaycees,\(^12\) the plaintiffs contended that the exclusion of

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\(^8\) Id. at 383 n.2 (Souter, J., dissenting); id. at 377-78 (Stevens, J., joined by Souter & Ginsburg, JJ., dissenting).


\(^12\) 468 U.S. 609, 612-17 (1984).
women from the Jaycees violated the Minnesota Human Rights Act. That Act prohibited discrimination on the basis of gender by a business offering goods or services to the public. The Court held that the Constitution was not violated by application of the Act to the Jaycees.

In deciding the case, the Court recognized that the freedom of association is a fundamental right. Justice Brennan said that two forms of association were protected by the First Amendment: “intimate association,” a phase of personal liberty, and “expressive association,” a meeting together for First Amendment activities such as speech, assembly, petition for redress of grievances, and the exercise of religion. In Roberts, there had been no burden on the freedom of intimate association, since the Jaycees were neither small nor selective. However, there was a burden on the freedom of expressive association that required application of a strict scrutiny approach.\(^\text{13}\)

In applying strict scrutiny, Justice Brennan noted that Minnesota had a “compelling interest in eradicating discrimination against its female citizens.” The Act banning exclusion of women from the Jaycees was directly related to advancing that interest. Regarding narrow tailoring, Justice Brennan stated that the record did not demonstrate any serious burdens on the male members’ freedom of expression. He said there was no basis in the record “for concluding that admission of women as full voting members will impede the organization’s ability to engage in these protected activities or to disseminate its preferred views.” Thus, the statute was not unconstitutionally oppressive. Further, the statute was not unconstitutionally overinclusive since there were no less burdensome alternatives that would effectively advance the state’s compelling interest in eradicating discrimination against women. This justified “the impact that application of the statute to the Jaycees may have on the male members’ associational freedom.”\(^\text{14}\) The requirement under First Amendment review to engage in both oppressiveness/restrictiveness analysis and analysis for overinclusiveness is discussed at § 29.4.4.3 nn.149-53.

Similar cases have yielded similar results in the post-instrumentalist era. For example, in 1987, the Court held in Board of Directors of Rotary International v. Rotary Club of Duarte\(^\text{15}\) that requiring the admission of women in local rotary clubs did not interfere with “intimate association” because of the organization’s size, purpose, limited selectivity in choosing members, and the fact that many of their activities, including service activities, take place in the presence of strangers. Regarding the freedom of “expressive association,” rotary clubs do not take positions on public questions as a matter of policy. Even if some infringement resulted, it was justified by the compelling interest of eliminating discrimination against women.

The post-instrumentalist Court has faced cases where the individuals’ interest in association was greater, and thus strict scrutiny was harder for the state to meet. This difference was highlighted in

\(^{13}\) Id. at 617-23.

\(^{14}\) Id. at 623-29.

\(^{15}\) 481 U.S. 537, 544-49 (1987).
Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston.\textsuperscript{16} In this 1995 case, the Court held that private citizens who organized a parade could not be required to include among the marchers a gay, lesbian, and bi-sexual group imparting a message that the organizers did not wish to convey. The Supreme Judicial Court of Massachusetts had held that the parade was a public accommodation within the meaning of the state's anti-discrimination statute, that the plaintiffs were excluded in violation of the statute because of their sexual orientation, and that the First Amendment did not protect the defendants because it was not possible to discern any specific expressive purpose in the parade. The Supreme Court disagreed with this last conclusion and held that the First Amendment freedom of association did protect the defendants.

For a unanimous Court, Justice Souter said that not many parades are beyond the realm of expressive activity. A “narrow, succinctly articulable message” is not a condition of constitutional protection. It is enough to constitute expressive activity if the marchers “are making some sort of collective point.” Further, one who is speaking privately, through a parade, is entitled to select components much as do newspaper editors. Here, there was no intent or effect to exclude homosexuals as such. Thus, the compelling interest in eradicating discrimination in membership, critical to the decisions in \textit{Roberts} and \textit{Rotary Club}, was not involved here. Instead, the disagreement went to the admission of a separate gay, lesbian, and bisexual parade unit marching under its own banner. The Massachusetts court, in effect, had declared the sponsor's speech to be a public accommodation. However, that violated the parade organizer's autonomy to choose the content of its own message, as it chose to do by excluding the homosexual parade unit.\textsuperscript{17} The Court distinguished \textit{Turner Broadcasting}, discussed at § 30.3.1 nn.210-11, in which cable operators were required to set aside some channels for designated broadcast signals. In that case, there was little risk that viewers would assume that messages carried on the system were endorsed by the cable operator, and the government's interest was not in altering speech, but in the content-neutral reason of survival of speakers. For this reason, the Court applied intermediate scrutiny in \textit{Turner Broadcasting}, and not strict scrutiny review.

Similar protection for a private organization to control its message was given in \textit{Boy Scouts of America v. Dale}.\textsuperscript{18} The Boy Scouts had revoked the membership of James Dale upon learning that he was an avowed homosexual and gay rights activist. The New Jersey Supreme Court held that the state’s public accommodations law required the Scouts to admit Dale. The Court held 5-4 that this violated the Boy Scout’s First Amendment right of expressive association. A dissent by three Justices indicated that they too would have protected the Scouts had the Scouts shown an expressive message that would be burdened by applying to them the state’s public accommodations law.

For the majority, Chief Justice Rehnquist said that forcing a group to accept certain members infringes the group’s freedom of expressive association if “the presence of that person affects in a


\textsuperscript{17}  \textit{Id.} at 568-81.

significant way the group’s ability to advocate public or private viewpoints.” Applying that test, he accepted the Boy Scout’s assertion that its mission is to serve others by helping to instill values in young people and that it teaches that homosexual conduct is not morally straight. The Chief Justice said it was not necessary that every member of a group agree on every issue in order for the group’s policy to be expressive association. “The Boy Scouts takes an official position with respect to homosexual conduct, and that is sufficient for First Amendment purposes.” Finally, the Chief Justice drew by analogy on *Hurley*, saying that the interests embodied in the public accommodations law do not justify a severe intrusion on the right to freedom of expressive association.

A dissent by Justice Souter, joined by Justices Ginsburg and Breyer, indicated that in their view the Scouts had not made out an expressive association claim because the Scouts had failed to make sexual orientation the subject of unequivocal advocacy. These three Justices admitted that applying an anti-discrimination statute to require a group to accept an individual might in some cases so modify, muddle, or frustrate the group’s advocacy as to violate its expressive association rights. And Justice Souter added, “While it is not our business here to rule on any such hypothetical, it is at least clear that our estimate of the progressive character of the group’s position will be irrelevant to the First Amendment analysis if such a case comes to us for decision.”

Justice Stevens’ dissent, joined by Justices Souter, Ginsburg, and Breyer, tracked in part Justice Souter’s dissent. Justice Stevens concluded that the state law did not impose any serious burdens on the Scouts and did not force the Scouts to communicate any message that the Scouts do not wish to endorse. He did not find in Scout policy statements any clear, consistent, and unequivocal position on homosexuality. The case is different than *Hurley*, he said, because Dale’s inclusion in the Scouts sends no cognizable message to the Scouts or to the world. In addition, Justice Stevens went beyond Justice Souter’s dissent by saying that unfavorable opinions about homosexuals have ancient roots and have caused serious and tangible harm that can only be aggravated by the creation of a constitutional shield for a policy that is itself the product of an habitual way of thinking about strangers. This more instrumentalist, policy-oriented position was a departure from the statement in Justice Souter’s dissent that in terms of associational rights “the progressive character of the group’s position will be irrelevant to the First Amendment analysis.”

Following *Dale*, a number of state and municipal governments responded to the Boy Scout’s clearer position on homosexuality by refusing the Boy Scouts access to public facilities, rescinding

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19 *Id.* at 648.

20 *Id.* at 655.

21 *Id.* at 701-02 (Souter, J., joined by Ginsburg & Breyer, JJ., dissenting).

22 *Id.* at 665-78, 693-98 (Stevens, J., joined by Souter, Ginsburg & Breyer, JJ., dissenting).

23 *Compare id.* at 699-700 (Stevens, J., joined by Souter, Ginsburg & Breyer, JJ., dissenting) *with id.* at 702 (Souter, J., joined by Ginsburg & Breyer, JJ., dissenting).
outstanding contractual relations, revoking privileges, or barring the Boy Scouts from participating in state-sponsored charitable programs. Numerous private organizations also retracted existing funding or have refused to contribute to the Scouts, including at least 50 United Way chapters that stopped making financial contributions. As a matter of constitutional law, public entities, such as local public schools, would need to satisfy a strict scrutiny approach to justify excluding the Scouts from equal access to public facilities if the reason for denying the Scouts’ access was viewpoint discrimination based on the Scouts’ position regarding homosexuality. An interest in ensuring compliance with local or state anti-discrimination laws would be a compelling interest for purposes of strict scrutiny. Under the underinclusiveness aspect of strict scrutiny, however, discussed at § 26.1.1.2 n.56, the government would have to show that all groups engaging in discriminatory practices in violation of government policy were being banned from access, not just the Scouts, or else the special burden placed on the Scouts would be the result of unnecessary underinclusiveness, and thus not be the least discriminatory alternative. In some cases, the Scouts have successfully challenged restrictions on access to public facilities on this ground.

In contrast, where school administrators provide practical support for Boy Scout recruitment activities during school time for which student attendance and attention are mandatory, some courts have concluded that local schools boards have engaged in unlawful discrimination based on state or local anti-discrimination policies. In other cases, courts have held that denial of access was to discourage the harmful discriminatory conduct of the Boy Scouts, and not to suppress expressive association, and therefore have concluded that such action was viewpoint neutral. Where the conduct took place in a government-owned non-public forum, such as a government sponsored charitable subscription program, only rational review was triggered, as is typically for non-viewpoint discrimination in a non-public forum, discussed at § 29.2 n.67 & Table 29.2. Rational


25 See, e.g., Boy Scouts of America, South Florida Council v. Till, 136 F. Supp. 2d 1295, 1303-04, 1311 (S.D. Fla., 2001). Cf. Christian Legal Society v. Walker, 453 F.3d 853, 861-67 (7th Cir. 2006) (applying strict scrutiny based on viewpoint discrimination, preliminary injunction granted against public law school that revoked Christian Legal Society’s official student organizational status for refusing membership to practicing homosexuals in violation of school’s anti-discrimination policy banning discrimination on grounds of sexual orientation, in part because the Muslim Students’ Association and Adventist Campus Ministries were recognized as official student organizations despite their restricted memberships); Jana-Rock Construction, Inc. v. New York State Dep’t of Economic Develop., 438 F.3d 195, 207-09, 211-14 (2nd Cir. 2006) (“unnecessarily underinclusive” analysis needing to be done regarding whether it is constitutional to exclude persons of Portuguese and Spanish descent in affirmative action program for Hispanics, defined as Latin American Hispanics), discussed at § 26.2.1.4.C n.235.


27 See, e.g., Boy Scouts of America v. Wyman, 335 F.3d 80, 93-98 (2nd Cir. 2003).
review has also been applied when the government denied funding or subsidies to Boy Scout groups,28 based on Rust v. Sullivan, discussed at § 29.3.2 nn.79-80.  

In areas outside the specific context of the Boy Scouts and homosexuality, the doctrine of Boy Scouts of America v. Dale may have wider applicability. One author has noted, “The media has treated Dale mainly as a battle in the ongoing Kulturkampf between gay rights activists and their conservative opponents. However, the underlying moral rectitude of the [Scouts’] exclusion of homosexuals was not legally relevant in Dale. Rather, Dale was about the right of non-profit, private, expressive organizations of all ideological stripes – including church schools . . . – to set their membership and employment rules free from government interference.”29 This author then concluded that district court precedents that a Christian school may not fire an unmarried teacher for becoming pregnant, contrary to Christian doctrine on sexual activity outside of marriage, should be decided differently after Dale.30

§ 31.2.3 Policies Concerning Membership in Groups Alleged to Pose a Threat of Violent Action or Other Harmful Conduct

The Court has considered a number of cases involving government regulations that sanction individuals for membership in groups alleged to pose a threat of violent action. Where the group engages in activity that involves “unprotected speech,” such as advocacy of imminent lawless action, discussed at § 30.1.1.1, membership in such a group is “unprotected” under a freedom of association analysis. As the Court stated in Scales v. United States,31 “[T]he advocacy with which we are here concerned is not constitutionally protected speech, and . . . to promote such advocacy, albeit under the aegis of what purports to be a political party, is not such association as is protected by the First Amendment. We can discern no reason why membership, when it constitutes a purposeful form of complicity in a group engaging in this same forbidden advocacy, should receive any greater degree of protection from the guarantees of that Amendment.”

Where a threat of lawless action is not imminent, the First Amendment applies. During the Cold War, a number of these cases involved membership in the Communist Party. During the Holmesian era, inquiry into membership by the government tended to be upheld. For example, in 1951, in

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28 Evans v. City of Berkeley, 40 Cal. Rptr. 3d 205, 211-17 (Cal. 2006).
Garner v. Board of Public Works of the City of Los Angeles, the Court held that a city could require its employees by affidavit to disclose their past or present membership in the Communist Party.

The outcome of these cases changed during the instrumentalist era. The instrumentalist-era Court required a finding that the individual shared in the illegal intent for the government to be able to regulate. For example, in 1967, in Keyishian v. Board of Regents, the Court struck down as unconstitutional a conviction for membership in the Communist Party because there was no proof that the individual knew of any illegal objectives of the Party or intended to further them. Relying on Garner, four Holmesian Justices dissented in Keyishian: Justices Clark, joined by Justices Harlan, Stewart, and White. In United States v. Robel, the Court made it clear that mere “membership” in such a group was not enough to satisfy a strict scrutiny approach. The government would have to show that the individual actively affiliated with the group, knowing of its illegal activities, and had a specific intent to promote those ends. By this time, Justice Clark had been replaced on the Court by Justice Marshall, and Justice Stewart joined the majority opinion, likely based on his great respect for precedent, noted at § 10.4 n.90. That left only Justices White and Harlan in dissent.

More recently, lower federal courts have upheld federal statutes passed after 9-11 making it a crime to provide “material support or resources to a foreign terrorist organization” so designated by the federal government, despite the lack of a specific intent element regarding the terrorist group’s goals. The courts have held that these statutes do not directly ban “expressive association,” but rather the “conduct of providing material support,” and thus should be analyzed as content-neutral regulations based on the harmful secondary effects of such conduct under O’Brien’s intermediate scrutiny approach, discussed at § 29.4.4.1 nn.119-20. Under such intermediate scrutiny, the statutes have been upheld as constitutional as substantially related to curbing the spread of international terrorism, and not substantially more burdensome than necessary.

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33 385 U.S. 589, 605-10 (1967); id. at 623-25 (Clark, J., joined by Harlan, Stewart & White, JJ., dissenting).
34 389 U.S. 258, 264-68 (1967); id. at 268 (Marshall, J., took no part in the consideration or decision of this case); id. at 282-88 (White, J., joined by Harlan, J., dissenting).
35 See, e.g., United States v. Afshari, 426 F.3d 1150, 1159-62 (9th Cir. 2005), rehearing en banc denied, 446 F.3d 915, 915 (2006); United States v. Hammoud, 381 F.3d 316, 328-31 (4th Cir. 2004). But see Afshari, 446 F.3d at 915-22 (Kozinski, J., joined by Pregerson, Reinhardt, Thomas & Paez, J.J., dissenting from denial of rehearing en banc) (ban on giving money should be viewed as a prior restraint on speech, and analyzed under the strict scrutiny standard of Freedman v. Maryland for prior restraints, discussed at § 29.6.1.1 nn.215-17).
Where no such plausible content-neutral reason is apparent from the facts, a strict scrutiny approach is used to determine the validity of the government regulation. For example, in *Shelton v. Tucker*, the question was whether the state of Arkansas could ask its teachers to disclose every single organization with which the teacher had been associated over a five-year period. The Court noted that the “breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose,” and, applying a least restrictive alternative approach, held the regulation unconstitutional because the state’s end in terms of “fitness and competency of its teachers” could “be more narrowly achieved.” In *NAACP v. Button*, the Court considered a Virginia statute that made it a crime for a person to advise another that his legal rights have been infringed and to refer him for assistance to a particular attorney or group of attorneys, such as the legal staff of the Virginia conference of the NAACP. Under a “compelling government interest” strict scrutiny approach, the Court held that such a statute violated the freedom of association of the NAACP, with the Court stating that despite Virginia's interest “in regulating the traditionally illegal practices of barratry, maintenance and champerty,” the government must regulate with “narrow specificity” and “precision of regulation,” which this statute did not.

An example of a regulation that might survive strict scrutiny would be a regulation merely requiring faculty at private universities to affirm allegiance to the Constitution. For example, in *Knight v. Board of Regents*, a three-judge district court held that a state does not violate the First Amendment by requiring teachers at private schools to support the governmental systems which shelter and nourish the institutions in which they teach. One author has noted that, as of 2003, 14 states required loyalty oaths of teachers to uphold the Constitution, with 7 of those oaths applying to teachers at private schools in addition to public schools. From that author’s perspective, such oaths applied to teachers at private schools should be viewed as unconstitutional under strict scrutiny as not being directly related to controlling illegal conduct. For oaths taken by public school teachers, the *Pickering* third-order rational review test would apply for speech by government employees, discussed § 30.2.2.1, giving the government a better chance of success, as in *Ohlson v. Phillips*.


Where the burden on a right of association is viewed as slight, as for a rule limiting the rights of prisoners to receive visitors, the Supreme Court indicated in *Overton v. Bazzetta* that the proper standard of review is the second-order rational review approach used in *Turner v. Safley*. In an unusual case, the Second Circuit held in *Church of American Knights of the Ku Klux Klan v. Kerik* that a ban on persons wearing masks at public gatherings, based on a concern with public safety and reducing criminal or violent activity, with an exception for masquerades, did not implicate the First Amendment at all. The court viewed the wearing of a mask as adding nothing to the expressive conduct of wearing a hood and robe. Probably the better analysis would be to view the regulation as either a minimal burden on associational rights triggering second-order rational review, or as a burden on speech in a public forum based on content-neutral concerns of reducing criminal activity, triggering an intermediate scrutiny approach, as analyzed by the district court in the case.

§ 31.2.4 Policies Concerning Elections

Cases involving burdens on associational rights also take place in the context of regulations of political parties and elections. Where the burden is great, strict scrutiny applies. For example, in *California Democratic Party v. Jones*, the Court was confronted with a referendum provision that converted the state's primary election from a closed primary to a blanket primary in which voters could vote for any candidate regardless of voter's or candidate's party affiliation. The Court stated, “We can think of no heavier burden on a political party's associational freedom. Proposition 198 is therefore unconstitutional unless it is narrowly tailored to serve a compelling state interest.”

On the other hand, lesser burdens on associational rights trigger less exacting review. As the Court noted in *Burdick v. Takushi*, a state's "important regulatory interests" will usually be enough to justify “reasonable, nondiscriminatory restrictions." As noted at § 31.2.1 nn.7-9, this involves application of a second-order kind of rational review. The regulation at issue in *Burdick* involved a challenge to the state of Hawaii’s absolute ban on write-in voting. The Court concluded that “in light of the adequate ballot access afforded under Hawaii's election code, the State's ban on write-in voting imposes only a limited burden on voters' rights to make free choices and to associate politically through the vote.” Thus, the Court applied this lower level of scrutiny.

On the merits, the Court then concluded that the state's legitimate interests in banning write-in voting at both the primary and the general election outweighed the petitioner's limited interest to choose...
his preferred candidate through a write-in ballot. The Court noted, "Hawaii's interest in "avoid[ing] the possibility of unrestrained factionalism at the general election" provides adequate justification for its ban on write-in voting in November. . . . The prohibition on write-in voting is a legitimate means of averting divisive sore-loser candidacies." In addition to this interest, Hawaii also supported its ban on write-in voting as a means of enforcing nominating requirements, combating fraud, and "fostering informed and educated expressions of the popular will." Hawaii also asserted that its ban on write-in voting at the primary stage is necessary to guard against "party raiding," which involved "the organized switching of blocs of voters from one party to another in order to manipulate the outcome of the other party's primary election." The Court noted, "Hawaii's system could easily be circumvented in a party primary election by mounting a write-in campaign for a person who had not filed in time or who had never intended to run for election. . . . The State has a legitimate interest in preventing [this], and the write-in voting ban is a reasonable way of accomplishing this goal."45

A less than undue burden was also found in Clingman v. Beaver.46 The Oklahoma state law here prevented a political party form inviting registered voters of other parties to vote in its primary, but permitted voters registered as independents to vote in the primary. Because of the “independent” option, the law was viewed as a less than undue burden on political associational rights, and upheld, consistent with Burdick, as being supported by legitimate interests in preserving political parties as viable and identifiable groups, retaining the importance of party affiliation, and minimizing the effects of party-splintering. In dissent, Justice Stevens, joined by Justices Souter and Ginsburg, viewed the state law as having a substantial burden both on the individual’s right to vote for the candidate of the voter’s choice and on the political party’s right to open its primary to registered voters of other others, as the Libertarian Party wished to do in this case. For them, the state law was unconstitutional under strict scrutiny.47

Additional election and ballot access cases are discussed at § 26.2.1.5 (racial discrimination and redistricting of election districts under the Equal Protection Clause); § 26.5.3 (right to vote and ballot access cases under the Equal Protection Clause); § 30.4.2.2 (freedom of speech cases involving disclosure requirements and anonymous advocacy in the context of election campaigns); and § 30.4.2.3 (freedom of speech cases involving regulation of political parties).

45 Id. at 439-42.

46 544 U.S. 581, 590-97 (2005); id. at 598-99 (O'Connor, J., joined by Breyer, J., concurring in part and concurring in the judgment) (“Oklahoma's semiclosed primary law” imposes “only a modest, nondiscriminatory burden on respondents' associational rights,”and “this burden is justified by the State's legitimate regulatory interests”); id. at 608-10, 617-18 (Stevens, J., joined by Souter & Ginsburg, JJ., dissenting) (Oklahoma’s law “diminishes the value of two important rights protected by the First Amendment: the individual citizen's right to vote for the candidate of her choice and a political party's right to define its own mission”; “it is not a mere ‘burden’; it is a prohibition,” which should trigger a strict scrutiny, “compelling government interest” analysis).
CHAPTER 32: THE RELIGION CLAUSES OF THE FIRST AMENDMENT

The First Amendment includes two clauses dealing with religion: the Establishment Clause and the Free Exercise Clause. As discussed at § 32.1, the Establishment Clause requires some level of separation of church and state. The amount of separation required varies according to the Justices’ decisionmaking style. As discussed at § 32.2, under the Free Exercise Clause, government actions discriminating against sincerely held religious beliefs trigger strict scrutiny. Non-discriminatory government regulations burdening religious practices trigger only minimum rational review.

§ 32.1 The Establishment Clause

§ 32.1.1 Introduction

The Establishment Clause of the First Amendment provides that “Congress shall make no law respecting an establishment of religion.” Although this literally creates only a congressional barrier, the Establishment Clause has been incorporated into the 14th Amendment’s Due Process Clause, like every other provision of the First Amendment, and thus imposes the same limits on states as on the federal government. As with the freedom of speech and the press, discussed at § 27.2.2 nn.111-12, this incorporation occurred for the Establishment and Free Exercise Clauses during the 1920s.¹

Under the Establishment Clause, four different tests have been used to find an “establishment of religion.” They are: (1) whether the government action has a sole purpose to advance religion, or a principal or primary effect to advance religion, or creates an excessive entanglement between church and state, the so-called Lemon test; (2) whether an objective observer would think the government action was an endorsement of religion; (3) whether the government action is coercing or proselytizing religion; and (4) whether the government action is an unreasonable accommodation of religion given our Nation’s history and traditions. While not a perfect match for the Justices’ views, in general the Lemon test reflects a liberal instrumentalist approach, the “endorsement” test reflects a natural law approach, the “coercion or proselytizing” test reflects a Holmesian approach, and the “history and traditions” test reflects a formalist approach.

As will be seen below, the Lemon test is still supported by the liberal instrumentalist Justices currently on the Court, Justices Stevens, Ginsburg, and Breyer, as the precedents decided under the Lemon test predominantly reflect the liberal policy of a strong separation of church and state. Justice O’Connor advocated replacing the Lemon test with an “endorsement” test, which Justice Souter is willing to follow. Justice Kennedy has focused more on the “coercion” or “proselytizing” of religion. Chief Justice Rehnquist, and Justices Scalia and Thomas, have wanted the analysis to focus more on specific historical examples of accommodation between church and state at the time the Constitution was ratified, as well as specific legislative and executive traditions since ratification. That will likely be the approach of Chief Justice Roberts and Justice Alito.

§ 32.1.2 The Development of Establishment Clause Doctrine

§ 32.1.2.1 The Natural Law Approach

In his treatise, Commentaries on the Constitution of the United States,² published in 1833, Joseph Story wrote of the First Amendment: "Probably at the time of the adoption of the constitution, and of the amendment to it, now under consideration, the general, if not the universal sentiment in America was, that Christianity ought to receive encouragement from the state, so far as was not incompatible with the private rights of conscience, and the freedom of religious worship. An attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation." Story continued: "The real object of the amendment was, not to countenance, much less to advance, Mahometanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment, which should give to a hierarchy the exclusive patronage of the national government. It thus cut off the means of religious persecution, (the vice and pest of former ages), and of the subversion of the rights of conscience in matters of religion, which had been trampled upon almost from the days of the Apostles to the present age."

This view of religious freedom reflects a Stage 3 concrete customs and traditions approach. Such a Stage 3 vision is limited to the concrete prevailing attitudes of the times, as discussed at § 15.4.1 nn.50-58. However, even Justice Story understood that the Establishment Clause went far beyond responding to this limited vision. He noted in his treatise, "It was under a solemn consciousness of the dangers from ecclesiastical ambition, the bigotry of spiritual pride, and the intolerance of sects, thus exemplified in our domestic as well as in foreign annals, that it was deemed advisable to exclude from the national government all power to act upon the subject . . . . Thus, the whole power over the subject of religion is left exclusively to the State governments, to be acted upon according to their own sense of justice and the State constitutions; and the Catholic and the Protestant, the Calvinist and the Arminian, the Jew and the Infidel, may sit down at the common table of the national councils without any inquisition into their faith or mode of worship." Justice Story added, "But this alone would have been an imperfect security, if it had not been followed up by a declaration of the right of the free exercise of religion, and a prohibition . . . of all religious tests."³

He could also have noted that the official presidential oath of office provides, in Article II, §1, cl. 8, “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.” Underscoring an intent to exclude religion from the national government’s life, there is no “so help me God” final clause to the oath, despite the wide-spread use of that phrase then, as now, to swear in witnesses at trials and in other oaths of the time. In a later edition of Story’s Commentaries, the editor added the following remark, viewed as consistent with Story’s beliefs:

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³ Id. § 1873. For matters of state constitutional law, Justice Story did think states could be permitted to engage in various kinds of aid to religion, as long as that was permitted under their state Constitutions, as indicated in Terrett v. Taylor, 13 U.S. (9 Cranch) 43, 48-55 (1815) (Virginia law).
“[M]any regard it as a matter of serious concern that the Constitution does not expressly recognize the Supreme Being, or the fact that the nation is Christian, and are in favor of an amendment which shall embrace such recognition. The subject, however, appears as yet but slightly to influence the public mind.”\(^4\) Whether or not one regards this as a matter of serious concern, it is clear that even strong supporters of Christianity believed that to be consistent with Story’s views a constitutional amendment would be needed to commit the United States to the existence of a Supreme Being or to the country being a Christian nation. Even Justice Douglas’ famous dictum in Zorach v. Clauson\(^5\) that “we are a religious people whose institutions presuppose a Supreme Being” was stated in the context of applying a “strict neutrality” approach toward religion, and was used only to indicate that government did not have to be “hostile” toward religion to comply with the Establishment Clause.

This vision of strict government neutrality toward religion is reflective of a Stage 6 approach to religious freedom. As Justice Stevens noted in Wallace v. Jaffree,\(^6\) “Just as the right to speak and the right to refrain from speaking are complementary components of a broader concept of individual freedom of mind, so also the individual’s freedom to choose his own creed is the counterpart of his right to refrain from accepting the creed established by the majority. At one time it was thought that this right merely proscribed the preference of one Christian sect over another, but would not require equal respect for the conscience of the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism. But when the underlying principle has been examined in the crucible of litigation, the Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all. This conclusion derives support not only from the interest in respecting the individual’s freedom of conscience, but also from the conviction that religious beliefs worthy of respect are the product of free and voluntary choice by the faithful, and from recognition of the fact that the political interest in forestalling intolerance extends beyond intolerance among Christian sects – or even intolerance among ‘religions’ – to encompass intolerance of the disbeliever and the uncertain.”

At the time of its ratification, the Establishment Clause prevented the federal government from interfering with the established churches in many states, typically Anglican or Congregationalist, as that would have been a law “respecting” the establishment of religion. Those state establishments all disappeared by the 1830s on freedom of religion grounds.\(^7\) When the Establishment Clause became applicable against the states through incorporation into the 14\(^{th}\) Amendment, the same vision of strict neutrality of government toward religion became applicable against the states. The Court noted in Everson v. Board of Education\(^8\) that the Establishment Clause "requires the state to be a neutral in its relations with groups of religious believers and non-believers." In School District of

\(^4\) Story, supra note 2, at §§ 1879 n.(a) (5\(^{th}\) ed. 1891) (Melville M. Bigelow, ed.).


\(^8\) 330 U.S. 1, 18 (1947).
Abington Township v. Schempp, the Court stated, "The place of religion in our society is an exalted one, achieved through a long tradition of reliance on the home, the church and the inviolable citadel of the individual heart and mind. We have come to recognize through bitter experience that it is not within the power of the government to invade that citadel, whether its purpose or effect be to aid or oppose, to advance or retard. In the relationship between man and religion, the State is firmly committed to a position of neutrality."

A similarly broad principle of neutrality toward religion was expressed by James Madison, the principal drafter of the Establishment Clause. As the Court noted in Wallace v. Jaffree, in his "Memorial and Remonstrance Against Religious Assessments, 1785," James Madison wrote, in part:

1. Because we hold it for a fundamental and undeniable truth, “that Religion or the duty which we owe to our Creator and the [Manner of discharging it, can be directed only by reason and] conviction, not by force or violence.” The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right. It is unalienable; because the opinions of men, depending only on the evidence contemplated by their own minds, cannot follow the dictates of other men: It is unalienable also; because what is here a right towards men, is a duty towards the Creator. It is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him. . . . We maintain therefore that in matters of Religion, no man's right is abridged by the institution of Civil Society, and that Religion is wholly exempt from its cognizance. . . .

3. Because, it is proper to take alarm at the first experiment on our liberties. We hold this prudent jealousy to be the first duty of citizens, and one of [the] noblest characteristics of the late Revolution. . . . We revere this lesson too much, soon to forget it. Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects?

Madison held these views his whole life. Quoting from letters of Madison, a court noted in 1872:

“Religion is not within the purview of human government.” And again [Madison] says, “Religion is essentially distinct from human government, and exempt from its cognizance. A connection between them is injurious to both. There are causes in the human breast which insure the perpetuity of religion without the aid of law.”


The history surrounding the drafting of the Establishment Clause supports this vision of strict neutrality. As Justice Souter noted in *Lee v. Weisman*, joined by Justices Stevens and O’Connor:

What is remarkable is that, unlike the earliest House drafts or the final Senate proposal, the prevailing language is not limited to laws respecting an establishment of "a religion," "a national religion," "one religious sect," or specific "articles of faith." The Framers repeatedly considered and deliberately rejected such narrow language and instead extended their prohibition to state support for "religion" in general.

Implicit in their choice is the distinction between preferential and nonpreferential establishments, . . . . [T]he Framers were vividly familiar with efforts in the colonies and, later, the States to impose general, nondenominational assessments and other incidents of ostensibly ecumenical establishments. . . . . The Virginia Statute for Religious Freedom, written by Jefferson and sponsored by Madison, captured the separationist response to such measures. Condemning all establishments, however nonpreferentialist, the Statute broadly guaranteed that "no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever," including his own . . . .

What we thus know of the Framers’ experience underscores the observation of one prominent commentator, that confining the Establishment Clause to a prohibition on preferential aid "requires a premise that the Framers were extraordinarily bad drafters – that they believed one thing but adopted language that said something substantially different, and that they did so after repeatedly attending to the choice of language." We must presume, since there is no conclusive evidence to the contrary, that the Framers embraced the significance of their textual judgment.12

Similarly, Professor Nadine Strossen has observed:

Justice Souter reviewed the substantial evidence that the framers did consider language that would have barred only government aid to specific sects, but then deliberately rejected these narrower formulations, in favor of the open-ended, broad prohibition in the Establishment Clause. Justice Souter's opinion in *Lee v. Weisman* also pointed to another problem with the nonpreferentialist version of the Establishment Clause . . . . As Justice Souter observed: “[N]onpreferentialism requires some distinction between ‘sectarian’ religious practices and those that would be, by some measure, ecumenical enough to pass Establishment Clause muster. [B]y requiring the enquiry, nonpreferentialists invite the courts to engage in comparative theology. I can hardly imagine a subject less amenable to the competence of the federal judiciary, or more deliberately to be avoided where possible.”13

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Such a view requiring strict neutrality regarding religion by government does not mean that all expressions by government officials of their belief in a Supreme Being are unconstitutional, or that all statements directed to them in their public capacities are unconstitutional. Such individuals, after all, have their own free exercise rights. Thus, statements addressed to government officials to aid them in the performance of their public duties, such as beginning each day’s legislative session with a prayer, as in *Marsh v. Chambers*, discussed at § 32.1.2.3 n.49, or beginning Supreme Court sessions with the phrase “God Save this Honorable Court,” are not unconstitutional. Personal statements by the President, such as “God Bless America” at the end of presidential speeches, also do not create an Establishment Clause problem.

By the same token, the oath most persons take at trial to “tell the truth, the whole truth, and nothing but the truth, so help me God” does not create an Establishment Clause problem, since the government does not require the individual to add the phrase “so help me God” if the individual objects. Similarly, as Justice O’Connor noted, concurring in *Elk Grove Unified School District v. Newdow*,14 “the oaths of judicial office, citizenship, and military and civil service all end with the (optional) phrase ‘[S]o help me God.’ See 28 U.S.C. § 453; 5 U.S.C. § 3331; 10 U.S.C. § 502; 8 CFR § 337.1.” The phrase mentioning God must be optional, however. In *Torcaso v. Watkins*,15 a case involving a Maryland statute that required an individual to profess a belief in God to become a notary public, a unanimous Supreme Court held, “We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a person ‘to profess a belief or disbelief in any religion.’ Neither [a State nor the Federal Government] can constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs.”

In contrast to permissible expressions regarding personal faith, government statements addressed to the public, such as posting the Ten Commandments in public schools or public courtrooms, do implicate the principle of strict neutrality toward religion by raising the specter of government endorsement of religion. This requirement of “strict neutrality” is reflective of the Lockean concept of “liberty of conscience” in religious matters. Consistent with the views of Justice Story and James Madison regarding the dangers of mixing government and religion, cited at § 32.1.2.1 nn.2-11, it has been noted that there was wide-spread agreement in 18th-century America among Puritans, Baptists, Enlightened Deists, and Civic Republicans for the Lockean concept of “liberty of conscience.”16 Under this conception:

> the commonwealth is composed by its members solely for the civil interests of life, liberty, and property and therefore has no jurisdiction over matters falling outside these interests. Once this view is accepted, it follows that civil government cannot interfere with matters of religion except to the extent necessary to preserve civil interests. . . .

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[Locke] maintains that it would make no sense for a person to grant to another the power to compel him to act against conscience because (1) it is impossible to grant another the power to change one's mind, and (2) it is sinful to act against conscience. If one were to reject [this] view that it is wrong to act against conscience, then there would be no particular reason to deny that the individual could grant to the commonwealth power to exercise authority over affairs of religion. The connection between liberty of conscience and the [natural law concern with the] exercise of rationality was implicit in Locke's argument that liberty of conscience related to the "care . . . of every man's soul," which "belongs unto himself; and is to be left unto himself." The care of one's soul entailed the exercise of human reason, even though that reason must be directed towards forming true beliefs.

The familiar dichotomy of reason and faith did not seem to Locke a contradiction. In his Essay Concerning Human Understanding, he argued that "Reason leads us to the Knowledge of this certain and evident Truth, That there is an eternal, most powerful, and most knowing Being; which whether any one will please to call God, it matters not." Armed with this proposition, Locke further explained in a chapter on "Faith and Reason" that faith had to do only with matters of revelation, and that in such matters, revelation might confirm the dictates of reason, "yet cannot in such Cases, invalidate its Decrees." This led to the conclusion that one could never be obliged to abandon reason for something contrary to it "under a Pretence that it is [a] Matter of Faith." Thus, for Locke, it was entirely logical to connect liberty of conscience to rational activity. His argument for liberty of conscience was at once religious and rationalist.17

This Lockean view of liberty of conscience subsumed those who believed government should be kept separate from religion: (1) in order to protect religion, as evangelicals tended to hold; (2) in order to protect the secular interests of government, as Jefferson and other Deists tended to hold; or (3) in order to protect both, as Madison held. In his treatise, Professor Tribe noted:

[A]t least three distinct schools of thought . . . influenced the drafters of the [Religion Clauses]: first, the evangelical view (associated primarily with Roger Williams) that “worldly corruptions . . . might consume the churches if sturdy fences against the wilderness were not maintained”; second, the Jeffersonian view that the church should be walled off from the state in order to safeguard secular interests (public and private) “against ecclesiastical depredations and incursions”; and, third, the Madisonian view that religious and secular interests alike would be advanced best by diffusing and decentralizing power so as to assure competition among sects rather than dominance by any one.18

Although differing in their starting points, as Professor Tribe noted, each of these three views ended up supporting the Lockean vision, as noted above at § 32.1.2.1 n.16. As part of this Lockean vision, as quoted at § 32.1.2.1 n.17, “civil government cannot interfere with matters of religion except to the extent necessary to preserve civil interests.” This qualification was also part of the views of the Framing generation. As Madison phrased it in a letter to Edward Livingston on July 10, 1822, “I

17 Id. at 370-72 (citations omitted).

18 Laurence Tribe, American Constitutional Law 1158-59 (2d ed. 1988) (citations omitted).
observe with particular pleasure the view you have taken of the immunity of religion from civil government, in every case where it does not trespass on private rights or the public peace. This has always been a favorite doctrine with me.”19 This view regarding regulation to advance the public peace is reflected in modern Free Exercise Clause doctrine, discussed at § 32.2.2.5 nn.253-64, which permits neutral governmental regulations incidentally to burden religious beliefs as long as they advance legitimate public interests under a rational review test, and permits regulation discriminating against religious beliefs to be constitutional if the government can satisfy a strict scrutiny test.20

While arguments of practice are relevant in a natural law constitutional analysis, the fact that the traditional practices of many states following ratification did not live up to the Lockean and Madisonian vision of strict neutrality and liberty of conscience is not determinative from a natural law perspective. An analogous example involves the Equal Protection Clause as interpreted in *Plessy v. Ferguson*, *Sweatt v. Painter*, and *Brown v. Board of Education*. As discussed at § 26.2.1.1.B-26.2.1.1.E, despite ratification of the Equal Protection Clause after the Civil War, during the formalist era the Court tolerated whites treating non-whites as second-class citizens based on traditional practices, as permitted by *Plessy* and its progeny. During the Holmesian era, in cases like *Sweatt*, the Court banned the most extreme forms of such second-class treatment. However, it was not until *Brown*, and the cases which followed, that the Court rejected root-and-branch such second-class treatment. Every member of the Court today recognizes that *Plessy* from its inception violated the central mandate of equal protection and permitted decades of unconstitutional behavior.

Similarly, state treatment of non-Christians – whether Moslems, Jews, Buddhists, Hindus, agnostics, atheists, or others– as second-class citizens by state endorsement of Christianity, or state preference for Protestantism, such as posting the Protestant version of the Ten Commandments in classrooms or courthouses, not the Catholic version, as discussed at § 32.1.4 nn.215-18, violates the central mandate of the Establishment Clause protecting liberty of conscience. The fact that such practices occurred over many decades does not make them constitutional, just as many decades of Jim Crow laws did not make those laws constitutional. More recently, as discussed at §§ 32.1.3.1.B & 32.1.3.2.B, the Court has struck down more extreme forms of government violation of strict neutrality through the “endorsement” test as applied by Justices O’Connor and Souter, among others. But, as discussed at § 32.1.4, the Court has not yet has its *Brown* moment to reject forcefully second-class treatment by government of non-believers in service of the dominant majority’s faith.

§ 32.1.2.2 The Formalist Approach

As with other constitutional doctrines, the formalist approach to the Establishment Clause focuses on literal interpretation and specific historical intent, buttressed, as in substantive due process

19 Letter from James Madison to Edward Livingston (July 10, 1822), in 9 The Writings of James Madison 98, 100 (Gaillard Hunt ed., 1910).

analysis, discussed at § 27.1.1 nn.10-14, by specific legislative and executive practice. While such use of legislative and executive practice after ratification is inconsistent with a formalist preference for “static” interpretation, it is likely adopted here, as in the substantive due process area, discussed at § 9.2.2.1 nn.37-47, for pragmatic reasons or as a matter of “settled law” regarding constitutional interpretation. As noted at § 32.1.2.1 nn.2-18, aspects of literalness and specific historical intent could be used to support the concept of strict neutrality, given the views expressed by Madison and Justice Story; the history surrounding the drafting of the Establishment Clause; the wide-spread agreement in 18th-century America for the Lockean concept of “liberty of conscience”; and the text of the Constitution stating that “Congress shall make no law respecting an establishment of religion.” However, the result of most formalist analysis is more accommodating toward religion.

This is true even for those formalists who begin their analysis, based on text and specific intent, from a strict neutrality perspective. An example is formalist Justice Black’s 1947 opinion for the Court in *Everson v. Board of Education.*21 In *Everson,* Justice Black discussed the history of religious persecution among various sects in Europe and the American colonies before the Constitution was adopted. In light of this history, he noted that the Establishment Clause meant that neither the federal government nor a state could set up a church, aid one religion or all, or prefer one over another, influence or punish a person with respect to attending church or professing belief or disbelief in any religion, levy a tax to support religious activities or institutions, or participate in the affairs of religious organizations or groups and vice versa. On the other hand, he noted, the Establishment Clause only requires neutrality, not hostility, toward religion. A state may extend its general state law benefits, including fire and police protection, to all its citizens and to all its businesses and charitable organizations, including churches, without regard to religious faith.

In applying this test for neutrality in *Everson,* Justice Black adopted an accommodative approach to determining what were general state law benefits. *Everson* involved a New Jersey statute that authorized the reimbursement for parents of money expended by them on transportation of their children to school on buses operated by a public transportation system, including parents whose children attended parochial schools. In upholding the law, Justice Black stated that the reimbursements were part of a general program under which the state helped parents get their children safely to and from accredited schools, secular or religious. Any other decision would represent hostility toward religion.22 However, as noted by Justice Jackson in dissent, “[U]nder the Act and resolution brought to us by this case children are classified according to the schools they attend and are to be aided if they attend the public schools or private Catholic schools, and they are not allowed to be aided if they attend private secular schools or private religious schools of other faiths.”23 The Act was thus not neutral among religions, but favored Catholic schools over other private schools. It thus violated strict neutrality, as the dissenting opinions held in the case.24

21 330 U.S. 1, 8-16 (1947).
22 *Id.* at 16-18.
23 *Id.* at 20-21 (Jackson, J., joined by Frankfurter, J. dissenting).
24 *Id.* at 18-19 (Jackson, J., joined by Frankfurter, J. dissenting); *id.* at 28-33 (Rutledge, J., joined by Frankfurter, Jackson & Burton, JJ., dissenting).
A similar case is *Wallace v. Jaffree*.25 *Wallace* involved an Alabama statute which provided that at the beginning of each school day “a period of silence not to exceed one minute in duration shall be observed for meditation or voluntary prayer, and during any such period no other activities shall be engaged in.” The majority held that given its legislative history this statute, by authorizing prayer, endorsed prayer in violation of neutrality between church and state. Although also applying a neutrality analysis, formalist Chief Justice Burger rejected that conclusion. He stated that it makes no sense to say that Alabama has "endorsed prayer" by merely enacting a new statute "to specify expressly that voluntary prayer is one of the authorized activities during a moment of silence," and that to “suggest that a moment-of-silence statute that includes the word ‘prayer’ unconstitutionally endorses religion, while one that simply provides for a moment of silence does not, manifests not neutrality but hostility toward religion. . . . Today's decision recalls the observations of Justice Goldberg: '[U]ntutored devotion to the concept of neutrality can lead to invocation or approval of results which partake not simply of that noninterference and noninvolvement with the religious which the Constitution commands, but of a brooding and pervasive dedication to the secular and a passive, or even active, hostility to the religious. Such results are not only not compelled by the Constitution, but, it seems to me, are prohibited by it.”26

In addition to applying any neutrality test in a manner more favorable toward accommodation, the formalist approach is also willing to analyze history from a more accommodationist perspective. For example, in *Wallace v Jaffree*, Justice Rehnquist, whose Holmesian predisposition of deference to government has led him to adopt a very accommodationist approach to Establishment Clause jurisprudence, noted:

James Madison was undoubtedly the most important architect among the Members of the House of the Amendments which became the Bill of Rights, but it was James Madison speaking as an advocate of sensible legislative compromise, not as an advocate of incorporating the Virginia Statute of Religious Liberty into the United States Constitution. During the ratification debate in the Virginia Convention, Madison had actually opposed the idea of any Bill of Rights. His sponsorship of the Amendments in the House was obviously not that of a zealous believer in the necessity of the Religion Clauses, but of one who felt it might do some good, could do no harm, and would satisfy those who had ratified the Constitution on the condition that Congress propose a Bill of Rights. His original language "nor shall any national religion be established" obviously does not conform to the "wall of separation" between church and State idea which latter-day commentators have ascribed to him. His explanation on the floor of the meaning of his language – “that Congress should not establish a religion, and enforce the legal observation of it by law" is of the same ilk. When he replied to Huntington in the debate over the proposal which came from the Select Committee of the House, he urged that the language "no religion shall be established by law" should be amended by inserting the word "national" in front of the word "religion."


It seems indisputable from these glimpses of Madison's thinking, as reflected by actions on the floor of the House in 1789, that he saw the Amendment as designed to prohibit the establishment of a national religion, and perhaps to prevent discrimination among sects. He did not see it as requiring neutrality on the part of government between religion and irreligion.\footnote{Id. at 97-99 (Rehnquist, J., dissenting).}

There are two main problems with use of this history to support a view that the Establishment Clause does not require neutrality toward religion, but only no discrimination among sects. First, Madison’s belief that no Bill of Rights provision was necessary was held precisely because of the belief, similar to Justice Story’s understanding of the Establishment Clause, that the national government was granted no affirmative power over religion in the first instance. For Madison, that principle was reflected in the fact that Article I, § 8 contained no power over religion. Second, as noted in Justice Souter’s passage from \textit{Lee v. Weisman}, cited at § 32.2.1.1 n.12, the framers rejected Madison’s more limited proposal regarding “national religion” in favor of the broader language of the Establishment Clause.

In his opinion in \textit{Wallace},\footnote{Id. at 104-06.} Justice Rehnquist also referred to passages by Justice Story concerning the general sense of the American people, cited at the beginning of § 32.1.2.1 n.2, to support the view that the Establishment Clause only banned preferentialist statements in favor of one religious sect over another. Conspicuous by its absent in Justice Rehnquist’s opinion, however, was citation to Justice Story’s ultimate conclusion that the Establishment Clause was drafted as a prophylactic ban on any national governmental power over religion, discussed at § 32.1.2.1 n.3.

Even under Justice Rehnquist’s view, which would permit nonpreferentialist statements of religion, just not discrimination among religious sects, the typical formalist analysis is to view the facts in an accommodationist manner. For example, Professor Strossen has noted about Justice Scalia:

\begin{quote}
A woman in the audience asked Justice Scalia why the rabbi's prayer in \textit{Lee v. Weisman}, which closely paraphrased a traditional Jewish prayer of thanksgiving – the "Shehecheyanu" – did not violate even Justice Scalia's limited view of the Establishment Clause. . . . He said that, despite its traditional Jewish nature, the prayer at issue in \textit{Weisman} was nonetheless not sufficiently "sectarian" to trigger his limited version of the Establishment Clause because it was "not uncongenial to any other religion." I fully share the questioner's flabbergasted response, which she expressed in these understated terms: "That's a very interesting view of sectarianism." One has to wonder, if Justice Scalia does not deem this government-sponsored prayer sufficiently sectarian to violate his nonpreferentialist conception of the Establishment Clause, what government-sponsored prayer, if any, would satisfy that limited conception.\footnote{Strossen, \textit{supra} note 13, at 462.}
\end{quote}

In 2005, in \textit{Van Orden v. Perry},\footnote{125 S. Ct. 2854, 2864 (2005) (Scalia, J., concurring).} discussed at § 32.1.3.2.B nn.200-02, a case permitting a plaque

Justice Scalia phrased his preferred approach to the Establishment Clause as follows: “I would prefer [doctrine] that is in accord with our Nation's past and present practices, and that can be consistently applied – the central relevant feature of which is that there is nothing unconstitutional in a State's favoring religion generally, honoring God through public prayer and acknowledgment, or, in a nonproselytizing manner, venerating the Ten Commandments.” In support of such an approach, one commentator has noted, “Some of the earliest American colonies began as havens for religious believers. Religious institutions operated nearly the entire educational system in eighteenth-century America. . . . During the eighteenth century, Congress consistently permitted the performance of invocations and religious services in the United States Capitol.”

Justice Thomas has argued for an even more accommodationist approach toward religion. In his view, the Establishment Clause should be viewed as not having been incorporated against the states, while also supporting the view that “establishment of religion” should be read “necessarily [to] involve actual legal coercion,” based in part on Justice Scalia’s observation that the “coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support by force of law and threat of penalty.”

Both of Justice Thomas’ conclusions are not consistent with a principled formalist analysis, but reflect conservative instrumentalism. With respect to the doctrine of incorporation, every other Justice since 1937 has viewed the Establishment Clause as protecting a right as least as fundamental as the other Bill of Rights which are incorporated. From a formalist perspective, that view should be “settled law.” Further, there is no specific historical intent evidence supporting Thomas’ position that the Establishment Clause was viewed differently by the framers and ratifiers of the 14th Amendment than the other Bill of Rights provisions. Only a conservative instrumentalist, with little respect for precedent, and greater emphasis on reaching a result consistent with a particular policy perspective, could take Justice Thomas’ position on incorporation.

Regarding the meaning of the Establishment Clause, the framers and ratifiers did not prohibit only “establishment” of “a religion,” but any law “respecting establishment of religion,” as noted at § 32.1.2.1 nn.12-13. Indeed, an unenacted version of the Clause, proposed in the House of Representatives by Representative Samuel Livermore, provided that “Congress shall make no laws touching religion, or infringing the rights of conscience.” Representative Livermore's motion passed by a vote of 31 for and 20 against. The following week, without any apparent debate, the House voted to alter the language of the Religion Clauses to read “Congress shall make no law establishing


religion, or to prevent the free exercise thereof, or to infringe the rights of conscience.” The fact there was no debate suggests that change was viewed as predominantly stylistic in nature. Broadening of the language to provide “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof” became the final version.34

Nothing in the history suggests that this final change was intended to dilute the “right of conscience.” Rather, the Lockean concept of a “right of conscience,” noted at § 32.1.2.1 n.16-18, was now part of “no law respecting an establishment of religion, or prohibiting the free exercise thereof.” In addition, as Justice Story noted, cited at § 32.1.2.1 nn.2-3, even if the “real object of the amendment was . . . to prevent any national ecclesiastical establishment,” that object was achieved by banning “the whole power over the subject of religion.” Thus, Justice Thomas’ attempt to minimize these aspects of Establishment Clause history35 is not faithful to literal text or specific historical intent.

The final aspect of a formalist approach to the Establishment Clause involves noting the various customary and traditional governmental practices that have supported religion throughout our Nation’s history that would violate a strict neutrality conception of the Establishment Clause.36 Great reliance on such concrete customary and traditional practices is not surprising for a formalist approach, grounded as it is, as discussed at § 15.3 nn.41-43 & 15.4.1 nn.60-66, on Kohlberg’s Stage 4 concrete operational thought. However, just as the customs and traditions regarding Jim Crow did not make Plessy a valid interpretation of the Equal Protection Clause, such customs and traditions should not make the nonpreferentialist conception a valid interpretation of the Establishment Clause, given the text, purpose, and history arguments in favor of a strict neutrality approach, discussed at § 32.1.2.1. From any moral perspective more cognitively advanced than Stage 4, and thus a moral perspective transcending mere customs and traditions, as discussed at §§ 15.4.1 nn.67-81 & 16.1, such customs and traditions are not entitled to determinative weight.

In addition, it is perhaps not surprising that such “non-preferentialist” expressions of religion, particularly those tolerated in 19th-century and 20th-century America during the formalist era between 1873 and 1937, came against a backdrop of pervasive anti-Semitism37 and pervasive anti-

36 See, e.g., McCreary County, Kentucky v. ACLU of Kentucky 125 S. Ct. 2722, 2748, 2750 (2005) (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., dissenting), discussed at § 32.1.4 n.207; Wallace, 472 U.S. at 100-04 (Rehnquist, J., dissenting).
Catholicism.\textsuperscript{38} That history of discrimination cautions of the dangers of embracing a “customs and traditions” formalist approach, and underscores the Framing generation’s concerns, as expressed by Madison, cited at § 32.1.2.1 n.10, that “in matters of Religion, no man's right is abridged by the institution of Civil Society, and that Religion is wholly exempt from its cognizance.”

\section*{§ 32.1.2.3 The Holmesian Approach}

Like the natural law approach, the Holmesian approach to the Establishment Clause is based on the text, purpose, and history behind the clause, which, as noted at § 32.1.2.1, supports a view of government neutrality toward religion. However, reflecting the Holmesian deference-to-government mentality, the Holmesian application of neutrality is more deferential toward government than the natural law approach. For most Holmesians, this has meant that government must “coerce” or “proselytize” religion, not merely “endorse” religion, for the governmental practice to be unconstitutional. On the other hand, based on great deference to legislative and executive practice, some Holmesians have embraced the formalist approach toward the Establishment Clause which is based more on concrete legislative and executive customs and traditions, as discussed at § 32.1.2.2 nn.36-38. This has been true especially for conservative Holmesians, such as Justice Reed in the 1940s,\textsuperscript{39} or Justice Stewart in the 1960s,\textsuperscript{40} or Chief Justice Rehnquist in the 1980s through 2000s.\textsuperscript{41} Centrist and liberal Holmesians, however, such as Justices Frankfurter and Jackson in the 1940s through 1960s, have focused more on “proselytizing” or “coercion” as the appropriate inquiry.

For example, Justice Jackson noted in \textit{West Virginia State Board of Education v. Barnette},\textsuperscript{42} “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens


\textsuperscript{39} See, e.g., Illinois ex rel. McCollum v. Board of Educ., 333 U.S. 203, 250-56 (1948) (Reed, J., dissenting) (customs and traditions support a public school during school hours having students attend voluntarily a class in religious education).

\textsuperscript{40} See, e.g., Engel v. Vitale, 370 U.S. 421, 444-50 (1962) (Stewart, J., dissenting) (customs and traditions support a moment of voluntary prayer at the beginning of the public school day).

\textsuperscript{41} See, e.g., Wallace v. Jaffree, 472 U.S. 38, 100-03 (1985) (Rehnquist, J., dissenting) (customs and traditions support a moment of silence at the beginning of the public school day where the state statute provided that the moment of silence was for “meditation or prayer”); Lee v. Weisman, 505 U.S. 577, 632-36 (1992) (Scalia, J., joined by Rehnquist, C.J., and White \& Thomas, JJ., dissenting) (customs and traditions support a school-sponsored benediction at a high school graduation ceremony).

\textsuperscript{42} 319 U.S. 624, 642 (1943).
to confess by word or act their faith therein." In *Everson v. Board of Education*, Justices Jackson and Frankfurter, among others, in dissent, concluded that the Court was permitting aid to private religious schools, and was thus necessarily engaged in a form of proselytizing religion. In a dissent joined by Justices Frankfurter, Jackson, and Burton, Justice Rutledge said that the object of the Establishment Clause was to prevent any such form of aid to proselytize religion: “It was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion.”

In 1948, the Court invalidated an Illinois “released time” program in *Illinois ex rel. McCollum v. Board of Education*. In this program, religious teachers, employed by private religious groups, were permitted to come weekly into public school buildings during regular hours and, for children of parents who consented, substitute their religious teaching for the secular education in which other children continued to participate. The Court said that the state was helping to provide pupils with religious instruction through the state's machinery in violation of the separation of church and state. The only dissenter was Justice Reed, who pointed out that Thomas Jefferson approved such a program at the University of Virginia. Adopting the formalist focus on customs and tradition, as conservative Holmesian Chief Justice Rehnquist has often done, conservative Holmesian Justice Reed allowed this history of past practice to be determinative of constitutional meaning.

In *Zorach v. Clauson*, decided in 1952, the Court upheld a "released time" program in which students, whose parents had authorized their participation, could leave the school building and go to religious centers for religious instruction or devotional exercises. Other students remained in their classrooms. In dissent, Justice Jackson noted that there was still an element of coercion present, since the school “serves as a temporary jail for a pupil who will not go to church.” Jackson said, “This released time program is founded upon a use of the State's power of coercion, which, for me, determines its unconstitutionality. Stripped to its essentials, the plan has two stages, first, that the State compel each student to yield a large part of his time for public secular education and, second, that some of it be 'released' to him on condition that he devote it to sectarian religious purposes.”

Justice Frankfurter also dissented in *Zorach*. He stated, “When constitutional issues turn on facts, it is a strange procedure indeed not to permit the facts to be established. When such is the case, there are weighty considerations for us to require the State court to make its determination only after a thorough canvass of all the circumstances and not to bar them from consideration. If we are to decide this case on the present record, however, a strict adherence to the usage of courts in ruling on the sufficiency of pleadings would require us to take as admitted the facts pleaded in the appellants' complaint, including the fact of coercion, actual and inherent. Even on a more latitudinarian view, I cannot see how a finding that coercion was absent, deemed critical by this Court in sustaining the practice, can be made here, when appellants were prevented from making

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43 330 U.S. 1, 18-28 (1942) (Jackson, J., joined by Frankfurter, J., dissenting); *id.* at 31-32 (Rutledge, J., joined by Frankfurter, Jackson & Burton, JJ., dissenting).

44 333 U.S. 203, 211-12 (1948); *id.* at 250-56 (Reed, J., dissenting).

45 343 U.S. 306, 308-10 (1952); *id.* at 324 (Jackson, J., dissenting).
a timely showing of coercion because the courts below thought it irrelevant.\footnote{Id. at 322-23 (Frankfurter, J., dissenting).}

This Holmesian approach focusing on “coercion” or “proselytizing” of religion also turned out to be the controlling vote in \textit{Lee v. Weisman},\footnote{505 U.S. 577, 590-99 (1992).} during the first part of the modern natural law era in 1992, because of its adoption by Justice Kennedy, who usually follows a natural law approach. In \textit{Weisman}, the Court held that a public school could not offer an invocation or benediction in a graduation exercise because this exerted a subtle coercive pressure on students to participate in, or appear to participate in, a religious exercise, given the fact that presence at graduation is, in a practical sense, obligatory. Justice Kennedy explained that a “state-created orthodoxy puts at grave risk the freedom of belief and conscience which are the sole assurance that religious faith is real, not imposed.”\footnote{Id. at 592.} Reflecting a pragmatic approach, eschewing formalist literalism, Kennedy indicated that literal legal coercion was not required, if in-fact coercive pressure existed.

For Justice Kennedy, the case was distinguishable from \textit{Marsh v. Chambers},\footnote{463 U.S. 783, 792-95 (1983).} which allowed prayers at legislative sessions, because any influence is much less in that setting. In that setting, as noted at § 32.1.2.1 text following n.13, any benediction is directed to individuals as part of discharging their public jobs. Those individuals already have well-formed views. It was not a part of state-sponsored educational program, as in \textit{Weisman}, with the state coercing or proselytizing on behalf of religion. This focus on “coercion” as the touchstone of Establishment Clause analysis is consistent with a Holmesian emphasis on legislative and executive practice, which, during the first 150 years of the Nation’s history, was predominantly concerned with: “(1) institutional mingling between government and religion, (2) direct governmental support for a particular religion, (3) special privileges for a particular religion, or (4) coercion of religious belief, including the punishing of non-adherents.”\footnote{Stuart Buck, \textit{The Nineteenth-Century Understanding of the Establishment Clause}, 6 Tex. Rev. L. & Pol. 399, 400 (2002). See generally id. at 400-09; Michael W. McConnell, \textit{The Origins of the Religion Clauses of the Constitution: Coercion: The Lost Element of Establishment}, 27 Wm. & Mary L. Rev. 933, 939-41 (1986).}

While Justice Kennedy was the critical fifth vote in \textit{Weisman}, and thus his adoption of the “coercion” test was determinative in that case, given the change in Court membership since 1992, a 5-Justice majority of Justices Stevens, O’Connor, Souter, Ginsburg, and Breyer analyzed Establishment Clause cases from 1994-2005, at a minimum, from the more vigorous natural law requirement of “strict neutrality,” which requires no government “endorsement” of religion. During this period, the instrumentalist or instrumentalist-leaning among these Justices also still relied occasionally on the instrumentalist \textit{Lemon} test, discussed next, at § 32.1.2.4.
§ 32.1.2.4  The Instrumentalist Approach

In 1971, in *Lemon v. Kurtzman*, the Court invalidated statutes of Rhode Island and Pennsylvania that provided financial aid to non-public schools or their teachers, the schools being primarily Roman Catholic schools. The Rhode Island statute paid a bonus of up to 15% of the regular salary for teachers of secular subjects, provided the teacher used only teaching materials used in the public schools and agreed not to teach a course in religion while receiving the supplement. The Pennsylvania law reimbursed schools for expenditures on secular educational services involving salaries, textbooks, and instructional materials. Chief Justice Burger developed a test that reflected the precedents of the instrumentalist era. He said that three concerns may be gleaned from the cases:

1. The law must have a secular legislative purpose;
2. Its principal or primary effect must be one that neither advances nor inhibits religion;
3. The law must not foster an excessive government entanglement with religion.

This test reflects a categorical doctrine approach, with a three-part means/end element analysis – that kind of doctrine discussed generally at § 21.2.2.4 – with the three elements being a focus on ends (purposes); the benefit derived from the law’s means (incidental effect, or principal or primary effect); and burdens (whether or not excessive entanglement is fostered). Applying this test, the Chief Justice said there was no reason to believe the legislatures meant to do anything other than what the statutes declared, *i.e.*, to enhance the quality of the secular education in all schools covered by compulsory attendance laws. As to the second prong, the Court did not need to decide whether certain legislative precautions restricted the principal or primary effect of the programs, because the cumulative impact of the relationship arising under the statutes involved excessive entanglement.

Explaining his entanglement conclusion, the Chief Justice said that the determination of whether there was a principal or primary effect to advance religion would require examining (1) the character and purposes of the institutions benefitted, (2) the nature of the aid, and (3) the resulting relationship. Looking to the nature of the aid, the Chief Justice said that the Court could not ignore the likelihood that teachers in parochial schools would experience great difficulty in remaining religiously neutral. A comprehensive and continuing state surveillance will be required to ensure that restrictions on teachers will be obeyed. Further, it seemed likely that these plans would entail considerable political activity with respect to which, unlike tax exemptions, there is not two hundred years of history. Thus, there would be entanglement with respect to both (1) government intrusion into religious instruction and (2) church intrusion into affairs of government.

Justice Douglas concurred, with Justice Black. Justice Douglas said that the principal “raison d’être” for the existence and growth of Catholic schools in this country was that Protestant groups were perverting the public schools by using them to propagate their faith. After much conflict during the 19th century, religious instruction was eliminated from public schools and the use of public funds to support religious schools was banned. The situation now has changed and public funds are supplied to sectarian schools in various ways. But this may result in two kinds of forbidden entanglement: government through grants or otherwise may (1) punish a sect for

propagation of its faith or (2) deprive a teacher, under threats of reprisal, of the right to give a sectarian construction to matters of history or literature, or to use the teaching of those subjects to inculcate a religious creed or dogma.\textsuperscript{52}

Justice White, dissenting in part, said that the states were helping to finance the important secular function of education. That religion may incidentally benefit does not convert the laws into impermissible establishments of religion. In his view, the Rhode Island Act clearly augmented the salaries of teachers in nonpublic schools teaching only secular subjects, and thus was constitutional, while a trial should have been held on whether the Pennsylvania Act, which on its face only reimbursed for secular educational services, in fact financed religious instruction by the state.\textsuperscript{53}

In applying the \textit{Lemon} test, the Court has noted that the state's motive, benign or not, is not relevant. As early as 1943, the Court had noted in \textit{West Virginia State Board of Education v. Barnette}:

\begin{quote}
Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil men. Nationalism is a relatively recent phenomenon but at other times and places the ends have been racial or territorial security, support of a dynasty or regime, and particular plans for saving souls. As first and moderate methods to attain unity have failed, those bent on its accomplishment must resort to an ever-increasing severity. As governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be. . . . Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.\textsuperscript{54}
\end{quote}

Reflecting these concerns, the \textit{Lemon} test, particularly as applied by liberal instrumentalist Justices, has been used to support sensitivity to religious diversity and the inclusion of all persons of different faiths or non-believers as equal citizens in American society.\textsuperscript{55} More broadly, it supports a Stage 5 pluralistic democracy, which is associated with instrumentalism, as discussed at § 15.4.1 nn.72-76, by serving as “a prophylactic measure that (1) protects religious liberty and autonomy, including the protection of taxpayers from being forced to support religious ideologies to which they are opposed; (2) stands for equal citizenship without regard to religion, . . . ; (3) protects against the destabilizing influence of having the polity divided along religious lines; (4) promotes political community; (5) safeguards the autonomy of the state to protect the public interest; (6) shelters churches from the corrupting influences of the state; and (7) promotes religion in the private sphere.”\textsuperscript{56}

\begin{flushright}
\textsuperscript{52} \textit{Id.} at 626-42 (Douglas, J., joined by Black, J., concurring).
\textsuperscript{53} \textit{Id.} at 665-71 (White, J., concurring in part and dissenting in part).
\textsuperscript{54} 319 U.S. 624, 640-41 (1943).
\end{flushright}
As the Court has applied the *Lemon* test, it has come under attack by dissenters as not reflecting, in practice, principled or predictable doctrine. For example, when considering the issue of legislative “purpose,” the Court concluded in *Engel v. Vitale*\(^57\) that beginning each public school day with a prayer had no secular purpose. The Court noted, "It is neither sacrilegious nor antireligious to say that each separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those the people choose to look for religious guidance." Similarly, in *Stone v. Graham*,\(^58\) the Court held that a statute requiring the posting of the Ten Commandments on the walls of every public school classroom had only a religious purpose. In *Edwards v. Aguillard*,\(^59\) the Court held that Louisiana's Creationism Act, which forbid the teaching of the theory of evolution in public elementary and secondary schools unless accompanied by instruction in the theory of “creation science,” was unconstitutional because, despite Louisiana’s argument they were merely supporting a diversity of viewpoints, “the primary purpose of the Creationism Act is to endorse a particular religious doctrine.”

On the other hand, the Court held in *McGowan v. Maryland*\(^60\) that a state law requiring businesses to be closed on Sunday, while having “strongly religious origin[s],” and thus being accommodating to religion, was nonetheless permissible because it had a secular purpose of providing “a uniform day of rest for all citizens.” In *Gillette v. United States*,\(^61\) the Court held that creating an exception to draft laws for conscientious objectors did not violate the Establishment Clause because, despite such an exemption having a purpose of accommodating to the views of religious conscientious objectors, the law was supported by the secular, pragmatic consideration of the difficulty of converting a sincere conscientious objector into an effective fighting man. In *Rosenberger v. Rector and Visitors of the University of Virginia*,\(^62\) the Court permitted a university to impose on students a fee to support a diversity of viewpoints, including religious viewpoints, because excluding religious viewpoints would be “hostile” to religion and would deny individuals rights under the Free Speech Clause of the First Amendment, as discussed at § 29.3.2. nn.81-82. In addition, in a number of cases involving the Free Exercise Clause, discussed at § 32.2.2.4 nn.241-46, the Court has held that states must accommodate the beliefs of religious citizens by exempting them from generally applicable regulations, and this is not an unconstitutional legislative purpose.\(^63\)


In *Edwards v. Aguillard*, Justice Scalia, joined by Chief Justice Rehnquist, observed that given these cases, and others:

Our cases interpreting and applying the purpose test have made such a maze of the Establishment Clause that even the most conscientious governmental officials can only guess what motives will be held unconstitutional. We have said essentially the following: Government may not act with the purpose of advancing religion, except when forced to do so by the Free Exercise Clause (which is now and then); or when eliminating existing governmental hostility to religion (which exists sometimes); or even when merely accommodating governmentally uninhibited religious practices, except that at some point (it is unclear where) intentional accommodation results in the fostering of religion, which is of course unconstitutional.  

Justice Scalia continued:

But the difficulty of knowing what vitiating purpose one is looking for is as nothing compared with the difficulty of knowing how or where to find it. . . . [D]iscerning the subjective motivation of those enacting the statute is, to be honest, almost always an impossible task. The number of possible motivations, to begin with, is not binary, or indeed even finite. In the present case, for example [Louisiana’s “Creationism Act” which forbid the teaching of the theory of evolution in public elementary and secondary schools unless accompanied by instruction in the theory of “creation science”], a particular legislator need not have voted for the Act either because he wanted to foster religion or because he wanted to improve education. He may have thought the bill would provide jobs for his district, or may have wanted to make amends with a faction of his party he had alienated on another vote, or he may have been a close friend of the bill’s sponsor, or he may have been repaying a favor he owed the majority leader, or he may have hoped the Governor would appreciate his vote and make a fundraising appearance for him, or he may have been pressured to vote for a bill he disliked by a wealthy contributor or by a flood of constituent mail, or he may have been seeking favorable publicity, . . . or, of course, he may have had (and very likely did have) a combination of some of the above and many other motivations. To look for the sole purpose of even a single legislator is probably to look for something that does not exist.  

406 U.S. 205, 213-19 (1972) (unconstitutional to apply Wisconsin's compulsory education law to Amish parents who amply supported their claim that enforcement of the compulsory formal education requirement after the eighth grade would gravely endanger, if not destroy, the free exercise of their religious belief); Sherbert v. Verner, 374 U.S. 398, 403-09 (1963) (unconstitutional to apply eligibility provisions of unemployment compensation statute to deny benefits to a Seventh-Day Adventist, who had refused employment based on her religious beliefs, since that employment would have required her to work on Saturday, her sabbath).


*Id.* at 636-37.
Regarding the second “principal or primary effect” prong of Lemon, inconsistencies can also be noted in the Court’s decisions. For example, the Court has found a primary effect to advance religion in providing funds to repair “physical facilities” at a private religious school,66 but only an incidental effect where funds were provided to build “secular buildings” on a religious campus67; a primary effect to advance religion by providing loans of “instructional equipment and materials” to private schools,68 but only an incidental effect to provide “secular textbooks” to students69; and a primary effect to advance religion to provide tuition grants to parents of children attending private schools,70 but only an incidental effect where tax benefits for textbooks, tuition, and transportation were granted to parents for children in public or private schools, despite the fact that parents of children in private schools would get most of the benefit, since private tuition is the main part of the expense, and 96% of children attending private schools attended religious schools.71

Regarding the third “excessive entanglement” prong of Lemon, an attempt to police the risk that religious messages will be conveyed in a school program funded by public funds has constituted excessive entanglement of religion. At the same time, no excessive entanglement existed in annual state grants to private colleges, including religiously affiliated institutions, although four judges dissenting would have found excessive entanglement from dependency on grant money.72 Recordkeeping and disclosure requirements associated with routine collection of sales taxes on sale of religious materials was held to create no excessive entanglement, while recordkeeping and disclosure requirements on charities soliciting funds in a city, where disclosure included names, salaries, and criminal histories of solicitors, and reports of funds collected, was held to constitute excessive entanglement when applied to religious organizations.73

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72 Aguilar v. Felton, 473 U.S. 402, 404-14 (1985) (entanglement found); Roemer v. Board of Public Works of Maryland, 426 U.S. 736, 761-67 (1976) (no entanglement found); id. at 770-73 (Brennan, J., joined by Marshall, J., dissenting); id. at 773-75 (Stewart, J., dissenting); id. at 775 (Stevens, J., dissenting) (entanglement found).

While Justice Scalia’s concern with determining legislative motive is perhaps overstated in many cases, as indicated by a quote from Justice Breyer, cited at § 6.2.1.1 n.5, concerns with predictability and consistency of application, in part, led Justice O’Connor to suggest in Lynch v. Donnelly\(^{74}\) that the Court should depart from the separate inquiries in Lemon into the subjective purpose of the government action and its principal or primary effect, and should substitute instead an objective inquiry into whether the government activity would be seen by a reasonable objective observer as an endorsement of religion. While in Lynch Justice O’Connor called for the endorsement inquiry merely to replace the first two prongs of Lemon, Justice O’Connor’s majority opinion in Agostini v. Felton,\(^{75}\) discussed at § 32.1.3.1.B n.118, subsumed Lemon’s third prong concern with excessive entanglement under Lemon’s second prong concern with effect. This would unite all three prongs of Lemon under the endorsement inquiry were that approach adopted by a majority of the Court.

Even under Lemon’s strong view of separation of church and state, Congress may be permitted to carve out a religious exemption from otherwise neutral, generally applicable laws, and this will not always violate the Establishment Clause. For example, as noted above at § 32.1.2.4 n.61, the Court held in Gillette v. United States\(^{76}\) that the exemption from the military draft for religious conscientious objectors did not violate Establishment Clause. Similarly, the Court held in Corporation of the Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos\(^{77}\) that exempting religious organizations from compliance with certain federal antidiscrimination laws did not violate the Constitution. The Court held in Walz v. Tax Commission of the City of New York\(^{78}\) that granting religious organizations an exemption from state property taxes was constitutional.

Consistent with this approach, a lower court has held that the Religious Freedom Restoration Act (RFRA), which requires federal laws that substantially burden religious beliefs to satisfy a strict scrutiny approach, rather than minimum rational review, as under current Free Exercise Clause doctrine, discussed at § 32.2.2.5 nn.253-56, does not violate the Establishment Clause. In Hankins v. Lyght,\(^{79}\) the Second Circuit concluded that the RFRA had a secular legislative purpose within the meaning of Lemon – namely, to protect individual First Amendment Free Exercise Clause rights as understood by Congress. The court then held that the RFRA also satisfies the other two prongs of Lemon. Its principal effect neither advances nor inhibits religion within the meaning of Lemon, for the law simply grants an exemption to religious organizations, similar to the exemptions the Supreme Court has approved, noted above at § 32.1.2.4 nn.76-78, unless the government can satisfy a strict scrutiny approach. Finally, the RFRA decreases rather than fosters government entanglement with religion, since an exemption effectuates a more complete separation of church and state and


\(^{76}\) 401 U.S. 437, 460 (1971).


\(^{79}\) 441 F.3d 96, 107-09 (2nd Cir. 2006).
avoids any intrusive inquiry into religious belief. Thus, it satisfies the third prong of Lemon. For these reasons, the Second Circuit held that the RFRA, as applicable to federal law, does not violate the Establishment Clause of the Constitution.

§ 32.1.3 Specific Examples of Establishment Clause Analysis

Most recent cases under the Establishment Clause have either involved government regulation of matters involving schools, or cases involving religious displays on public property. Cases involving the regulation of schools are discussed at § 32.1.3.1. Cases involving religious displays on public property are discussed at § 32.1.3.2. Following these sections, general comments on the current state of Establishment Clause doctrine, and its predicted future development, are addressed at § 32.1.4.

§ 32.1.3.1 The School Cases

A. The Instrumentalist Era

The matter of prayer in school was first considered during the instrumentalist era in Engel v. Vitale, decided in 1962. In Engel, the Court struck down a policy of having teachers, at the beginning of each school day, say a non-denominational prayer. Students were not compelled to join in the prayer over their parents’ objection. The Court noted that, because of the Establishment Clause’s ban on any law “respecting an establishment of religion,” a state is without power to prescribe by law any particular form of prayer which is to be used as an official prayer in carrying on any program of governmentally sponsored religious activity – even if observance by students is voluntary. Here, there was an indirect coercive pressure on religious minorities to conform to the prevailing officially approved religion. Moving beyond this Holmesian focus on “coercion” as the touchstone of the analysis, the Court then noted, “But the purposes underlying the Establishment Clause go much further than that. Its first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion.”

Justice Douglas, concurring in Engel, said that the state cannot finance a religious exercise, such as this prayer, even if the dollar amounts are minuscule. For Justice Douglas, “no matter how briefly the prayer is said, . . . the person praying is a public official on the public payroll, performing a religious exercise in a governmental institution.” Justice Douglas acknowledged that under this view it is also unconstitutional to open each legislative session with a prayer given by a chaplain paid by Congress, or for the Supreme Court’s Crier to open each Court session with the phrase, “God save the United States and this Honorable Court.”

The only dissenter was Holmesian Justice Stewart, who said that an official religion was not being established by letting those who want to say a prayer say it. While ostensibly adopting a Holmesian approach focused on whether the recitation of the prayer could legitimately be termed “coercive,”

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81 Id. at 439-44 (Douglas, J., concurring).
Justice Stewart’s opinion was driven more by a formalist focus on customs and traditions. Justice Stewart concluded that the state had merely recognized and followed “deeply entrenched and highly cherished spiritual traditions of our Nation.” Justices Frankfurter and White took no part in the decision of the case.82

One year later, in *School District of Abington Township v. Schempp*,83 the Court struck down a Pennsylvania law that required that at least 10 verses from the Holy Bible shall be read, without comment, at the opening of public school on each school day, with children to be excused upon the written request of their parents or guardian. The Court reviewed the law in light of the general principle that to withstand the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion. Explaining the purpose behind this rule, the Court said that the "neutrality" of which the precedents speak stems from a recognition of the teachings of history that otherwise there might come to be an official government support for one or all orthodoxies. A further reason for neutrality is found in the Free Exercise Clause, which protects the right of every person to choose his own course with reference to religion.

Applying these principles to the facts, Justice Clark said that here the state law required a religious exercise conducted by the state, and this violated the Establishment Clause. In one of the cases under review, the trial court had found that the state intended to conduct a religious exercise, and the Court agreed with that finding. In another of the cases, the trial court made no such finding and the state argued that the law had secular purposes such as promoting moral values, contradicting the materialistic trend of our times, perpetuating our institutions, and teaching literature. Pointing to “alternative use” of the King James version of the Bible or the Catholic Douay version, Justice Clark wrote of the “pervading religious character” of the readings, and that the Bible was not here being used as an instrument for moral inspiration or a reference for the teaching of secular subjects. The Court rejected as defenses that individual students may be excused on parental request or that the encroachment on the First Amendment might be relatively minor, or that unless these religious exercises were permitted there will be a "religion of secularism" hostile to religion. Justice Clark did acknowledge, however, that the Bible is worthy of study for its literary and historic qualities when presented objectively as part of a secular program of education.84

Justice Douglas, concurring, said the Establishment Clause was being violated in two ways: (1) the state is conducting a religious exercise, and (2) public funds, even though small in amount, are being used to promote a religious exercise. Justice Brennan, also concurring, said that the states may not prefer, discriminate against, or oppress, a particular sect of religion and may not: (1) serve the essentially religious activities of religious institutions; (2) employ the organs of government for essentially religious purposes; or (3) use essentially religious means to serve governmental ends, where secular means would suffice. Reflecting a more accommodating approach toward religion, Justice Goldberg, concurring with Justice Harlan, said, “Neither government nor this Court can or

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82 Id. at 436 (Frankfurter, J., took no part in the decision of the case; White, J., took no part in the consideration or decision of the case); id. at 444-50 (Stewart, J., dissenting).


84 Id. at 223-27.
should ignore the significance of the fact that a vast portion of our people believe in and worship God and that many of our legal, political and personal values derive historically from religious teachings. . . . And it seems clear to me from the opinions in the present and past cases that the Court would recognize the propriety of providing military chaplains and of the teaching about religion, as distinguished from the teaching of religion, in the public schools. . . . [However, the] practices here involved do not fall within any sensible or acceptable concept of . . . accommodation and involve the state so significantly and directly in the realm of the sectarian as to give rise to those very divisive influences and inhibitions of freedom which both religion clauses of the First Amendment preclude.**

As in Engel, Justice Stewart dissented in this case. In this case, he grounded his analysis more clearly in a Holmesian concern with “coercion,” rather than a formalist concern with “customs and traditions.” He stated, “[I]t seems to me clear that certain types of exercises would present situations in which no possibility of coercion on the part of secular officials could be claimed to exist. Thus, if such exercises were held either before or after the official school day, or if the school schedule were such that participation were merely one among a number of desirable alternatives, it could hardly be contended that the exercises did anything more than to provide an opportunity for the voluntary expression of religious belief. On the other hand, a law which provided for religious exercises during the school day and which contained no excusal provision would obviously be unconstitutionally coercive upon those who did not wish to participate. And even under a law containing an excusal provision, if the exercises where held during the school day, and no equally desirable alternative were provided by the school authorities, the likelihood that children might be under at least some psychological compulsion to participate would be great. In a case such as the latter, however, I think we would err if we assumed such coercion in the absence of any evidence.”**

Based on the limited factual background in the cases before the Court, Justice Stewart stated he would remand both cases for further hearing.

In 1968, in Board of Educators of Central School District No. 1 v. Allen, the instrumentalist Court upheld against an Establishment Clause challenge a law that required local public school authorities to lend textbooks to all students in grades 7 through 12 who attended public or private schools, including parochial schools. For the Court, Justice White emphasized that although the books loaned would be those required by a parochial school, each book had to be approved by public school board authorities and only secular books could receive approval. Recognizing that parochial schools play a valuable role in secular education, Justice White said that nothing in the slight record supported the proposition that the textbooks are used by the parochial schools to teach religion. Thus, on the record, this aid was no more a law respecting the establishment of religion than the transportation of children to parochial schools approved in 1947 in Everson, discussed at § 32.1.2.2 nn.21-24.

** Id. at 229-30 (Douglas, J., concurring); id. at 231-32, 294-95 (Brennan, J., concurring); id. at 306-07 (Goldberg, J., joined by Harlan, J., concurring).

** Id. at 318-19 (Stewart, J., dissenting)

Justice Harlan, concurring, emphasized, “The attitude of government toward religion must, as this Court has frequently observed, be one of neutrality.” Relying on Justice Goldberg’s concurrence in *Schempp*, which he had joined, Justice Harlan stated, “Neutrality requires that ‘government neither engage in nor compel religious practices, that it effect no favoritism among sects or between religion and nonreligion, and that it work deterrence of no religious belief.’ I would hold that where the contested governmental activity is calculated to achieve nonreligious purposes otherwise within the competence of the State, and where the activity does not involve the State ‘so significantly and directly in the realm of the sectarian as to give rise to . . . divisive influences and inhibitions of freedom,’ it is not forbidden by the religious clauses of the First Amendment.”

Three Justices dissented in *Allen*. For Justice Black, books used by sectarian schools will in some way inevitably tend to propagate the religious views of the favored sect. Books, the heart of any school, could easily be distinguished from the bus fares in *Everson* that merely provide a convenient and helpful general public transportation service. Justice Black concluded that not a penny of tax-raised funds should be used to support religious schools, buy their books, erect their buildings, pay their teachers, or pay any other of their maintenance expenses because the Establishment Clause was written on the assumption that “state aid to religion and religious schools generates discord, disharmony, hatred, and strife.” Justice Douglas, also dissenting, said there was not “the slightest doubt” that the head of the parochial school will select books that best promote the sectarian creed. If the board submits, the struggle to keep church and state separate will have been lost. If the board resists, then the result of tying parochial school textbooks to public funds will be to put nonsectarian books into religious schools and in the long view that would tend towards state domination of the church. So either way the principle of separation of church and state would be violated. Justice Fortas, the third dissenter, emphasized that the promise of the law was that the books will be secular, but the fact remains that the books are chosen by and for the sectarian schools. This could be called a "general" program only if the school books made available to all children were the same.

In 1971, the case of *Lemon v. Kurtzman* was decided, discussed at § 32.1.2.4 nn.51-56. Although Justices Harlan and Stewart had adopted different approaches toward the Establishment Clause in *Engel*, *Schempp*, and *Allen*, as noted above, their great respect for precedent, discussed at § 10.4 n.90, led them to join Chief Justice Burger’s opinion in *Lemon*, which was consistent with instrumentalist-era precedents. *Lemon* had immediate and continuing application in many situations. For example, in *Tilton v. Richardson*, decided the same day as *Lemon*, a 5-4 Court upheld the application to a church-related institution of federal construction grants for buildings and facilities used exclusively for secular educational purposes. In a plurality opinion joined by Justices Harlan, Stewart, and Blackmun, Chief Justice Burger noted that with respect to secular purpose, the Act was

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89 *Id.* at 232-34 (Black, J., dissenting); *id.* at 256-57 (Douglas, J., dissenting); *id.* at 270-72 (Fortas, J., dissenting).

90 403 U.S. 672, 678-89 (1971); *Lemon*, 403 at 667-71 (White, J., concurring in the judgment in *Tilton* and dissenting in *Lemon*).
drafted to ensure that federally subsidized facilities would be used only for secular purposes. If not, the government would recover its money, based on an amount equal to the proportion of the facilities’ present value that the federal grant bore to its original cost. Regarding effect, the record showed that there had been no religious services, symbols, or plaques in the buildings and they had been used solely for nonreligious purposes. There was no evidence that religion was being taught in the facilities, the evidence showed that the schools were characterized more by academic freedom than religious indoctrination, and the case should not be decided based on a hypothetical concern that sectarian institutions do everything they can to propagate a particular religion. With respect to entanglement, Chief Justice Burger said that the necessity for intensive governmental surveillance of the program was diminished because the institutions had secular education rather than indoctrination as their primary mission, and the opportunities for subverting congressional objectives and limitations is less in postgraduate courses because of their disciplines and because the students are less impressionable and less susceptible to religious instruction. Other factors which lessened entanglement were the non-ideological nature of the aid, and that the government supplied a one-time, single-purpose construction grant. Justice White concurred in the judgment, consistent with his dissent in Lemon, discussed at § 32.2.1.4 n.53, supporting secular aid to religious institutions.

Justice Douglas dissented in Tilton, joined by Justices Black and Marshall. He said that sectarian purposes are aided by making the parochial school system more viable. Further, religious teaching and secular teaching are so enmeshed in parochial schools that only the strictest supervision would insure compliance with the condition, creating excessive entanglement. Justice Douglas also continued to voice his view, from Engel and Schempp, that not even the slightest amount from taxpayers should go into the coffers of a church. Justice Brennan also dissented in Tilton, consistent with concurring with the majority in Lemon. For Justice Brennan, however, it was not clear whether the institutions involved in Tilton were sectarian. Thus, he stated, “[T]he Act is unconstitutional insofar as it authorizes grants of federal tax monies to sectarian institutions, but is unconstitutional only to that extent. I therefore think that our remand of the case should be limited to the direction of a hearing to determine whether the four institutional appellees here are sectarian institutions.”

The Court was unanimous on one aspect of the statute in Tilton. One part of the statute provided that, after 20 years, government supervision would end to ensure the facilities were being used for secular purposes. The Court unanimously held that this provision violated the Establishment Clause, since the facilities could then be used for religious indoctrination, and government cannot provide direct aid for such religious education, even with a 20-year delay.

Two years after Lemon, in Committee for Public Education & Religious Liberty v. Nyquist, the Court struck down a state law giving “tax credits” for each child attending a nonpublic school, and providing for state funds to be used for “maintenance and repair” of such schools. While the provisions had a secular purpose of “preserving a healthy and safe educational environment for all

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91 Id. at 692-97 (Douglas, J., joined by Black & Marshall, JJ., dissenting); Lemon, 403 U.S. at 642, 659-61 (Brennan, J., dissenting in Tilton and concurring in Lemon).

92 Id. at 682-84.

of its schoolchildren” and “promoting pluralism and diversity among its public and nonpublic schools,” each provision had a principal or primary effect of advancing religion by providing direct financial support to the religious institutions. Unlike *Tilton*, there was no “effective means of guaranteeing that the state aid derived from public funds will be used exclusively for secular, neutral, and nonideological purposes.”

Justice Rehnquist, joined by Chief Justice Burger and Justice White, dissented as to the provision regarding “tax credits.” They viewed that provision as similar to property tax exemptions granted to religious organizations in *Walz*, cited at § 32.1.2.4 n.78, which the Court had previously upheld. They also viewed the provision as consistent with *Lemon*, in that any aid to religion was incidental, not principal or primary, since parents sending their children to nonpublic schools “are rendering the State a service by decreasing the costs of public education and by physically relieving an already overburdened public school system” and “New York is effectuating the secular purpose of the equalization of the costs of educating New York children that are borne by parents who send their children to nonpublic schools.” As in *Everson* and *Allen*, the impact, if any, on religious education from the aid granted is “significantly diminished” by the fact that the benefits – transportation, books loaned, or tax credits – technically “go to the parents rather than to the institutions.” Such an application of *Lemon* reflects both a formalist predisposition for literalism (technically to whom the aid is initially given) and a Holmesian predisposition for deference to government.

Six years after *Lemon*, in 1977, the Court upheld in *Wolman v. Walter* state provision to nonpublic school pupils, including those in parochial schools, of books, standardized testing and scoring, diagnostic services, and therapeutic and counseling services. Applying the *Lemon* test, Justice Blackmun, joined by Chief Justice Burger, and Justices Stewart and Powell, said that the purpose of the statute was to protect the health of the young and provide a fertile educational environment of all schoolchildren in the state. Regarding effect and entanglement, the loan of textbooks had been upheld in previous cases; testing and scoring did not involve teaching personnel, and the non-public school does not control the content of the tests; and diagnostic and therapeutic and counseling services had little or no educational content and were not closely associated with the educational missions of the schools. Reflecting their deference-to-government views, and their dissent in *Nyquist* regarding “effectuating the secular purpose of the equalization of the costs of educating” children in public and nonpublic schools, Justices White and Rehnquist concurred in this result.

Justices Brennan dissented, viewing each of these provisions as impermissible government aid toward religion. Justice Marshall also dissented, with the exception of the provision of diagnostic services, such as for speech and hearing diagnosis, psychological diagnosis, and psychological and speech and hearing therapy, which he viewed as neutral, medical provisions. For Justice Marshall, the counseling services were different, because they included educational counseling, and thus they involved government aid supporting the educational mission of the school. Justice Stevens dissented as to the provision of books, and the standardized testing and scoring, but indicated that he was not

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94 Id. at 806-08, 812-13 (Rehnquist, J., joined by Burger, C.J., and White, J., dissenting).

95 433 U.S. 229, 235-48 (1977); id. at 255 (Rehnquist, J., joined by White, J., concurring in the judgment in part and dissenting in part).
prepared to hold unconstitutional any of the diagnostic or therapeutic or counseling provisions of the statute on a facial challenge.\footnote{Id. at 255-56 (Brennan, J., concurring in part and dissenting in part); id. at 256-62 (Marshall, J., concurring in part and dissenting in part); id. at 255-56 (Stevens, J., concurring in part and dissenting in part).}

For a different majority, the Court struck down in \textit{Wolman} supplying instructional materials and equipment, and money for field trips. Justice Blackmun concluded that the instructional equipment could be used for sectarian as well as secular education, and thus that aid inevitably flowed in part to support the religious role of the schools. In addition, field trips presented the same problem because the destination was chosen by a teacher, who makes the trip meaningful. An unacceptable risk of fostering religion was an inevitable byproduct. These provisions thus violated the second prong of \textit{Lemon} as having a principal or primary effect to advance religion. Any meaningful attempt by the public school authorities to ensure secular use of the instructional equipment or field trip funds to solve this problem would involve close supervision of the nonpublic teachers, and this would create excessive entanglement in violation of the third prong of the \textit{Lemon} test. Justice Blackmun was joined in this view by Justices Brennan, Stewart, Marshall, and Stevens.\footnote{\textit{Id.} at 248-55 (Blackmun, J., opinion, joined by Stewart, J.); \textit{id.} at 255-56 (Brennan, J., concurring in part and dissenting in part); \textit{id.} at 256 (Marshall, J., concurring in part and dissenting in part); \textit{id.} at 265-66 (Stevens, J., concurring in part and dissenting in part).} This conclusion on instructional materials tracked the Court’s decision two years earlier in \textit{Meek v. Pittenger}, which also struck down provision of instructional materials to nonpublic schools. Chief Justice Burger, and Justices White and Rehnquist, dissented in \textit{Meek}, reflecting their dissent in \textit{Nyquist}, that such aid merely equalizes costs and does not impermissibly advance religion. With respect to instructional materials and field trips in \textit{Wolman}, Justice Powell joined only in the judgment as to the instructional materials that were involved in this case. He noted that some of the materials, such as “wall maps, charts, and other classroom paraphernalia” involved items “for which the concept of a loan to individuals is a transparent fiction. A loan of these items is indistinguishable from forbidden ‘direct aid’ to the sectarian institution.” He continued, “But I would find no constitutional defect in a properly limited provision lending to the individuals themselves only appropriate instructional materials and equipment similar to that customarily used in public schools.” Justice Powell dissented as to the field trips, noting, “The Court writes as though the statute funded the salary of the teacher who takes the students on the outing. In fact only the bus and driver are provided for the limited purpose of physical movement between the school and the secular destination of the field trip. . . . I find this aid indistinguishable in principle from that upheld in \textit{Everson}.” Consistent with their dissents in \textit{Nyquist} and \textit{Meek}, Chief Justice Burger, and Justices White and Rehnquist, dissented from each of Justice Blackmun’s conclusions on instructional
materials and field trips.\footnote{99}

As the instrumentalist era drew to a close, the \textit{Lemon} test continued to be applied in a variety of situations. In the 1983 case of \textit{Mueller v. Allen},\footnote{100} the Court, per Justice Rehnquist, upheld a Minnesota income tax deduction – $500 per dependent in grades K through six and $700 per dependent in grades seven through 12 – for expenses involved in tuition, textbooks, and transportation for each dependent attending an elementary or secondary school in Minnesota. Most of the tuition deductions went to parents of children in parochial schools, since 96% of children attending private schools attended religious private schools.

Applying the \textit{Lemon} test, the Court held that the plan had the secular purpose of ensuring that the state's citizenry is well educated. By having many students in private schools, the public schools were relieved of a great burden. The Court next concluded that the statute did not have a principal or primary effect of advancing the sectarian aims of the nonpublic schools. Several features were deemed particularly significant. First, this was only one of many deductions, and legislatures have traditionally been allowed especially broad latitude in creating classifications in tax statutes. Second, the deduction is available to all parents. Third, public funds become available to parochial schools only through the private choices of individual parents of school-age children. Fourth, although it may be true that the greatest benefit of the tax credit involves the tuition for students attending private religious schools, the Court “would be loath” to consider the extent to which various classes of private citizens claim benefits because such an approach “would scarcely provide the certainty” that is needed, nor “principled standards by which such statistical evidence might be evaluated.” Fifth, whatever unequal effect was created by the classification, it can be regarded as a rough return for the benefits provided to the state by parents who send their children to parochial schools. Regarding entanglement, the only place where surveillance might be entanglement is in judging whether the deduction is for "instructional books and materials used in the teaching of religion tenets, doctrines or worship, the purpose of which is to inculcate such tenets, doctrines, or worship." This is not more intrusive than what the Court had already approved with respect to the loaning of textbooks in \textit{Allen}, discussed at § 32.1.3.1.An.87-89.

Justice Marshall dissented, joined by fellow liberal instrumentalists Justices Brennan, Blackmun, and Stevens. Applying a stronger concept of separation of church and state, which is typical for liberal instrumentalists, Justice Marshall said that the Establishment Clause forbids a state from subsidizing religious education directly or indirectly. The tax exemption involved here subsidizes tuition payments to sectarian schools, and that is unconstitutional. Justice Marshall said that the majority had unpersuasively attempted to distinguish \textit{Nyquist}, discussed at § 32.1.3.1.A nn.93-94, where the Court struck down a state law giving tax credits for each child attending a nonpublic school. First, \textit{Nyquist} cannot be distinguished merely because the tax exemption involved there was only for parents whose children attended non-public schools. Here, the fact that a small benefit is

\footnote{99} 433 U.S. at 262-64 (Powell, J., concurring in part, concurring in the judgment in part, and dissenting in part); \textit{id.} at 255 (Burger, C.J., dissenting in part); \textit{id.} at 255 (Rehnquist, J., joined by White, J., concurring in the judgment in part and dissenting in part).

\footnote{100} 463 U.S. 388, 394-403 (1983).
granted to all parents does not change the fact that the most substantial benefit relates to tuition, and that benefit, in practice, is predominantly a subsidy of parochial school tuition masquerading as a subsidy of general educational expense. Second, *Nyquist* cannot be distinguished merely because the amount in *Nyquist* was predetermined by the tax bracket of the taxpayer, whereas the Minnesota deduction varied with the amount of the expenditure. In terms of whether a subsidy is created, that is a distinction without a difference. Justice Marshall said that the tax deduction for books and instructional materials is also unconstitutional. Both can be used to inculcate religious values and belief because here, as distinguished from *Allen*, the deduction is permitted for books that are chosen by the parochial schools themselves, violating the principle that no tax can be levied to support religion.\(^{101}\)

The dissent could also have noted, responding to the majority’s view concerning the benefits provided to the state by parents who send their children to parochial schools (e.g., decreasing the costs of public education and physically relieving an already overburdened public school system) that there is also a serious cost to the state of such flight from the public schools, particularly where a majority of such flight is by middle and upper-middle class white families. This creates a more difficult educational environment in which the public schools must operate, particularly in terms of active community involvement based on parental support and attempting to ensure integrated, diverse educational opportunities for the students.

Despite the more accommodating approach toward the *Lemon* test adopted in *Mueller v. Allen*, the instrumentalist Justices were in the majority two years later in *School District of Grand Rapids v. Ball*.\(^{102}\) In *Ball*, the Court held that a school district's Shared Time and Community Education programs, which provided classes to nonpublic school students at public expense in classrooms located in and leased from the nonpublic schools, had a principal or primary effect of advancing religion. Of the 41 nonpublic schools who participated in the program, 40 were religious schools: twenty-eight of the schools were Roman Catholic, seven were Christian Reformed, three were Lutheran, one was Seventh Day Adventist, and one was Baptist.

The Community Education program classes were taught in the nonpublic elementary schools and commenced at the conclusion of the regular school day. Among the courses offered were “Arts and Crafts, Home Economics, Spanish, Gymnastics, Yearbook Production, Christmas Arts and Crafts, Drama, Newspaper, Humanities, Chess, Model Building, and Nature Appreciation.” Community Education teachers were hired as part-time public school employees. The Community Education courses were completely voluntary and were offered only if 12 or more students enrolled. The Court noted, “Because a well-known teacher is necessary to attract the requisite number of students, the School District accords a preference in hiring to instructors already teaching within the school. Thus, ‘virtually every Community Education course conducted on facilities leased from nonpublic schools has an instructor otherwise employed full time by the same nonpublic school.’”

\(^{101}\) 463 U.S. at 404-16 (Marshall, J., joined by Brennan, Blackmun & Stevens, JJ., dissenting).

The Shared Time teachers were full-time employees of the public schools, who often moved from classroom to classroom during the course of the school day. A “significant portion” of the teachers (approximately 10%) “previously taught in nonpublic schools, and many of those had been assigned to the same nonpublic school where they were previously employed.” Among the subjects offered in the Shared Time program were “remedial” and “enrichment” mathematics, “remedial” and “enrichment” reading, art, music, and physical education. The Court noted that since a typical nonpublic school student attends these classes for one or two class periods per week, approximately “ten percent of any given nonpublic school student's time during the academic year would consist of Shared Time instruction.”

Based on these facts, the Court, per Justice Brennan, stated, “We conclude that the challenged programs have the effect of promoting religion in three ways. [1] The state-paid instructors, influenced by the pervasively sectarian nature of the religious schools in which they work, may subtly or overtly indoctrinate the students in particular religious tenets at public expense. [2] The symbolic union of church and state inherent in the provision of secular, state-provided instruction in the religious school buildings threatens to convey a message of state support for religion to students and to the general public. Finally, [3] the programs in effect subsidize the religious functions of the parochial schools by taking over a substantial portion of their responsibility for teaching secular subjects. For these reasons, the conclusion is inescapable that the Community Education and Shared Time programs have the ‘primary or principal’ effect of advancing religion, and therefore violate the dictates of the Establishment Clause of the First Amendment.”103

Chief Justice Burger and Justice O’Connor agreed that the Community Education program, with virtually all the teachers also being employed full-time by the non-public schools, violated the Establishment Clause. However, as in Aguilar v. Felton, discussed next, they viewed the impact of the Shared Time program, providing remedial and enrichment education, for at most approximately 10% of class-time during the day, as only an incidental effect to advance religion. Justice Rehnquist would have upheld both programs, stating that “[n]ot one instance of attempted religious inculcation exists in the records” even though the “programs have been in operation for a number of years.” Justice White also dissented, following the same accommodationist approach to the Lemon test, upholding provision of secular aid to religious schools, in his dissents in Lemon and Nyquist.104

On the same day Ball was decided, the Court also decided Aguilar v. Felton.105 In Aguilar, the Court held that the Establishment Clause barred New York City from sending public school teachers into parochial schools to provide remedial education to disadvantaged children pursuant to a congressionally mandated program. Such programs were held to be inconsistent with the “primary effect” and “no entanglement” requirements of Lemon. The Court said teachers would inevitably feel pressure to teach religion. Close supervision would thus be required, and there would be a

103 Id. at 397.

104 Id. at 398 (Burger, C.J., concurring in the judgment in part and dissenting in part); id. at 398-99, 429-30 (O’Connor, J., concurring in the judgment in part and dissenting in part); id. at 400 (White, J, dissenting); id. at 400-01 (Rehnquist, J., dissenting).

105 473 U.S. 402, 404-14 (1985); id. at 416, 418 (Powell, J., concurring).
reasonable perception that the state was endorsing religion. The Court’s opinion, authored by Justice Brennan, was joined in full by Justices Marshall, Blackmun, Powell, and Stevens. Justice Powell also wrote a concurring opinion, which noted that in addition to the “direct financial subsidy to be administered in significant part by public school teachers within parochial schools” there also remains a “considerable risk of continuing political strife over the propriety of direct aid to religious schools” and “a likelihood whenever direct governmental aid is extended to some groups that there will be competition and strife among them and others to gain, maintain, or increase the financial support of government.” This creates entanglement by church intrusion into affairs of government.

Chief Justice Burger, and Justices White, Rehnquist, and O’Connor, all dissented in Aguilar. Justice O’Connor noted, “The Court greatly exaggerates the degree of supervision necessary to prevent public school teachers from inculcating religion.” In Part II of her dissent, joined by Justice Rehnquist, she also noted, “Pervasive institutional involvement of church and state may remain relevant in deciding the effect of a statute [under the effects prong of Lemon], but state efforts to ensure that public resources are used only for nonsectarian ends should not in themselves serve to invalidate an otherwise valid statute [under Lemon’s entanglement prong].” In addition, “political divisiveness as evidence of undue entanglement is also unpersuasive. There is little record support for the proposition that New York City’s admirable Title I program has ignited any controversy other than this litigation.” Chief Justice Burger, and Justices White and Rehnquist, raised greater concerns about the entire Lemon framework as it had been applied in cases like Nyquist, Ball, and Aguilar.106

In the final Establishment Clause case of the instrumentalist era, Witters v. Washington Department of Services for the Blind,107 a unanimous Supreme Court held in 1986 that a vocational tuition grant to a blind person who wished to use the grant to attend a Christian college was constitutional. The Court, per Justice Marshall, said that this aid did not have a principal or primary effect of advancing religion because the aid went directly to the blind student, that student could use the aid at any institution he wished, and, as the aid was for vocational assistance, “nothing in the record indicates that . . . any significant portion of the aid expended under the Washington program as a whole will end up flowing to religious education.” Although the case could be interpreted in a narrow fashion as limited to vocational aid to a handicapped individual, Justice O’Connor later said in Agostini v. Felton, discussed at § 32.1.2.1.B nn.117, that Witters departed from the third justification used to find a principal or primary effect to advance religion relied upon in Ball, discussed at § 32.1.3.1.A n.103, that (3) otherwise neutral or secular aid to nonpublic schools “in effect subsidize[s] the religious functions of the parochial schools.”

B. The Modern Natural Law Era

Since 1986, in the post-instrumentalist era, there has been a decline in the percentage of cases where government action challenged under the Establishment Clause has been struck down. However, the

106 Id. at 419-20 (Burger, C.J., dissenting); id. at 420-21 (Rehnquist, J., dissenting); id. at 421 (O’Connor, J., joined by Rehnquist, J., as to Parts II and III, dissenting) (citations omitted); Ball, 473 U.S. at 400 (White, J., dissenting in both Ball and Aguilar).

pattern has not been entirely fixed. Between 1986-2005, Justice O’Connor’s use of an “endorsement” test tended to place her with instrumentalist Justices in the school prayer and the public display cases, even though she suggested that no single test should be employed. Justice Kennedy’s concern about possible “coercion” or “proselytizing” also tended to place him with instrumentalist Justices in the school prayer cases, although not as much in the public display cases. In the school aid cases, both Justices O’Connor and Kennedy tended to join Chief Justice Rehnquist and Justices Scalia and Thomas in supporting various forms of government aid toward religious schools on grounds that the aid merely reflected neutrality toward religion. Of course, under the “endorsement” approach, Justice O’Connor was more cautious about this than Justice Kennedy under the “coercion” or “proselytizing” test. During this time, Chief Justice Rehnquist and Justices Scalia and Thomas made it clear that they thought the Lemon test should be overruled as incompatible in many of its applications with American traditions and history.

(1) School Aid Cases

During the first part of the modern natural law era, the Court did not consider any major Establishment Clause cases involving school aid. The first such case was in 1993. In Zobrest v. Catalina, the Court allowed public resources to be used in parochial schools when it held that the Establishment Clause does not bar a public school district from providing, under the Individuals with Disabilities Education Act (IDEA), a sign-language interpreter for a deaf student who attended classes at a Roman Catholic high school. The Court said that government programs which neutrally provide benefits to a broad class of citizens, defined without reference to religion, are not readily subject to Establishment Clause challenge just because sectarian institutions may receive an attenuated financial benefit. Here, no government funds found their way into the sectarian school’s coffers. The interpreter would not function as a teacher, and so would not intentionally or accidentally engage in religious instruction. Although the case could be interpreted narrowly, since the interpreter did no teaching, Justice O’Connor later said in Agostini v. Felton, discussed at § 32.1.2.1.B nn.116, that Zobrest had rejected the first two notions relied on in Ball, discussed at § 32.1.3.1.A n.103, that (1) public employees will be presumed to inculcate religion and (2) the presence of public employees on private school property creates an impermissible symbolic link between government and religion.

Four Justices dissented in Zobrest on the question of whether the constitutional issue needed to be addressed. Justice Blackmun, joined by Justices Stevens, O’Connor, and Souter, concluded that the constitutional question did not have to be reached, as the IDEA itself, and implementing regulations, did not require a sign-language interpreter to be provided to a deaf student wishing to attend a sectarian school. Deciding to address the merits, Justices Blackmun and Souter concluded that the public resources were capable of advancing religion since the interpreter might serve as a conduit for religious education, and impressionable youngsters might view the government as

\[108\] 509 U.S. 1, 8-14 (1993).

\[109\] Id. at 14-17 (Blackmun, J., joined by Souter, J., and joined in Part I by Stevens & O’Connor, JJ.).
supporting the religious denomination of the school. This conclusion is more faithful to Justice Brennan’s application of the Lemon test in Ball than the majority opinion in Zobrest.

In 1994, in Board of Education of Kiryas Joel Village School District v. Grumet, the Court, per Justice Souter, struck down the establishment of the Kiryas Joel Village School District. Justice Souter noted, “The village of Kiryas Joel in Orange County, New York, is a religious enclave of Satmar Hasidim, practitioners of a strict form of Judaism,” and its incorporators intentionally drew its boundaries under the state’s general village incorporation law to exclude all but Satmars. Given this fact, there was no assurance of religious neutrality in the exercise of its school district power.

In a concurring opinion, Justice Stevens, joined by Justices Blackmun and Ginsburg, agreed that this was more establishing than accommodating religion. In a separate concurrence, Justice Blackmun noted that the Grumet decision was consistent with the Lemon test, and its 30-year progeny, even though Justice Souter’s opinion did not explicitly apply the Lemon test.

Agreeing with the result, Justice O’Connor said that the real problem here was that this was a legislatively drawn religious classification singling out a particular group for favorable religious treatment. Justice Kennedy similarly noted that the real vice was drawing political boundaries on the basis of religion. Both Justice O’Connor and Justice Kennedy indicated, however, that they would be willing to reconsider other of the Court’s school aid cases, such as Ball and Aguilar, with Justice O’Connor, who was on the Court and had dissented in those cases, indicating a willingness to overrule consistent with her dissents. Dissenting in Grumet, Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, indicated that the Lemon test should be rejected in favor of an accommodationist approach toward religion based upon text, history, and tradition, that is, as discussed at § 32.1.2.2, a formalist approach to the Establishment Clause. The dissent also called for cases like Ball and Aguilar to be overruled.

In 1997, consistent with Justice O’Connor’s dissents in those cases, the Court did overrule Ball and Aguilar in Agostini v. Felton. Justice O’Connor opened her opinion by pointing out that in the 1985 appeal of this case, Aguilar v. Felton, discussed at § 32.1.3.1.A. nn.105-06, the Court held that the Establishment Clause barred New York City from sending public school teachers into parochial schools to provide remedial education to disadvantage children, pursuant to a federal program. This resulted in a permanent injunction reflecting the ruling. The parties bound by that injunction now sought relief, saying that because of subsequent decisions of the Court, the original holding was no longer good law. The Court agreed and ordered relief from the injunction.

110 Id. at 18-24 (Blackmun, J., joined by Souter, J., dissenting).

111 512 U.S. 687, 690, 702-08 (1994); id. at 710-11 (Blackmun, J., concurring); id. at 711-12 (Stevens, J., joined by Blackmun & Ginsburg, JJ., concurring).

112 Id. at 716-18 (O’Connor, J., concurring in part and concurring in the judgment); id. at 722, 730-32 (Kennedy, J., concurring in the judgment).

113 Id. at 732, 743-52 (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., dissenting).

In Part I of her opinion, Justice O'Connor detailed the facts of the case and its procedural history. Title I channels federal money to local agencies to provide remedial education, guidance, and job counseling to students who reside in low income areas and who are failing or at risk of failing, regardless of whether the children attend public schools. The teachers are public employees, and they are instructed not to introduce any religious matter into their teaching or become involved in the religious activities of the schools. All religious symbols are removed from classrooms used for Title I services. To assure compliance, a publicly employed field supervisor must make at least one unannounced visit to each teacher's classroom every month. After the Court originally found this to be unconstitutional under Lemon, the school system began providing the Title I instruction at public school sites, at leased sites, and in mobile instructional units – alternatives uniformly permitted by courts as not involving a "principal or primary effect" to advance religion or create “excessive entanglement.” This created added costs and reduced the number of students receiving benefits. Pointing to the fact that five Justices in Grumet suggested that Aguilar might well be overruled (Chief Justice Rehnquist, and Justices O'Connor, Scalia, Kennedy, and Thomas), the petitioners asked the district court for relief from the permanent injunction. The motion was denied and the court of appeals affirmed.

In Part II, Justice O'Connor narrowed the issue to whether later Establishment Clause cases have so undermined Aguilar that it is no longer good law. She did this by first noting that a judgment could be set aside under the Court’s Rule 60(b)(5) if prospective application is no longer equitable, as when there has been a significant change in factual conditions or law. She rejected the need for change on the factual conditions of high costs, because all were aware when Aguilar was decided that there would be added costs. Second, the fact that a majority of the Justices have said that Aguilar should be reconsidered or overruled does not effect a change in the law. So the critical issue was whether Aguilar had been so undermined by later decisions that it was no longer good law.

In Part III, Justice O'Connor overruled Aguilar. In Part III(A) she explained the rationale on which Aguilar and Ball were decided. In the Shared Time program in Ball, and in Aguilar, the state provided remedial and enrichment classes, at public expense, to students attending non-public schools during regular school hours by publicly employed teachers. The Court found that the programs impermissibly advanced religion. It did so by assuming that teachers involved in the program might become involved intentionally or inadvertently in inculcating particular religious tenets. They might conform their instruction to the sectarian environment, and there was direct aid to the schools by freeing up money for religious indoctrination that the school would otherwise have devoted to secular education. No weight was placed on the fact that the program was provided to students and that it only supplemented other courses. The assumptions leading to the conclusion of advancing religion were that: (1) public employees working on parochial premises inevitably inculcate religion, (2) their presence on the premises creates a symbolic union between church and state, (3) all public aid that directly aids the educational function of parochial schools impermissibly finances religious indoctrination, and (4) excessive entanglement is inevitable because teachers must be closely monitored.\footnote{\textit{Id.} at 218-22.}

\footnote{\textit{Id.} at 218-22.}
In Part III(B), Justice O'Connor pointed out how later cases have undermined these four assumptions by manifesting a changed understanding of the criteria by which to determine whether aid to religion has an impermissible effect. Justice O'Connor examined the first assumption that teachers on parochial premises must inevitably indoctrinate. She said that presumption was abandoned in Zobrest, where a deaf student was allowed to bring his state-employed sign-language interpreter to his Roman Catholic high school. Zobrest also repudiated the second assumption regarding a symbolic link. Replying the Justice Souter's attempt to limit Zobrest to translators, Justice O'Connor said that this was not a principled basis on which to confine Zobrest's rationale, because “the signer in Zobrest had the same opportunity to inculcate religion in the performance of her duties as do Title I employees.”

With respect to the third assumption that all direct aid to education impermissibly finances religious indoctrination, Justice O'Connor said that this assumption was abandoned in Witters, where the Court allowed a state to issue a vocational tuition grant to a blind person who wished to become a pastor, and where the aid reached the parochial school as a result of independent and private choices of individuals. Similarly, in Zobrest, a deaf student was permitted to attend a religious school with a state-paid sign-language interpreter. These cases make clear that direct aid to education will not, as a matter of law, be deemed to have the effect of advancing religion through indoctrination.

With respect to the fourth assumption, that excessive entanglement would be necessary to ensure close monitoring, Justice O'Connor noted that Aguilar's conclusion that there was excessive entanglement was based on both concerns regarding entanglement identified in Lemon, discussed at § 32.1.2.4 n.51, that (1) government would become entangled with religion, through pervasive monitoring needed to ensure against inculcation of religion and the program’s required administrative cooperation, and (2) religion would become entangled with government, because the program might increase political divisiveness. Based on the analysis in her dissent in Aguilar, discussed at § 32.1.3.1.A n.106, she replied that the concern with entanglement should be viewed as part of the means/end inquiry done under second prong of Lemon concerned with effects. She noted that the entanglement prong concerns the same kind of considerations – (1) the character and purposes of the institutions benefitted, (2) the nature of the aid, and (3) the resulting relationship – that Chief Justice Burger identified in Lemon as appropriate for the effects prong, discussed at § 32.1.2.4 n.51. From that perspective, some administrative cooperation or the potential of political divisiveness does not automatically create a principal or primary effect to advance religion. The assumption that public employees will inevitably inculcate religion was abandoned in Zobrest, as discussed at § 32.1.3.1.B n.116, and so the Court must discard the assumption that pervasive monitoring will be required. Thus, Justice O'Connor concluded that Aguilar is no longer good law.

Justice O'Connor also replied to three differences that Justice Souter’s dissent, joined by Justices Stevens and Ginsburg, perceived from Zobart and Witters. Justice Souter said that Title I services

\[116\] Id. at 222-25, 227-28.

\[117\] Id. at 225-27.

\[118\] Id. at 232-35.
are distributed directly to religious schools. She replied, however, that the funds go to a public agency and then to eligible students. He said that Title I funds relieve a religious school of an expense it would otherwise have assumed. She replied that there is no evidence in the record that Title I services supplant services offered in the sectarian schools. He said more students are being served. She replied that this distinction is not meaningful. Justice O'Connor also replied to an argument that Title I provides aid to religion by creating incentives for persons to attend parochial schools. She replied that no such incentive exists where the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and where it is made available to religious and secular beneficiaries on a nondiscriminatory basis.119

In Part III(C), Justice O'Connor noted that the doctrine of stare decisis is at its weakest in constitutional cases because, unlike cases of statutory interpretation, where the legislature can amend a statute, the Court's interpretation of the Constitution can be altered only by constitutional amendment or overruling prior decisions, as discussed at § 4.3.2 nn.88-89. Here, the decision to overrule Aguilar and Ball was based on more than a present doctrinal decision to come out differently, but rather on the view that the Court is convinced that its prior decisions' premises have been undermined by later decisions.120 Inconsistency with related law is one of the special grounds for overruling precedent from the natural law perspective, as discussed at § 7.3.3.2.

In Part IV, Justice O'Connor concluded that the change in constitutional law entitled the plaintiffs to relief because of the general practice to apply the rule of law announced in a new case to the parties before the court. Justice O'Connor cautioned lower courts that they should follow the latest precedent on point, even though it rests on reasons rejected in other cases, leaving to the Supreme Court the prerogative of overruling its own decisions, consistent with Rodriguez de Quijas v. Shearson/American Express Inc., discussed § 4.3.4 n.100. In addition, she advised parties not to file Rule 60(b)(5) motions to vacate injunctions premised on nothing more than the claim that various Justices have stated that the law has changed. She noted that the Court is acting here only because the propriety of continuing prospective relief is at issue. As a final matter, Justice O'Connor noted that there is no reason to wait for a better vehicle to overrule Aguilar because New York City was spending millions on mobile instructions units and leased sites, when that money could be spent on disadvantaged children under a program perfectly consistent with the Establishment Clause.121

Justice Souter dissented, with Justices Stevens and Ginsburg, and with Justice Breyer as to Part II. Justice Souter's main point in Part I was that if the Court was to draw a line short of barring all state aid to religious schools for teaching standard subjects, the Aguilar-Ball line was sensible and capable of principled adherence. That line was whether state-paid teachers were placed into the physical and social setting of religious schools, where (1) the pressures for the teacher to reflect the school’s mission and (2) the symbolic link between church and state would be greater. Responding to the third concern in Ball, discussed at § 32.1.3.1.A n.103, that (3) the program in effect subsidizes the religious functions of the parochial schools, Justice Souter noted that Title I aid is not merely

119 Id. at 228-32; id. at 241-47 (Souter, J., joined by Stevens & Ginsburg, JJ., dissenting).

120 Id. at 235-36.

121 Id. at 237-40.
supplemental when they teach subjects that the religious schools would otherwise have been obliged to teach. Justice Souter indicated that based on this concern perhaps there is an invalid subsidy to religious schools even when remedial education takes place off the religious premises, because the benefits flow directly to the schools in the form of classes and programs and these benefits make it easier for them to survive and concentrate their resources on their religious objectives.\(^\text{122}\)

In Part II of his opinion, Justice Souter argued that the Court had not abandoned the assumptions underlying *Aguilar* and much of *Ball*. *Zobrest*, as he saw it, was a narrow holding based on the fact that the signer did not have an opportunity to inject religious content into what was supposed to be secular instruction. He next said it was not true that cases after *Ball* had departed from a broad holding in *Ball* that all government aid which aids the educational function of religious school is invalid, since *Ball* only held more narrowly that a particular program in that case subsidized the religious functions of parochial schools by taking over a significant portion of the teaching of secular subjects. *Zobrest* and *Witters* involved individual students with no evidence being presented that the schools were being relieved of expenses they otherwise would have assumed. Thus, there was no government aid supplanting religious funding in those cases. Justice Souter concluded that, as here, where the government aid results in support for religious educational institutions in some substantial degree, the formal neutrality of the criteria for aid should not protect it from the Establishment Clause.\(^\text{123}\)

In concluding his dissent, Justice Souter said that if the precedents are not read for exaggerated propositions it can be seen that no subsequent case has abandoned the *Aguilar* and *Ball* assumptions. Specifically, no case has abandoned concern about public school teachers furthering religious doctrine; or the distinction between direct and substantial aid and aid that is indirect and incidental; or that fusing public and private faculties in one school may well create an impression of endorsement; or that direct subsidization of religious education is unconstitutional; or the view that the public taking over a portion of a religious school's teaching responsibility on that school's property is direct subsidization. Justice Souter admitted that the cost of complying with *Aguilar* was high – conducting such remedial or enrichment classes off-site, thus reducing any impression of endorsement of religion and making the aid indirect, rather than direct. However, he found that cost offset by the need for remaining faithful to principled constitutional lines.\(^\text{124}\)

Justice Ginsburg also dissented, and was joined by Justices Stevens, Souter, and Breyer. She contended that a proper application of the Court's rules called for deferring consideration of *Aguilar* until another case. The reason was that it was too late in *Aguilar* to ask for rehearing of the case, and the Court had used Rule 60(b)(5) regarding vacating judgments that are no longer equitable basically to achieve that end. She would await another case to preserve integrity in the interpretation of procedural rules, avoid having the Court set its own agenda, and avoid invitations to reconsider

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\(^{122}\) *Id.* at 241-47 (Souter, J., joined by Stevens & Ginsburg, JJ., dissenting).

\(^{123}\) *Id.* at 247-53 (Souter, J., joined by Stevens, Ginsburg & Breyer, JJ., dissenting).

\(^{124}\) *Id.* at 253-54 (Souter, J., joined by Stevens & Ginsburg, JJ., dissenting).
old cases based on chance speculations from changes in Court personnel.125

The difference between the treatment of the Court’s precedents by Justice O’Connor, joined by Justice Kennedy, in Agostini, and Justice Souter, is consistent with their differences noted in other cases, as discussed at § 12.3.2. As discussed there, Justice Souter tends to follow both the core holdings and general reasoning of precedents, and thus in Agostini was faithful to the limited holding in Justice Marshall’s opinion in Witters, and the limited language in Chief Justice Rehnquist’s opinion in Zobrest. In contrast, Justices O’Connor and Kennedy, while faithful to the core holdings in Witters and Zobrest, interpreted their reasoning in light of their own views on text, context, and history, which focuses on “endorsement” or “coercion,” as discussed next in Mitchell v. Helms.

The weakening of the instrumentalist-era understanding of Lemon in the school aid context continued in 2000 in Mitchell v. Helms.126 In a plurality opinion, Justice Thomas, with Chief Justice Rehnquist and Justices Scalia and Kennedy, upheld a federal program that funded state agencies that loaned educational materials and equipment to public and private schools, with the enrollment of each participating school determining the amount of aid. Justice Thomas noted that in Agostini the Court had modified Lemon for the purpose of evaluating aid to schools by stating that entanglement is not a separate inquiry, but only one criteria for deciding if there is a primary effect of advancing religion, and by revising criteria for determining the principal or primary effect of a statute. After Agostini, Justice Thomas said, three primary criteria are used to evaluate whether government aid has the effect of impermissibly advancing religion: does the aid “result in governmental indoctrination; define its recipients by reference to religion; or create an excessive entanglement.”

In applying this test, Justice Thomas adopted a formalist, literal approach to the question of governmental indoctrination, concluding that “if the government, seeking to further some legitimate secular purpose, offers aid on the same terms, neutrally, without regard to religion, to all who adequately further that purpose, then it is fair to say that any aid going to a religious recipient only has the effect of furthering that secular purpose.” From such a perspective, the possibility that the loaned educational materials and equipment could be diverted and used in the context of religious instruction is not constitutionally relevant, since that diversion would not be done by the government, and thus could not result in government “coercion” or “proselytizing” of religion, from either Justice Kennedy’s “in-fact” coercion analysis in Lee v. Weisman, discussed at § 32.1.2.3 n.47-50, or Justices Scalia and Thomas’ literal “actual legal coercion” test, discussed at § 32.1.2.2 nn.32-33. Justice Thomas also noted that government neutrality, rather than indoctrination, is virtually assured if an aid program literally, or figuratively, passes through the hands of numerous private citizens who can direct the aid elsewhere by their choice of a school for their children. In such a case, the private citizen is making the choice, not the government.127

125 Id. at 255-60 (Ginsburg, J., joined by Stevens, Souter & Breyer, JJ., dissenting).


127 Id. at 809-14, 820-25.

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Regarding the second criterion of how the recipients are defined, Justice Thomas noted that the aid in this case “is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis.” Aid is allocated based on enrollment, and under the program “for every dollar you spend for the public school student, you spend the same dollar for the non-public school student.” The allocation criteria therefore created no improper incentive for parents to chose a religious education for their children, and thus were neutral in how recipients were defined.128

Further reflecting a formalist approach, and the formalist preference for doctrine phrased as categorical elements, rather than as factors, discussed at §§ 4.2.2 text following n.48 & 4.2.4 n.68, Justice Thomas treated the three Agostini criteria as three separate elements in his analysis, not as factors to weigh, specifically criticizing the dissent for using a factor approach to resolve the issue of effect. Reflecting the formalist preference for “bright-line” rules, discussed at § 4.2.3 nn.54-56, Justice Thomas also noted that certain factors mentioned by the dissent as relevant to the overall issue of effect – the potential for political divisiveness, the pervasive sectarian character of the institution receiving the aid, and whether the aid given is direct or indirect – should no longer be considered in the constitutional analysis. In Justice Thomas’ view, these considerations are not central to the issue of whether government indoctrination is taking place, unlike the issues addressed by Justice Thomas of whether the aid is provided to secular and religious schools on a neutral basis, and whether the aid literally, or figuratively, goes to parents who make a private choice on which school to send their child. Continued focus on the other factors produces more “chaos” than principled decisionmaking.129 Finally, given the result in this case upholding state provision of instructional materials and equipment to nonpublic schools, those aspects of the earlier cases of Meek and Wolman, discussed at § 32.1.3.1.A nn.97-98, which had struck down such aid, were overruled.130

Justice O’Connor, joined by Justice Breyer, concurred in the judgment, but said the plurality was giving formal neutrality too much importance, and the plurality’s discussion of direct versus indirect aid, and the discussion of diversion, were flawed. For Justice O’Connor, the three Agostini criteria are “factors” to be weighed against an overall decision whether a reasonable observer would conclude that the government’s action constituted an “endorsement” of religion. From that perspective, as Justice O’Connor noted, “[A] government program of direct aid to religious schools based on the number of students attending each school differs meaningfully from the government distributing aid directly to individual students who, in turn, decide to use the aid at the same religious schools. In the former example, if the religious school uses the aid to inculcate religion in its students, it is reasonable to say that the government has communicated a message of endorsement. . . . In contrast, when government aid supports a school's religious mission only because of independent decisions made by numerous individuals to guide their secular aid to that school, '[n]o reasonable observer is likely to draw from the facts . . . an inference that the State itself

128 Id. at 829-32.

129 Id. at 814-20, 825-29.

130 Id. at 835-36.
is endorsing a religious practice or belief.” 131 Regarding the issue of diversion of instructional materials or equipment for religious instruction, Justice O’Connor stated that if diversion could be shown, with the government either approving or acquiescing in such use, a reasonable observer could well conclude that the government was endorsing religion, because then the plaintiff would have proven that “the aid in question actually is, or has been, used for religious purposes.” In this case, however, reflecting their occasional Holmesian deference-to-government predisposition, discussed at § 11.4 nn.107-09 (Justice Breyer) & 12.4.2 nn. 173-85 (Justice O’Connor), Justices O’Connor and Breyer concluded the record did not reflect any meaningful diversion that could give rise to a concern with endorsement. As Justice O’Connor noted, this conclusion was rejected by the other 7 Justices on the Court, who all concluded the some meaningful diversion had taken place in the case. 132

Justice Souter, dissenting with Justices Stevens and Ginsburg, agreed with Justice O’Connor that the Agostini criteria are factors to be weighed in an overall balance concerning the principal or primary effect of any aid program. In engaging in this factor analysis, Justice Souter noted that the Court’s precedents under Lemon has considered “whether the government is acting neutrally in distributing its money, and about the form of the aid itself, its path from government to religious institution, its divertibility to religious nurture, its potential for reducing traditional expenditures of religious institutions, and its relative importance to the recipient, among other things.” Justice Souter continued, “At least three main lines of enquiry addressed particularly to school aid have emerged to complement [formal] neutrality. First, we have noted that two types of aid recipients heighten Establishment Clause concern: pervasively religious schools and primary and secondary religious schools. Second, we have identified two important characteristics of the method of distributing aid: directness or indirectness of distribution and distribution by genuinely independent choice. Third, we have found relevance in at least five characteristics of the aid itself: its religious content; its cash form; its divertibility or actually diversion to religious support; its supplantation of traditional items of religious school expense; and its substantiality.” In addition, reflecting concerns with entanglement between church and state, Justice Souter noted that the Court’s precedents had expressed concern with whether state aid would “ violate a taxpayer's liberty of conscience, threaten to corrupt religion, [or] generate disputes over aid.” 133 In this case, Justice Souter said, the plurality was rejecting the fundamental principle that had emerged from applying these factors in earlier cases of no taxpayer funded aid to a school’s religious mission. Here there was aid to the schools themselves which could be used, and was being used, to advance the religious inculcative functions of the recipient religious schools. This made the government aid clearly unconstitutional, since prior cases had indicated, unlike Justice O’Connor’s view, that a “substantial risk of diversion” is all that is required for the Establishment Clause to be violated, not “actual” diversion. 134

131 Id. at 838-44 (O’Connor, J., joined by Breyer, J., concurring in the judgment), citing, inter alia, Lynch v. Donnelly, 465 U.S. 668, 692 (O’Connor, J., concurring) (discussing “endorsement”).

132 Id. at 857-67.

133 Id. at 868-69, 885, 901 (Souter, J., joined by Stevens & Ginsburg, JJ., dissenting).

134 Id. at 908-13.
The more accommodating approach toward school aid issues adopted in *Mitchell* continued in 2002 in *Zelman v. Simmons-Harris*.135 *Zelman* involved a pilot program adopted by the state of Ohio in 1996 to provide educational choices to families with children who reside in a “covered district,” defined to apply only to Cleveland. Under the program, tuition aid of up to $2,250 per year was provided to parents who chose to send their child to a school other than a Cleveland public school. Any private school, whether religious or nonreligious, could participate in the program and accept program students so long as the school was located within the boundaries of a covered district and met statewide educational standards. Participating private schools had to agree not to discriminate on the basis of race, religion, or ethnic background, or to “advocate or foster unlawful behavior or teach hatred of any person or group on the basis of race, ethnicity, national origin, or religion.” Any public school located in a school district adjacent to the covered district could also participate in the program. Adjacent public schools were eligible to receive the same $2,250 tuition grant for each program student accepted, in addition to the full amount of per-pupil state funding attributable to each additional student, although none of the public schools chose to participate in the program.

Given these details, the governmental aid program on its face was neutral with respect to religion, 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. For the four Justices in the plurality opinion in *Mitchell*, this made the program clearly constitutional. Justice Thomas also noted in a separate concurrence that the main beneficiaries of this program would be low-income minorities living in Cleveland who wished educational alternatives to the Cleveland public schools, which were “[b]esieged by escalating financial problems and declining academic achievement.”136

Concurring as the critical fifth vote, Justice O’Connor emphasized the limited nature of the program; that it did not provide “substantial” aid to the religious schools; the nonpublic schools, both religious and secular, had to accept students without regard to “race, religion, or ethnic background”; and the parents had a range of non-religious private school options from which to choose. Given these facts, the program could not be viewed by an objective reasonable observer as government endorsement of religious education.137

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136 *Id.* at 652-54; *id.* at 676-67 (Thomas, J., concurring).

137 *Id.* at 668-76 (O’Connor, J., concurring). *See also* American Jewish Congress v. Corporation for National and Community Service, 399 F.3d 351, 354-59 (D.C. Cir. 2005) (federally chartered corporation's AmeriCorps Education Awards Program, a nationwide community service program which allowed participants to be placed as teachers in both secular and religious schools, did not violate Establishment Clause, even though some participating individuals at religious schools elected to teach religion in addition to secular subjects; participants were chosen without regard to religion, participants’ choice to teach religion in addition to secular subjects did not have imprimatur of government endorsement, and participants who chose to teach in religious schools did so only as a result of their own genuine and private choice).
In his dissent, Justice Souter, joined by Justices Stevens, Ginsburg, and Breyer, noted that under this voucher program up to $2,250 in tuition vouchers could be used by parents sending their children to religious schools. He noted, “The money will thus pay for eligible students’ instruction not only in secular subjects but in religion as well, in schools that can fairly be characterized as founded to teach religious doctrine and to imbue teaching in all subjects with a religious dimension. Public tax money will pay at a systemic level for teaching the covenant with Israel and Mosaic law in Jewish schools, the primacy of the Apostle Peter and the Papacy in Catholic schools, the truth of reformed Christianity in Protestant schools, and the revelation to the Prophet in Muslim schools, to speak only of major religious groupings in the Republic.” Under the instrumentalist-era precedents of Allen, Tilton, and Nyquist, discussed at § 32.1.3.1.A nn.87-94, among others, this aid to religious schools, not limited to secular materials, secular instruction, or secular construction, would have been held to violate the Establishment Clause, as Justice Souter noted.138

A principled natural law approach, focused on “strict neutrality” as measured by no government “endorsement” of religion, would likely adopt an approach between the greater deference-to-government application of the endorsement test by Justice O’Connor, and the greater separation of church and state instrumentalist approach of Justice Souter. Justice O’Connor is right that to the extent the decision to use the vouchers is made by parents, there is no governmental aid going to religion per se. Because the governmental aid is focused on education, not religion, such programs do not violate a strict mandate, as stated by Madison, noted at § 32.1.1 n.10, that religion be “wholly exempt from [the] cognizance” of government. To the extent any school covered by the program cannot discriminate in its admittance policies on grounds of religion, or teach doctrines of religious hatred, there is even less of a chance of the perception of government endorsement of religion.

On the other hand, there are aspects of Justice Souter’s dissents in Mitchell and Zelman that are important to keep in mind from a natural law, strict neutrality objective endorsement perspective. First, and most obviously, the test of whether an objective observer would conclude the government is behaving with strict neutrality or endorsing religion is based on a full analysis of all the facts of the government’s action. The government cannot evade the endorsement test by keeping its aid “secret” and then claim that since individuals do not know about it, no endorsement is taking place. As a doctrinal matter, the endorsement test, as phrased by Justice O’Connor, is not based on subjective knowledge, but is an objective test based on objective facts. More generally, given the concerns with entanglement of church and state expressed by Madison, Story, and others, discussed at § 32.1.1 nn.2-18, secret aid, suggesting of a church/state conspiracy, is naturally much more problematic than aid given in the open. Justice Souter’s concern in Mitchell that the endorsement test might not cover the problem of “secret aid” is inapposite.139 The endorsement test can handle this problem easily.

Second, political divisiveness brought on by lobbying pressures regarding what aid should go to religious schools does raise concerns of entangling church and state. As Justice Souter indicated in Zelman, these are precisely the kind of concerns of factional politics about which Madison, in

138 Id. at 686-93 (Souter, J., joined by Stevens, Ginsburg & Breyer, JJ., dissenting).

139 Mitchell, 530 U.S. at 900-01 (Souter, J., joined by Stevens & Ginsburg, JJ., dissenting).
particular, was quite sensitive. While Justice O’Connor is right that the mere filing of a lawsuit does not establish any real concern with political divisiveness, more intense lobbying activities, as noted by Justice Breyer in his separate dissent in Zelman, should raise real entanglement issues. The concerns are separate from, and thus not solved by, the “parental choice” aspect of the program.

On the question of whether Justice Souter’s “substantial risk” of diversion, discussed at § 32.1.3.1.B n.134, or Justice O’Connor’s “actual” diversion, discussed at § 32.1.3.1.B n.132, is the relevant inquiry from an endorsement perspective, if the “risk” is “substantial” enough, then an objective observer might well conclude that the government being willing to take that risk evidences endorsement of religion, unless compelling secular interests justify taking the risk. As one factor in the endorsement inquiry, there should be no per se rule preventing considering the risk of diversion, but only truly substantial risks should make much difference in the factor analysis in the absence of any actual diversion, particularly if the government indicates a willingness to respond to any actual diversion which might take place. Response to any diversion indicates the government’s commitment not to endorse religion.

Finally, many of the concerns regarding the dangers of more wide-spread government support for religious education raised by Justices Souter and Breyer in their dissents in Zelman are speculative. Given the religious diversity in the Nation, and the fact that most individuals educate their children in the public schools, and will likely continue to do so in the future, there is not likely to be much sustained political pressure for wide-spread voucher programs or other kinds of aid to nonpublic schools. Certainly after Zelman, no such explosion in voucher programs has taken place. Indeed, the greater threat to public schools may come from charter schools, which, though “public” schools in the sense of being completely funded by the government, are typically founded, organized, and run not by the district or the state, but by self-organizing groups of education entrepreneurs – parents, teachers, or third parties. In some states the same institutions that accredit school districts also certify charter schools, and in other states charter schools must apply for their authorizing "charter" to the local school district with which they plan to compete. Charter schools are more thoroughly regulated than voucher schools – for example, they cannot teach a sectarian curriculum – but they are still exempt from many of the regulations and policies that govern traditional public, district-run schools.

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141 Aguilar, 473 U.S. at 429 (O’Connor, J., joined by Rehnquist, J., dissenting).

142 Zelman, 536 U.S. at 717-29 (Breyer, joined by Stevens & Souter, JJ., dissenting).


144 Id. at 881-82.
In addition, many states have provisions in their state constitutions which restrict them from directing money to religious educational institutions. In most states, such provisions were passed in the late 19th century, when most religious educational institutions were Catholic, as part of the Anti-Catholicism of that era. As one author has noted:

Blaine Amendments, as they are called, are the result of a campaign by Congressman James Blaine of Maine. While in Congress, he sponsored a constitutional amendment that would have barred the state from establishing or sponsoring a religion, but his proposal fell short of the necessary votes. The amendment was introduced on December 14, 1875, and said [in part]:

“[N]o money raised by taxation in any State for the support of public schools, or derived from any public fund therefore, nor any public lands devoted thereto, shall ever be under the control of any religious sect, nor shall any money so raised or lands so devoted be divided between religious sects or denominations.”

Although the amendment failed in Congress, many anti-Catholic proponents took up the amendment, and as many as thirty-seven states eventually enacted Blaine Amendments.145

The Ohio and Wisconsin Supreme Courts have held that vouchers programs in their states are not barred by their state’s version of a Blaine Amendment.146 The Florida and Colorado Supreme Courts have struck down vouchers programs under provisions in their state constitutions regarding providing “free public education” and ensuring “local control” of schools, independent of Blaine Amendment concerns.147 As of 2006, ten states have constitutional provisions specifically banning public funds for any private school education: Alaska, California, Hawaii, Kansas, Michigan, Mississippi, Nebraska, New Mexico, South Carolina, and Wyoming.148

Given all of these considerations, while drawing the precise federal constitutional line regarding permissible aid to nonpublic schools in cases like Agostini, Mitchell, and Zelman is important in terms of developing principled constitutional doctrine, the greater practical concern regarding the Establishment Clause and schools is political pressure for religious influences to invade public schools, where most children are educated, and where political pressure may well be greater. On these issues, Justices O’Connor, Kennedy, and Souter have tended to agree, and the recent precedents continue to represent a relatively strict form of government neutrality toward religion. These cases are discussed next, at § 32.1.3.1.B.2.

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146 Simmons-Harris v. Goff, 711 N.E.2d 203, 211-12 (Ohio 1999); Jackson v. Benson, 578 N.W.2d 602, 620-23 (Wis. 1998).
147 Bush v. Holmes, 919 So.2d 392, 408-09 (Fla. 2006); Owens v. Colorado Congress of Parents, Teachers and Students, 92 P.3d 933, 938-44 ( Colo. 2004).
148 See Bush v. Holmes, 919 So.2d 392, 416 (Fla. 2006) (Bell, J., joined by Cantero, J., dissenting), and provisions cited therein.
(2) Religious Influences Within the Public Schools

As noted at § 32.1.3.1.A nn.80-86, the matter of prayer in public schools was first considered during the instrumentalist era in Engel v. Vitale,149 decided in 1962, and School District of Abington Township v. Schempp,150 decided in 1963. In Engel, the Court struck down a policy of having teachers, at the beginning of each school day, say a non-denominational prayer, with students not compelled to join in the prayer over their parents’ objection. In Schempp, the Court struck down a Pennsylvania law that required that at least 10 verses from the Holy Bible shall be read, without comment, at the opening of public school on each school day, with children to be excused upon the written request of their parents or guardian. In both cases, the Court viewed the prayers as having no purpose other than to advance religion. Thus, in both cases the government action violated the liberal instrumentalist understanding of the separation of church and state, which, as restated in 1971 as the first prong of the Lemon test, discussed at § 32.1.2.4 n.51, requires government acts to have a secular purpose to survive an Establishment Clause analysis.

By the beginning of the natural law era, in 1986, the Court had concluded that statements appearing to be directly in support of religion may have a secular purpose if they reflect what the Court has called “ceremonial deism.” Under this concept, as explained by Justice O’Connor, concurring in the judgment in Elk Grove Unified School District v. Newdow:

One such purpose is to commemorate the role of religion in our history. . . . It is unsurprising that a Nation founded by religious refugees and dedicated to religious freedom should find references to divinity in its symbols, songs, mottoes, and oaths. Eradicating such references would sever ties to a history that sustains this Nation even today.

Facially religious references can serve other valuable purposes in public life as well. . . . [S]uch references “serve, in the only ways reasonably possible in our culture, the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society.” For centuries, we have marked important occasions or pronouncements with references to God and invocations of divine assistance. Such references can serve to solemnize an occasion instead of to invoke divine provenance.

Given this secular purpose, the question of whether a particular statement or invocation in public schools violates the Establishment Clause then turns under Lemon to the question whether the statement has a principal or primary effect to advance religion. In deciding this question, the Justices tend to reflect their general approach to the Establishment Clause. For example, in 1992,

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the Court held in *Lee v. Weisman*\textsuperscript{152} that a public school could not offer invocations or benedictions in a high school graduation ceremony. Reflecting a liberal instrumentalist predisposition toward a strong concept of separation of church and state, Justice Blackmun noted in a concurring opinion, joined by Justices Stevens and O’Connor, that “mixing of government and religion can be a threat to free government, even if no one is forced to participate. When the government puts its imprimatur on a particular religion, it conveys a message of exclusion to all those who do not adhere to the favored beliefs. A government cannot be premised on the belief that all persons are created equal when it asserts that God prefers some.”\textsuperscript{153}

In a separate concurrence, focused more on the natural law concern with endorsement, Justice Souter, joined by Justices Stevens and O’Connor, concluded that the “ceremonial deism” rationale could not work in *Lee v. Weisman*, as it might for religious invocations on Thanksgiving. He noted that “religious invocations on Thanksgiving day addresses and the like are rarely noticed, ignored without effort, conveyed over an impersonal medium, and directed at no one in particular, and inhabit a pallid zone worlds apart from official prayers delivered to a captive audience of public school students and their families. . . . When public school officials, armed with the State's authority, convey an endorsement of religion to their students, they strike near the core of the Establishment Clause. However ‘ceremonial’ their messages may be, they are flatly unconstitutional.”\textsuperscript{154}

The critical fifth vote in *Lee v. Weisman* to hold such an invocation or benediction unconstitutional was Justice Kennedy, who authored the majority opinion for the Court. Focusing on the Holmesian concern with “coercion,” Justice Kennedy noted that opening the graduation with an invocation or benediction created a coercive pressure on students to participate in, or appear to participate in, a religious exercise, given the fact that presence at graduation is, in a practical sense, obligatory. Justice Kennedy explained that “the lesson of history that was and is the inspiration for the Establishment Clause, [is] the lesson that in the hands of government what might begin as a tolerant expression of religious views may end in a policy to indoctrinate and coerce. A state-created orthodoxy puts at grave risk the freedom of belief and conscience which are the sole assurance that religious faith is real, not imposed.”\textsuperscript{155}

Justice Scalia dissented, with Chief Justice Rehnquist, and Justices White and Thomas. Reflecting a formalist approach to the Establishment Clause, discussed at § 32.1.2.2 nn.29-30, 33 & 36, he stated that religious expression should be permissible in acknowledgment of the American cultural heritage and tradition. Further, there was no warrant for expanding the concept of coercion beyond

\textsuperscript{152} 505 U.S. 577, 598-99 (1992). See also Coles v. Cleveland Bd. of Educ., 171 F.3d 369, 376-83 (6th Cir. 1999) (prayers delivered at opening of public school board meetings in which students participate directly in discussion more like *Lee v. Weisman*, and thus impermissible, than permissible legislative prayer in *Marsh v. Chambers*, discussed at § 32.1.2.3 n.49).

\textsuperscript{153} Id. at 606-07 (Blackmun, J., joined by Stevens & O’Connor, JJ., concurring).

\textsuperscript{154} Id. at 630-31 (Souter, J., joined by Stevens & O’Connor, JJ., concurring).

\textsuperscript{155} Id. at 591-92.
acts backed by threats of a penalty. He suggested that, in any event, any coercive result could be avoided if educators provided a notice that no one is compelled to participate in the invocation or benediction, and it will not be assumed that, by rising, they have done so.156

In 2000, the Court returned to religious observance in schools, this time to a student prayer delivered before a football game. In Santa Fe Independent School District v. Doe,157 the Court held by a 6-3 vote that school involvement in the process of selecting the student speaker invited and encouraged religious messages. Reflecting the endorsement theory, the Court opinion noted, “Regardless of the listener's support for, or objection to, the message, an objective Santa Fe High School student will unquestionably perceive the inevitable pregame prayer as stamped with her school's seal of approval.” The Court also noted that the prayer was “coercive” under Justice Kennedy’s opinion in Lee v. Weisman. Attendance at a high school football game, particularly for team members and cheerleaders, was as obligatory as attendance at the high school graduation in Lee, and the fact that a student delivered the prayer did not alter the improper effect of coercing those present to participate in an act of religious worship. The Court noted, “[N]othing in the Constitution as interpreted by this Court prohibits any public school student from voluntarily praying at any time before, during, or after the school day. But the religious liberty protected by the Constitution is abridged when the State affirmatively sponsors the particular religious practice of prayer.”

Chief Justice Rehnquist, dissenting with Justices Scalia and Thomas, said the majority opinion “bristles with hostility to all things religious in public life.” The Court should not declare the policy invalid on its face because it has plausible secular purposes – to solemnize the event, to promote good sportsmanship, and thereby also to promote student safety. The dissent noted that “[i]t has not been the Court's practice, in considering facial challenges to statutes . . . to strike them down in anticipation that particular applications may result in unconstitutional [behavior].”158

Regarding the issue of a moment of silence at the beginning of the school day, the Court held in 1985 in Wallace v. Jaffree,159 discussed at § 32.1.2.2 n.25, that an Alabama statute which provided that at the beginning of each school day “a period of silence not to exceed one minute in duration shall be observed for meditation or voluntary prayer” was unconstitutional as having the purpose of advancing religion. In cases since 1986, statutes providing for “a moment of silence” at the beginning of each school day have been upheld if based on the secular purposes to solemnize the beginning of the school day; to help enable students to pause, settle down, compose themselves, and focus on the day ahead, making for a better learning environment; and to create a better atmosphere

156 Id. at 631-32, 640-45 (Scalia, J., joined by Rehnquist, C.J., and White & Thomas, JJ., dissenting).


159 472 U.S. 38, 56-60 (1985).
to deal with problems of student self-respect, discipline, and violence. As a typical example, in 2001, in Brown v. Gilmore, the Fourth Circuit upheld a Virginia “minute of silence” statute which provided for a minute of silence at the beginning of the school day so that “each pupil may, in the exercise of his or her individual choice, meditate, pray, or engage in any other silent activity which does not interfere with, distract, or impede other pupils in the like exercise of individual choice.”

Regarding the teaching of evolution in the public schools, the Court held in 1987 in Edwards v. Aguillard, discussed at § 32.1.2.4 n.59, that Louisiana’s Creationism Act, which forbid the teaching of evolution in public elementary and secondary schools unless accompanied by instruction in the theory of “creation science,” was unconstitutional because the purpose of the Creationism Act was to endorse a particular religious doctrine regarding creation. Since Aguillard, a similar issue has resurfaced regarding legislative attempts to require the theory of “Intelligent Design” (ID) to be taught in science classes along with the theory of evolution. While not explicitly based on the story of creation in Genesis, the theory of intelligent design does posit some intelligent force overseeing nature, rather than Darwin’s theory of natural selection. As of 2006, this issue had not reached the Supreme Court, but, in Kitzmiller v. Dover Area School District, a lower federal court ruled that requiring ID to be taught in public school constituted government endorsement of religion, under the endorsement test, and had a religious purpose, thus violating the first prong of the Lemon test. The court noted, “Although proponents of [ID] occasionally suggest that the designer could be a space alien or a time-traveling cell biologist, no serious alternative to God as the designer has been proposed by members.” Quoting the views of the National Academy of Sciences, the court also noted, “Creationism, intelligent design, and other claims of supernatural intervention in the origin of life or of species are not science because they are not testable by the methods of science. These claims subordinate observed data to statements based on authority, revelation, or religious belief.”

Most commentators have similarly concluded that teaching “Intelligent Design” would violate the Lemon test, Justice O’Connor’s endorsement test, or Justice Kennedy’s “coercion or proselytizing” test. However, one author has argued that “intelligent design theory [is] about the limits of

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160 258 F.3d 265, 270-73, 277-78 (4th Cir. 2001) (focus on solmenization and student violence). See also Bown v. Gwinnett County Sch. Dist., 112 F. 3d 1464, 1471-72 (11th Cir. 1997) (upholding Georgia’s moment of silence statute based on the purposes to provide students with a moment of quiet reflection to think about the upcoming day and to help develop self-respect and discipline). See generally Elizabeth Anne Walsh, Shh! State Legislators Bite Your Tongues: Semantics Dictate the Constitutionality of Public School “Moment of Silence” Statutes, 43 Cath. Law. 225 (2004).


163 Id. at 737, quoting The National Academy of Sciences, Science and Creationism: A View from the National Academy of Sciences IX, at 25 (2d ed. 1999).

scientific explanation,” and that the real question in these cases should be whether “theories about the limits of science belong in science courses?” Other authors have been more willing to embrace ID, with one author arguing that ID has “presented an array of sophisticated and empirically grounded arguments supporting the notion that intelligent agency may do a better job of accounting for certain aspects of the natural world, or the natural world as a whole, than non-agent explanations, such as natural selection or scientific laws working on the unguided interaction of matter.”

An easier case for unconstitutionality would be any attempt to ban the teaching of evolution in the public schools, such as occurred in the famous Scopes trial in Tennessee in 1925, or was involved in a similar Arkansas statute invalidated by the Supreme Court in 1968. Both cases involved a state statute that prohibited public school teachers and public university professors from teaching the theory that humans evolved from other species, or from using textbooks that contained material on evolution. In *Epperson v. Arkansas,* a unanimous Court invalidated the Arkansas statute, with Justice Fortas’ majority opinion holding that the statute had a sole purpose to advance religion, noting, "It is clear that fundamentalist sectarian conviction was and is the law's reason for existence." Justice Stewart concurred in the result, holding that the statute violated teachers’ free speech rights.

Despite these conclusions, other aspects of religious influences in public schools do not pose the same kind of problem under *Lemon,* the endorsement test, or the coercion or proselytizing test. For example, it is reasonably well-established that public schools can teach and perform sacred choral music as an integral part of a complete and historically accurate music education, to broaden the students' understanding of musical culture, and to increase the students' awareness of diversity. Such use is permissible as long as the sacred choral music does not predominate the music selection to create a principal or primary effect to advance religion under *Lemon,* or lead an objective observer to conclude the school is endorsing religion, under the endorsement test; or involve proselytizing or coercing students to participate in a religious, rather than musical, event, under the coercion test.

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167 393 U.S. 97, 107-08 (1968); *id.* at 116 (Stewart, J., concurring in the result).

Public schools can also teach about religion, and religious influences on society and historical events.\(^{169}\) Indeed, as far back as 1963 in *School District of Abington Township v. Schempp*,\(^ {170}\) discussed at § 32.1.3.1.A. n.84, the Court acknowledged that reading passages from religious works, such as the Bible, the Torah, or the Koran, was permissible when presented objectively as part of a secular program of education, as they are worthy of study for their literary and historic qualities.

During the instrumentalist era, concern about possible violation of the Establishment Clause was used by some public schools as a justification for refusing to allow groups with a religious perspective to use school facilities. However, since 1986, that justification has not been successfully invoked where the Court has concluded that denial of equal access to school facilities violated the free speech rights of such groups. For example, in 1993, in *Lamb’s Chapel v. Center Moriches Union Free School District*,\(^ {171}\) the Court held that a school district violated the First Amendment freedom of speech when it excluded a bible club from presenting films in a public forum opened by the school. The school had denied access because the films’ discussion of family values was from a religious perspective. For the Court, Justice White wrote that allowing use of school facilities for bible study would not have been an establishment under the three-part *Lemon* test or constitute government endorsement of religion. Justice Kennedy, concurred in the judgment, but indicated his disapproval of the endorsement test. Justice Scalia, joined by Justice Thomas, concurred in the judgment, but again rejected the *Lemon* test in favor of his formalist accommodationist approach. He said that using the *Lemon* test was like seeing “some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried.”\(^ {172}\)

In 1995, in *Rosenberger v. Rector and Visitors of the University of Virginia*,\(^ {173}\) a 5-4 Court held that a state university would not violate the Establishment Clause if it funded the publication of a wide variety of student newspapers, including one that expressed religious viewpoints. Justice Kennedy wrote that such a program would be neutral with respect to religion. However, failing to fund a student newspaper because it had a religious perspective was a form of viewpoint discrimination, as discussed at § 29.4.2 nn.99-100. A close analogy, he said, was *Lamb’s Chapel*, where state facilities generally open to the public were held to be invalidly closed to a group that wanted to discuss family issues from a religious viewpoint. This could not be justified on the ground of avoiding a violation of the Establishment Clause. If the University scanned student publications to eliminate funding for those with a religious viewpoint that would risk fostering a pervasive bias or hostility to religion, which could undermine the very neutrality required by the Establishment Clause.


\(^{172}\) *Id.* at 397 (Kennedy, J., concurring in part and concurring in the judgment); *id.* at 398 (Scalia, J., joined by Thomas, J., concurring in the judgment).

Justice Souter dissented with Justices Stevens, Ginsburg, and Breyer. Justice Souter denied that there was viewpoint discrimination, saying that the University’s ban applied to all religions and to agnostics and atheists, since it denied funding to activities promoting or manifesting a particular belief not only “in” but “about” a “deity or ultimate reality.” Lamb’s Chapel was distinguishable because here the funding was not denied to those who discussed issues in general from a religious viewpoint, but rather to those engaged in promoting or opposing religious conversion and religious observances as such. He noted that the Court had never before upheld direct state funding of the kind of proselytizing activities published in the religious newspaper in this case, and, in fact, had categorically condemned state programs directly aiding such religious activity.174

Consistent with Lamb’s Chapel and Rosenberger, the Court held in 2001 in Good News Club v. Milford Central School175 that a public school violated the free speech rights of a religious club that was excluded from meeting after hours on school premises. Delivering the opinion of the Court, Justice Thomas said that if a public agency has opened a limited public forum, as was done here, its power to restrict speech is limited in two ways: it may not discriminate against speech on the basis of viewpoint and its restriction must be reasonable in light of the purpose served by the forum. The exclusion here, as in Lamb’s Chapel and Rosenberger, constituted viewpoint discrimination. In reaching this conclusion, Justice Thomas explained that the school permitted the use of its facilities for any group that promoted the moral and character development of children. Here, the club sought to address that subject from a religious standpoint. He said that even though the club’s activities may be decidedly religious in nature, they can also properly be characterized as the teaching of morals and character development. Allowing the club to use the school facilities, as in Lamb’s Chapel, would not violate the Establishment Clause because the activities were not sponsored by the school, would not occur during school hours, and would have been open to the public. Even small children would not perceive endorsement here but, in any event, the danger of misperceiving the endorsement of religion was no greater than the danger that they would perceive a hostility toward the religious viewpoint of the club if it were excluded from the public forum.176

Reflecting his formalist viewpoint, discussed at § 32.1.2.2 nn.30, 33, Justice Scalia, concurring, said that there was absolutely no legal coercion in this situation and that religious expression could not violate the Establishment Clause where it was purely private conduct in a traditional or designated public forum, since any speech would be literally that of the private actor, not the government. Reflecting his occasional Holmesian deference-to-government predisposition, discussed at § 11.4 nn.107-09, Justice Breyer, concurring, speculated that a child participating in the program might perceive an endorsement of religion by the school, but Justice Breyer indicated that he would not presume government endorsement. That issue could be dealt with at trial.176

Justice Stevens, dissenting, said that the district court correctly classified the religious speech involved here as aimed principally at proselytizing or inculcating belief in a particular religious faith, and a school may bar such speech, just as it may bar worship, even though it permits speech

174 Id. at 874-75, 893-99 (Souter, J., joined by Stevens, Ginsburg & Breyer, JJ., dissenting).


176 Id. at 120-21 (Scalia, J., concurring); id. at 128-30 (Breyer, J., concurring in part).
about topics from a religious point of view. Similarly, Justice Souter, joined by Justice Ginsburg, said in his dissent that the club meets for the evangelical service of worship and not merely the teaching of morals and character from a religious point of view. The forum is not anything like the sites for wide-ranging intellectual exchange that were involved in *Lamb’s Chapel*. Indeed, rather than the school location being used to foster an atmosphere of exchange of ideas, the school’s physical location appeared to be the whole point. Attendance tripled when moved to that setting.\footnote{Id. at 131-34 (Stevens, J., dissenting); \textit{id.} at 137-39, 142-45 (Souter, J., joined by Ginsburg, J., dissenting).}

Reaching a similar conclusion, the Ninth Circuit has held that a county’s library refusal to allow religious services in the library is a permissible exclusion meant to preserve the limited public forum for “educational, cultural or community interest” activities, and does not constitute viewpoint discrimination.\footnote{Faith Center Church Evangelistic Ministries v. Glover, 462 F.3d 1194 (9th Cir. 2006).}

\section*{\textbf{§ 32.1.3.2} The Display Cases}

\subsection*{A. The Instrumentalist Era}

Not surprisingly, during the instrumentalist era, the pattern of results in the display cases mirrored those in the school aid cases. Liberal instrumentalist Justices found most displays unconstitutional if they contained a religious element. Justice O’Connor focused on whether the displays constituted a government endorsement of religion. The formalist perspective focused on whether the displays were consistent with our Nation’s history and traditions.

For example, as noted at § 32.1.2.4 n.58, in 1980 the Court held in *Stone v. Graham*\footnote{449 U.S. 39, 40-43 (1980); \textit{id.} at 43 (Burger, C.J., joined by Blackmun, J., dissenting); \textit{id.} at 43 (Stewart, J., dissenting); \textit{id.} at 44-46 (Rehnquist, J., dissenting).} that the display of a copy of the Ten Commandments on the walls of public classrooms violated the Establishment Clause as its sole purpose was to advance religion. The decision in *Stone* was \textit{per curiam}, and summarily reached without full briefing and argument. Four Justices dissented in the case. Chief Justice Burger and Justice Blackmun indicated they would grant certiorari and give the case plenary consideration. Justice Stewart also dissented from the summary reversal, indicating his view that, so far as appears, the lower courts applied wholly correct constitutional criteria. Justice Rehnquist filed a full dissenting opinion, stating that the statute did have a secular purpose of acknowledging the role our religious heritage, and in particular the Ten Commandments, has played in the social, cultural, and historical development of our Nation.

Four years later, in *Lynch v. Donnelly*, a 5-4 Court allowed a creche to be included in a large Christmas display sponsored by a city and held in a private park. Reciting numerous historical examples of “official acknowledgment by all three branches of government of the role of religion in American life,” Chief Justice Burger spoke of the display as giving benefit to religion only in a
way that was “indirect, remote, and incidental.” Thus, it did not violate the Lemon test as having a principal or primary effect to advance religion.

Justice O’Connor’s concurrence in the case was critical in terms of how Establishment Clause doctrine has developed during the modern natural law era. In her concurrence, she indicated for the first time that, for her, the controlling question in applying the first two prongs of the Lemon test (purpose and effect) was whether a reasonable observer would understand that the government was “endorsing” religion through its display. Applying that test, Justice O’Connor did not find an endorsement in Lynch, because a creche is a traditional symbol of Christmas, and was accompanied here by many secular elements, such as a banner proclaiming “Season’s Greetings” and, as the dissent acknowledged, a miniature village, including “Santa Claus’ house, a talking wishing well, and cut-out clowns and bears.”

Justice Brennan dis sented, joined by Justices Marshall, Blackmun, and Stevens. For them, the other elements in the display did not negate the endorsement of Christianity caused by the creche. Justice Brennan noted, “The inclusion of a distinctively religious element like the crèche . . . demonstrates that a narrower sectarian purpose lay behind the decision to include a nativity scene. . . . [T]he Mayor's testimony at trial [was] that for him, as well as others in the City, the effort to eliminate the nativity scene from Pawtucket's Christmas celebration ‘is a step towards establishing another religion, non-religion that it may be.’ Plainly, the City and its leaders understood that the inclusion of the crèche in its display would serve the wholly religious purpose of ‘keep[ing] “Christ in Christmas.”’ Referring to the fact-specific, limited nature of the holding in Lynch, Justice Brennan also noted that “nothing in the Court's opinion suggests that the [Third Circuit] erred when it found that a city-financed platform and cross used by Pope John Paul II to celebrate mass and deliver a sermon during his 1979 visit to Philadelphia was an unconstitutional expenditure of city funds.” He continued, “Nor does the Court provide any basis for disputing the holding of the [Eleventh Circuit] that the erection and maintenance of an illuminated Latin cross on state park property violates the Establishment Clause.”

**B. The Modern Natural Law Era**

Since 1986, the endorsement theory of Justice O’Connor has gained adherents and has been the key factor in several display cases. Liberal instrumentalist Justices, along with Justice Souter, have joined opinions applying the endorsement test to resolve issue of religious displays on public property. As with the school cases, Justice Kennedy has tended to focus on whether the displays involve coercion or proselytizing of religion, and the formalist perspective has focused on whether

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181 Id. at 688-94 (O’Connor, J., concurring); id. at 695 n.1 (Brennan, J., joined by Marshall, Blackmun & Stevens, JJ., dissenting).

182 Id. at 700-02 (Brennan, J., joined by Marshall, Blackmun & Stevens, JJ., dissenting).

183 Id. at 695 n.1, citing Gilfillan v. City of Philadelphia, 637 F.2d 924 (3d Cir. 1980).

184 Id., citing ACLU of Georgia v. Rabun County Chamber of Commerce, Inc., 698 F.2d 1098 (11th Cir. 1983.).
the displays are consistent with our Nation’s history and traditions.

For example, in 1989, in *County of Allegheny v. American Civil Liberties Union*, a county displayed a creche in the county courthouse and a city displayed a menorah in front of the City-County Building. The creche had a banner which proclaimed, “Gloria in Excelsis Deo,” and there were no figures of Santa Clause or other decorations. The menorah was placed next to a 45-foot Christmas tree and a sign titled “Salute to Liberty.” Beneath this title, the sign stated, “During this holiday season, the city of Pittsburgh salutes liberty. Let these festive lights remind us that we are the keepers of the flame of liberty and our legacy of freedom.” Reflecting the liberal instrumentalist strong separation of church and state approach, discussed at § 32.1.2.4, Justice Brennan, joined by Justice Marshall and Stevens, would have held that both displays violated the Establishment Clause. Quoting from his dissenting opinion in *Lynch v. Donnelly*, Justice Brennan stated, “I continue to believe that the display of an object that ‘retains a specifically Christian [or other] religious meaning,’ is incompatible with the separation of church and state demanded by our Constitution.”

In contrast, Justices Blackmun and O’Connor drew distinctions between the creche display and the menorah/Christmas tree/sign (MCS) display. Both viewed the creche display as having the impermissible effect of endorsing religion, while both viewed the MCS display as not constituting government endorsement. Justice Blackmun explained his conclusion that the two displays were different by noting that “the combination of the tree and the menorah communicates, not a simultaneous endorsement of both the Christian and Jewish faiths, but instead, a secular celebration of Christmas coupled with an acknowledgment of Chanukah as a contemporaneous alternative tradition. . . . The sign states that during the holiday season the city salutes liberty. Moreover, the sign draws upon the theme of light, common to both Chanukah and Christmas as winter festivals, and links that theme with this Nation’s legacy of freedom, which allows an American to celebrate the holiday season in whatever way he wishes, religiously or otherwise.” Reflecting his view that Justice O’Connor’s endorsement test was a refinement only of the second prong of *Lemon* dealing with effects, Justice Blackmun concluded that the MCS case should be remanded to consider the “purpose” and “entanglement” prongs of the *Lemon* test.

Justice O’Connor explained her conclusion that the two displays were different by noting that the creche display conveys a message to nonadherents of Christianity that they are “not full members of the political community,” and a corresponding message to Christians that they are “favored members of the political community.” However, the MCS display sent a message of pluralism and

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187 *Id.* at 598-602 (Blackmun, J., opinion for the Court) (joined by Justices Brennan, Marshall, Stevens & O’Connor).

188 *Id.* at 616-21 (Blackmun, J., opinion) (this part of Justice Blackmun’s opinion was joined by no other Justice on the Court).
freedom to choose one’s own beliefs, and not a message of endorsement of Judaism or of religion in general. This was so even though, as Justice O’Connor acknowledged more in her concurrence than did Justice Blackmun in his opinion, “Chanukah is a religious holiday with strong historical components particularly important to the Jewish people. Moreover, the menorah is the central religious symbol and ritual object of that religious holiday.”189 In Part II of her opinion, joined by Justices Brennan and Stevens, Justice O’Connor also defended her endorsement test, which she stated in Lynch should replace the first two prongs of Lemon, as: (1) consistent with Madisonian concerns, noted § 32.1.2.1 nn.10-11, 18, to protect, in her words, “the religious liberty [and] respect the religious diversity of the members of our pluralistic political community”; (2) consistent with the results in existing Court precedents; and (3) capable of principled and consistent application.190

Justice Kennedy, with Chief Justice Rehnquist and Justices White and Scalia, said that both displays were constitutional. Reflecting his coercion approach to the Establishment Clause, discussed at § 32.1.2.3. nn.47-50, Justice Kennedy noted that in his view only two limiting principles should exist on accommodating religion: (1) “the government may not coerce anyone to support or participate in any religion or its exercise,” and (2) “it may not, in the guise of avoiding hostility or callous indifference, give direct benefits to religion in such degree that it in fact ‘establishes a [state] religion or religious faith, or tends to do so.’” Consistent with a formalist “customs and tradition” approach, noted at § 32.1.2.2 n.36, and favored by Chief Justice Rehnquist, and Justices White and Scalia, Justice Kennedy also stated that to find invalid advancement of religion here reflects “an unjustified hostility toward religion, a hostility inconsistent with our history and our precedents.”191

Another leading display case came before the Court in 1995, Capitol Square Review and Advisory Board v. Pinette.192 The question in Pinette was whether a state violated the Establishment Clause when it permitted a private party (the Ku Klux Klan) to display an unattended religious symbol (a cross) in a traditional public forum (Capitol Square, located next to the statehouse). Justice Scalia announced the judgment of the Court upholding what the state had done, and he delivered an opinion joined by Chief Justice Rehnquist and Justices Kennedy and Thomas. In the crucial part IV of his opinion, Justice Scalia wrote that religious expression cannot violate the Establishment Clause where it “(1) is purely private and (2) occurs in a traditional or designated public forum, publicly announced and open to all on equal terms.” Both conditions were satisfied here and so the state could not bar the cross.193 Justice Thomas, concurring, said that erection of the cross in this case was primarily a political act, not a Christian act, so the case may not involve the Establishment Clause.

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189  Id. at 625-27, 632-37 (O’Connor, J., concurring in part and concurring in the judgment).

190  Id. at 627-32 (O’Connor, J., joined by Brennan & Stevens, JJ., concurring in part).

191  Id. at 655, 659 (Kennedy, J., joined by Rehnquist, C.J., and White & Scalia, JJ., concurring in the judgment in part and dissenting in part) (citations omitted).


193  Id. at 769-70 (plurality opinion of Scalia, J., joined by Rehnquist, C.J., and Kennedy & Thomas, JJ.).
Justice O’Connor, concurring, joined by Justices Souter and Breyer, wrote that the Establishment Clause inquiry cannot be distilled into such a fixed, *per se* rule. For example, she noted, under her endorsement test, the presence of a sign disclaiming government sponsorship or endorsement of the Klan cross would help make clear the state’s role to the community. She said this followed from the fact that the analysis should be from the perspective of a reasonable objective observer in possession of the relevant facts. She disagreed with the dissenting views that endorsement had occurred, because a reasonable observer in possession of the facts would be aware that Capitol Square was a public space in which many groups, both secular and religious, engaged in expressive conduct.  

Justice Stevens, dissenting, said that for a religious display to violate the Establishment Clause, it is enough that some reasonable observers would attribute a religious message to the state. Endorsement does not have to be established from the perspective of Justice O’Connor’s “ideal” reasonable observer, “‘a personification of a community ideal of reasonable behavior, determined by the [collective] social judgment,’” similar to the reasonable person in tort law. Here there was a single unattended religious display, and it is unlikely that all reasonable viewers knew about the history of the square. Justice Ginsburg, also dissenting, pointed out that the cross stood alone in close proximity to the statehouse. Near the cross were the government’s flags and the government’s statutes. No other private display was in sight. No plainly visible sign informed the public that the cross belonged to the Klan and that Ohio’s government did not endorse the display’s message. 

In 2005, in *McCreary County, Kentucky v. American Civil Liberties Union of Kentucky*, a 5-Justice majority of Justices Stevens, O’Connor, Souter, Ginsburg and Breyer held that posting a version of the Ten Commandments in a courthouse was unconstitutional. Justice Souter’s majority opinion struck down the display based on the first prong of *Lemon*, that its primary purpose was to advance religion. In reaching this conclusion, Justice Souter modified the *Lemon* purpose inquiry to hold that even if some valid secular purpose can be identified which is not a “sham,” *Lemon* is not satisfied if the government’s “primary purpose” was to advance religion, and the secular purpose was only “secondary.” This revision is consistent with an endorsement approach, since if the

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194 *Id.* at 770-72 (Thomas, J., concurring).

195 *Id.* at 772-78 (O’Connor, J., joined by Souter & Breyer, J.J., concurring in part and concurring in the judgment).

196 *Id.* at 797-800 & n.5 (Stevens, J., dissenting), *citing id.* at 779-80 (O’Connor, J., joined by Souter & Breyer, J.J., concurring in part and concurring in the judgment); *id.* at 817-18 (Ginsburg, J., dissenting).

197 125 S. Ct. 2722, 2735-37, 2739-41, 2745 (2005); Edwards v. Aguillard, 482 U.S. 578, 586-89 (1987). *See also ACLU of Ohio Foundation, Inc. v. Ashbrook, 375 F.3d 484 (6th Cir.2004) (judge’s display of a framed poster in his courtroom of the Ten Commandments, which he created himself on his computer, unconstitutional, despite being displayed across from a similarly styled framed poster of the Bill of Rights).*
primary purpose is to advance religion, an objective observer would conclude that the government is endorsing religion, even if a secondary secular purpose also existed. While mention had been made in passing in Edwards v. Aguillard, discussed at § 32.1.2.4 n.59, of such a “primary purpose” analysis, all cases before McCreary that involved government action failing the first prong of Lemon had involved no valid secular purpose or a sham secular purpose, including Aguillard, where the Court held that the requirement to teach “creation science” along with “evolution” was motivated by solely a religious purpose, and that any proposed secular purpose was a “sham.”

Justice O’Connor, concurring, noted that the “primary purpose” behind the counties’ display was relevant because, under her endorsement test, it conveyed “an unmistakable message of endorsement to the reasonable observer.” Indeed, consistent with this view on “primary purpose,” in 1987, Justice O’Connor had joined with Justice Powell, concurring in Aguillard, with that concurrence noting that to violate the Establishment Clause the “religious purpose must predominate.”

In dissent, in Part I of his opinion, Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, would have upheld the display of the Ten Commandments based on a “customs and traditions” formalist approach. In Part II of his dissent, Justice Scalia criticized the majority for shifting the focus in Lemon from “actual” government purposes to how government purposes would be “perceived” by an objective observer under an “endorsement” inquiry, and for modifying Lemon to hold that “primary” or “predominate” religious purposes, rather than “sole” religious purposes, can violate the first prong of the Lemon test. Even under Lemon, in Part III of his dissent, Justice Scalia concluded that the display was motivated not by a religious purpose, but by a non-coercive secular acknowledgment of the role the Ten Commandments have played in our Nation’s moral and legal history. Parts II and III of Justice Scalia’s dissent were joined by Justice Kennedy, reflecting his “coercion” approach to the Establishment Clause, and rejection of the “endorsement” test.

On the same day McCreary was decided, Justice Breyer voted in Van Orden v. Perry with Chief Justice Rehnquist, and Justices Scalia, Kennedy, and Thomas, to uphold a plaque of the Ten Commandments which was included among 16 other plaques on grounds in front of the Texas Capitol building. In this case, Justice Breyer concluded:

In certain contexts, a display of the tablets of the Ten Commandments can convey not simply a religious message but also a secular moral message (about proper standards of social conduct). And in certain contexts, a display of the tablets can also convey a historical message (about a historic relation between those standards and the law) . . . . The circumstances surrounding the display's placement on the capitol grounds and its physical setting suggest that the State itself intended the latter, nonreligious aspects of the tablets' message to predominate. And the monument's 40-year history on the Texas state grounds indicates that has been its effect.

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199 Id. at 2748-64 (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., and joined in Parts II and III by Kennedy, J., dissenting).
Those 40 years suggest that the public visiting the capitol grounds has considered the religious aspect of the tablets' message as part of what is a broader moral and historical message reflective of a cultural heritage.

The other 8 Justices on the Court decided *McCreary* and *Van Orden* the same way. Justices Stevens, O’Connor, Souter, and Ginsburg concluded that this plaque also constituted an endorsement of religion. As stated in Justice Souter’s dissent, “[A] pedestrian happening upon the monument at issue here needs no training in religious doctrine to realize that the statement of the Commandments, quoting God himself, proclaims that the will of the divine being is the source of obligation to obey the rules, including the facially secular ones.” Responding to an argument that the 16 other plaques reduced the religious message conveyed by the plaque, Justice Souter responded, “But 17 monuments with no common appearance, history, or esthetic role scattered over 22 acres is not [one display] . . . . One monument expresses admiration for pioneer women. One pays respect to the fighters of World War II. And one quotes the God of Abraham whose command is the sanction for moral law. . . . In like circumstances, we rejected an argument similar to the State’s, noting in *County of Allegheny* [discussed at § 32.1.3.2.B nn.185-91] that ‘[t]he presence of Santas or other Christmas decorations elsewhere in the [courthouse] fail to negate the [crèche’s] endorsement effect . . . . [T]he crèche . . . was its own display distinct from any other decorations . . . in the building.’”

Chief Justice Rehnquist, and Justices Scalia, Kennedy, and Thomas, found no coercion or proselytizing in the placement of the plaque, and said that the plaque was consistent with the Nation’s history and traditions. For them, whatever “may be the fate of the *Lemon* test in the larger scheme of Establishment Clause jurisprudence, we think it not useful in dealing with the sort of passive monument that Texas has erected on its Capitol grounds.”

Following *Van Orden*, the Eighth Circuit held *en banc* in *ACLU Nebraska Foundation v. City of Plattsmouth, Nebraska* that a granite monument in a city park displaying the Ten Commandments did not violate the Establishment Clause. The monument was donated to the city by a civic organization and was displayed without objection for several decades prior to commencement of lawsuit challenging the display. The monument was erected in a corner of the park, 10 blocks from city hall, and the words of the monument faced away from the park and its picnic benches and recreational equipment. The court also noted that the Ten Commandments have undeniable historic meaning in addition to their religious significance, and use of the text of the Ten Commandments to acknowledge the role of religion in our Nation’s heritage are “replete throughout our country.” The court noted, “Buildings housing the Library of Congress, the National Archives, the Department of Justice, the Court of Appeals and District Court for the District of Columbia, and the United

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201 *Id.* at 2893, 2895 (Souter, J., joined by Stevens & Ginsburg, J., dissenting), citing *County of Allegheny*, 492 U.S. at 598-99; *id.* at 2891 (O’Connor, J., dissenting).

202 *Id.* at 2861-64 (plurality opinion of Rehnquist, C.J., joined by Scalia, Thomas & Kennedy, JJ.).

203 419 F.3d 772, 774-77 (8th Cir. 2005) (*en banc* opinion) (citations omitted).
States House of Representatives all include depictions of the Ten Commandments. . . . Indeed, in the United States Supreme Court's own Courtroom, a frieze depicts Moses holding tablets that represent the Ten Commandments, and the Ten Commandments decorate the metal gates and doors around the Courtroom.”

A dissenting opinion in Plattsmouth noted that, unlike the display in Van Orden, the monument's religious message here stood alone with nothing to suggest a broader historical or secular context. The dissent also noted that “the oft noted image of Moses holding two tablets, depicted on the frieze in the Supreme Court's courtroom, appears in the company of seventeen other lawgivers, both religious and secular. Similarly, the depiction of Moses and the Ten Commandments on the Court's east pediment also finds him in the company of renowned secular figures.”

§ 32.1.4 Establishment Clause: General Thoughts For the Future

With the current membership of the Court as of 2006, there may now be 5 votes for some combination of formalist accommodation and Holmesian concern with coercion or proselytizing to determine results in Establishment Clause cases. This would occur if both Chief Justice Roberts and Justice Alito adopt either a formalist or Holmesian approach to the Establishment Clause, which they may, as discussed in the Addendum to this book. Those Justices would then join formalist Justices Scalia and Thomas, and Justice Kennedy, who has consistently adopted a Holmesian approach to Establishment Clause issues, as noted at §§ 32.1.2.3 nn.47-50, 32.1.3.1.B. nn.126-36 & 32.1.3.2.B nn.191-202, despite his usually adopting a natural law decisionmaking style.

In the long-run, however, and based in part on the material presented in Chapter 15 regarding cognitive, moral, and social developmental stages, the prediction of this book is that a modern natural law judicial decisionmaking style will represent the majority on the Supreme Court, as it was the controlling votes on Establishment Clause doctrine between 1994-2005, and remains the controlling votes in 2006 on most constitutional doctrines. Full development of that perspective regarding Establishment Clause issues would embrace a “strict neutrality” approach, as discussed at § 32.1.2.1, requiring that government not endorse religion. Such an approach would include the “primary purpose” analysis of McCreary; discussed at § 32.1.3.2.B nn.197-98; the “ideal” objective observer approach, discussed at § 32.1.3.2.B nn.195-96, which reflects a natural law commitment to reason, and thus rational, objective decisionmaking based on awareness of relevant facts; and sensitivity to the full dimension of the neutrality/endorsement inquiry, giving full consideration to the issues of purpose, effect, and entanglement, including the fact that true “political divisiveness,” or a “substantial risk” of diversion of government funds for religious use, can cause real concerns with government being dragged into endorsing religion, as discussed at § 32.1.3.1.B.2 nn.139-44.

Of course, reflecting the background natural law principle of “ut res magis valeat quam pereat” (so that the venture may succeed and not fail), discussed at § 10.2.1.1 & § 6.2.1.2, the Constitution is not a suicide pact. Thus, as under the Equal Protection Clause, where even race discrimination can be justified under a strict scrutiny, compelling government interest analysis, discussed at § 26.2.1.1.E nn.134-38; or Substantive Due Process doctrine, where even substantial burdens on

\[204\] Id. at 778-81 (Bye, J., joined by M.S. Arnold, J., dissenting) (citations omitted).
fundamental rights trigger a strict scrutiny approach, discussed at § 27.3.3 nn.170-79; or under the First Amendment freedom of speech, where even viewpoint discrimination is tested by strict scrutiny, discussed at § 29.4.3.1 nn.107-10; or Free Exercise Clause doctrine, where government can discriminate against religious beliefs if it can satisfy a strict scrutiny approach, discussed at §§ 32.2.2.4 nn.247-48 & 32.2.2.5 nn.251, 254, government endorsement of religion should be constitutional if it can satisfy a strict scrutiny, compelling government interest, least restrictive alternative analysis.

Subjecting such endorsement to a strict scrutiny test would be a departure from current doctrine, where endorsement is per se unconstitutional. However, applying strict scrutiny to endorsements, as applying strict scrutiny in the other doctrines mentioned above, despite their text also being stated in literal absolutist terms, makes sense as a reasoned elaboration of the law. It is also consistent with Madison’s views, who remarked in a letter in 1822, cited at § 32.1.1 n.19, on “the immunity of civil government from religion, in every case where it does not trespass upon private rights or the public peace.” While the exception for “private rights” suggests a Free Exercise concern, the exception for the “public peace” suggests that Madison did not view the Establishment Clause in absolutist terms, but was subject to a limited exception, which would be consistent with a strict scrutiny approach.

Viewing the Establishment Clause in this way would help clarify the Court’s precedents, since the Court has approved some actions which clearly constitute the government endorsement of religion. As Justice Souter stated in his majority opinion in McCrery, “In special instances we have found good reason to hold governmental action legitimate even where its manifest purpose was presumably religious.” Justice Scalia similarly acknowledged in his dissent, “Suffice it to say here that when the government relieves churches from the obligation to pay property taxes, when it allows students to absent themselves from public school to take religious classes, and when it exempts religious organizations from generally applicable prohibitions of religious discrimination, it surely means to bestow a benefit on religious practice – but we have approved it.” Rather than pretending that endorsement was not taking place in those cases, acknowledging that endorsement took place, but was justified by a compelling governmental interest, enhances reasoned, principled decisionmaking.

In one case, in 1982, the Court approached the Establishment Clause issue from a strict scrutiny perspective. In Larson v. Valente, the Court considered a Minnesota statute that imposed certain registration and reporting requirements upon those religious organizations that solicited more than


50% of their funds from nonmembers. The Court noted that such a requirement discriminated in favor of well-established churches, which could more easily meet the 50% requirement given their larger membership, versus newly-established churches, which could not. The Court then concluded, “[W]hen we are presented with a state law granting a denominational preference, our precedents demand that we treat the law as suspect and that we apply strict scrutiny in adjudging its constitutionality.” The Court then struck down the statute on Establishment Clause grounds.

Application of such an endorsement approach would require first a decision whether government endorsement was taking place, consistent with the “primary purpose, ideal observer” doctrine stated above, or was the speech or action involved merely government officials or private individuals reflecting their own free exercise or free speech rights to indicate their personal belief in God, as discussed § 32.1.2.1 nn.14-15. If government endorsement were found to be taking place, then a strict scrutiny approach would be used to determine whether that endorsement was constitutional.

Application of this approach can resolve most of the examples given by formalist Justices concerning “customs and traditions” in American history which are typically used to reject the view that the framers and ratifiers shared a strict neutrality, endorsement understanding of the Establishment Clause. For example, in his dissent in McCreary, Justice Scalia noted:

George Washington added to the form of Presidential oath prescribed by Art. II, § 1, cl. 8, of the Constitution, the concluding words “so help me God.” The Supreme Court under John Marshall opened its sessions with the prayer, “God save the United States and this Honorable Court.” The First Congress instituted the practice of beginning its legislative sessions with a prayer. The same week that Congress submitted the Establishment Clause as part of the Bill of Rights for ratification by the States, it enacted legislation providing for paid chaplains in the House and Senate. The day after the First Amendment was proposed, the same Congress that had proposed it requested the President to proclaim “a day of public thanksgiving and prayer, to be observed, by acknowledging, with grateful hearts, the many and signal favours of Almighty God.” President Washington offered the first Thanksgiving Proclamation shortly thereafter, devoting November 26, 1789 on behalf of the American people “‘to the service of that great and glorious Being who is the beneficent author of all the good that is, that was, or that will be,’” thus beginning a tradition of offering gratitude to God that continues today. The same Congress also reenacted the Northwest Territory Ordinance of 1787, . . . of which provided: “Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.” . . .

Our coinage bears the motto “In God We Trust.” And our Pledge of Allegiance contains the acknowledgment that we are a Nation “under God.” 207

The first set of these observations are covered by the principle, discussed § 32.1.2.1 nn.14-15, that speech or action by government officials reflecting their own free exercise and free speech rights to indicate their personal belief in God, or statements addressed to government officials in their

207 125 S. Ct. at 2748, 2750 (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., dissenting) (citations omitted).
personal capacity, which are viewed by most of those officials as aiding them in the performance of their public duties, do not involve the government endorsement of religion. An “ideal” objective observer, viewing the opening of a legislative session with a prayer, would not attribute that opening to official government endorsement of religion, but rather to sensitivity to the religious beliefs of most legislators. Similarly, government provision of chaplains to military personnel reflects sensitivity to the religious beliefs of “a good many soldiers and sailors,” as Justice Souter’s majority opinion stated in *McCready*. Because of the concerns regarding the perception of endorsement in educational settings, where the predominant on-going activity is teaching of facts, opening public school days with a prayer has been viewed, and should be viewed, as the endorsement of religion, although a moment of silence should be permissible, as discussed at § 32.1.3.2.B.2 nn.149-60.

Regarding Thanksgiving Day proclamations, Justice Souter, joined by Justices Stevens and O’Connor, noted in their concurrence in *Lee v. Weisman*, cited at § 32.1.2.1.B.2 n.154, “religious invocations on Thanksgiving day addresses and the like are rarely noticed, ignored without effort, conveyed over an impersonal medium, and directed at no one in particular.” From this perspective, such invocations would not be viewed by a reasonable objective observer as constituting the government endorsement of religion. Even if the invocation were viewed as having greater religious meaning, an objective observer would likely conclude that the invocation represented the religious views of the President who issued the proclamation, rather than reflecting the official views of the government on religion. Government endorsement is even less likely to be found since the proclamation has no binding legal effect on anyone’s rights. By the same token, congressional proclamations that have no legal effect raise no Bicameralism and Presentment Clause issues, as discussed at § 19.4.2.1 nn.77-78.

Despite this view of endorsement, which is consistent with the practice of the first two Presidents, Washington and Adams, Jefferson refused to issue such religious Thanksgiving Day Proclamations while President. Madison, who issued such proclamations during the War of 1812, later remarked that he thought such proclamations “imply a religious agency, making no part of the trust delegated to political rulers.” Indeed, contrary to the view regarding legislative and military chaplains stated above, at § 32.1.4 n.208, Madison’s view was that paid legislative and military chaplains violated his concept of separation of church and state.

Regarding the enactment of the Northwest Territory Ordinance of 1787, that Ordinance actually supports a view of strong separation of church and state. As Justice Scalia noted in the passage cited above, that Ordinance provided, “Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.” While the background clause of this provision underscores the importance of “religion, morality, and knowledge,” the operative part of the provision states only that “schools and the means of education shall forever be encouraged.” It does not mention any government role to encourage “religion.”

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208  *Id.* at 2742.

This drafting is consistent with Madison’s views, noted at § 32.1.1 n.11, that there are “causes in the human breast which insure the perpetuity of religion without the aid of law.” It is also consistent with other choices made by the framers and ratifiers concerning separation of church and state, such as omitting the words, “So help me God,” from the official Presidential oath. President Washington, and later Presidents, certainly have their free speech and free exercise rights to add that phrase at the end, if they so wish, but the framers and ratifiers were clear that such a phrase was not part of the official oath of office.

Of course, most of the framers and ratifiers believed that religion tended to aid individuals in behaving morally. Even someone traditionally viewed more as a religious skeptic, like Benjamin Franklin, noted that for most individuals religious beliefs aided them in not behaving in such a self-centered, or self-interested, manner.210 Phrased in terms of Kohlberg’s stages of moral development, discussed at § 15.2 nn.17-21, and Piaget’s stages of cognitive development, discussed at § 15.3 nn.26-43, for many individuals overcoming Stage 1 egocentricism and Stage 2 self-interested behavior, grounded in preoperational thought, is aided by adopting Stage 3 customs of the community or Stage 4 traditions of society, grounded in concrete operational thought. This is true as long as those customs and traditions reflect beliefs, including religious beliefs based on “love of neighbor as thyself,” which transcend the egotism of Stages 1 & 2. Of course, transcending the limitations of some of society’s Stage 3 or 4 customs and traditions, or some Stage 3 or 4 traditional religious customs and traditions, and adopting a perspective uniformly committed to “love of neighbor” and “equal concern and respect” for all individuals, as discussed at §§ 15.3 & 16.2.1, requires additional cognitive advances to formal operational thought and embracing a moral system fully reflective of reasoned thought, as noted at §§ 15.3 nn.44-46 & 15.4.1 nn.77-81. For that enterprise, education is critical, as the Northwest Territory Ordinance encouraged.

Government mottoes, like “In God We Trust” on coinage, and inclusion of the phrase, “Under God,” in the Pledge of Allegiance, raise more complex issues from the perspective of a primary purpose, ideal objective observer endorsement approach. For Justice O’Connor, reflecting her occasional Holmesian deference-to-government perspective, discussed at § 12.4.2, these cases did not raise difficult issues. As she stated, concurring in Elk Grove School District v. Newdow:

It is unsurprising that a Nation founded by religious refugees and dedicated to religious freedom should find references to divinity in its symbols, songs, mottoes, and oaths.

Note, for example, the following state mottoes: Arizona (“God Enriches”); Colorado (“Nothing without Providence”); Connecticut (“He Who Transplanted Still Sustains”); Florida (“In God We Trust”); Ohio (“With God, All Things Are Possible”); and South Dakota (“Under God the People Rule”). Arizona, Colorado, and Florida have placed their mottoes on their state seals, and the mottoes of Connecticut and South Dakota appear on the flags of those States as well. Georgia's newly-redesigned flag includes the motto “In God We Trust.” . . . Many of our patriotic songs contain overt or implicit references to the divine, among them: “America” (“Protect us by thy might, great God our King”); “America the Beautiful” (“God shed his grace on thee’); and “God bless America.”

[Concerning the phrase “Under God” in the Pledge of Allegiance,] certain ceremonial references to God and religion in our Nation are the inevitable consequence of the religious history that gave birth to our founding principles of liberty. It would be ironic indeed if this Court were to wield our constitutional commitment to religious freedom so as to sever our ties to the traditions developed to honor it.\textsuperscript{211}

The phrase “In God We Trust” on coinage and currency is relatively easy today to conclude is constitutional. An ideal reasonable objective observer today, aware of relevant facts, would certainly decide that such a phrase does not represent any government attempt to endorse religion. At the time the phrase was adopted, however, this was not so clear. The motto first appeared during the Civil War, on newly minted “greenbacks” and coins, as part of the increased religious fervor that accompanied the sacrifices made during the Civil War. Later on, as has been noted:

Attempts to legislate patriotism during times of crisis or war pervade twentieth-century U.S. history. For example, the Pledge [of Allegiance, originally drafted in 1892] was first codified in its original version—without the words "under God"—on June 22, 1942, in response to World War II. In addition to legislating patriotism, laws mandating references to God also emerged in connection to patriotic fervor in times of national stress. During the Cold War, a 1954 congressional act to add the words "under God" changed the original Pledge. Another highly visible example was the appearance during the Cold War of the national motto, "In God We Trust," on American currency. A 1955 congressional act mandated that the phrase "In God We Trust" be printed on coins and paper money, and a 1956 Act declared "In God We Trust" to be the national motto [replacing E Pluribus Unum, “From Many, One”]. Political leaders' reddefinition of the United States as a "nation under God" as well as the public confirmation that the American people trusted in God indicated an attempt – at the height of the Cold War hostilities – to distinguish this country from the "godless communists."\textsuperscript{212}

This set of actions likely would be viewed by an ideal objective observer at the time as government endorsement of religion. Rather than pretending endorsement was not taking place, under the approach suggested here, the question would then be whether the strategic advantage in terms of Cold War politics meant that such an endorsement could survive a strict scrutiny approach. Given the role of religious belief in undermining communism in Eastern European countries and the Soviet Union, including the role Polish Cardinal Karol Wojtyla played after becoming Pope John Paul II in 1978, there is a plausible argument that strict scrutiny might well have been met had the issue been faced at the time.

Absent such a continuing compelling government interest today, inclusion of the phrase “under God” in the Pledge of Allegiance, as well as various state mottoes referring to God, raise more serious concerns. If one takes seriously either an endorsement test, or court precedents under the \textit{Lemon} test, such references do appear to violate a strict neutrality command that government not

\textsuperscript{211} 542 U.S. 1, 35-36 & n.*, 44-45 (2004) (O’Connor, J., concurring in the judgment).

endorse religion. Such a conclusion would not mean that the phrase “under God” in the Pledge, or various state mottoes, would have to be changed. It would mean, however, that government must take seriously the concern with endorsement, and ensure, through age-appropriate lesson plans for the Pledge in public schools, or otherwise, in terms of state mottoes, that the government clearly communicate the historical and cultural backgrounds to those statements, and clearly indicate that the government is not endorsing any religious belief.

The fact that the government’s action should be tested by the rational “ideal” objective observer in possession of relevant facts, and not Justice Stevens’ “some” reasonable observer walking the streets, discussed at §§ 32.1.3.2.B nn.195-96 & 32.1.4 text following n.204, should make the government’s job easier in such cases. For example, the Sixth Circuit concluded that Ohio’s state motto, “With God, All Things are Possible,” was constitutional under the ideal objective observer approach. On the other hand, a public school teacher who tells a student that the phrase “Under God” in the Pledge of Allegiance means “God exists” should be viewed as having committed a constitutional violation.

A doctrine based on this notion of taking seriously an endorsement/strict neutrality doctrine would likely be rejected, of course, by numerous religious Americans who would accuse the Court of being anti-religious. Similarly, many whites, particularly in the South, accused the Court in Brown v. Board of Education of being hostile to whites. But Brown was not hostile to whites. It was hostile to the practice of some whites treating non-whites as second-class citizens through the instrumentality of government. Similarly, decisions such as removing the Ten Commandments from public courtrooms or public squares, or the phrase “under God” from the Pledge of Allegiance, unless its secular and ceremonial bases are made clear, are not hostile to religion. They are hostile to the practice of Protestant Americans treating non-Protestants, in the case of the Protestant version of the Ten Commandments, or religious individuals treating non-believers, in the case of the Pledge of Allegiance, as second-class citizens through the instrumentality of the government.

Justice Scalia has attempted to avoid some of these problems by characterizing almost any version of the Ten Commandments as consistent with Protestant, Catholic, Jewish, and Islamic beliefs, and thus congenial to all, and then concluding that under the Establishment Clause the government can favor monotheistic religions, treating agnostics, atheists, non-monotheistic believers, or believers in “unconcerned deities [e.g., Deists]” as second-class citizens by “disregard” of their views. Without regard to whether Protestants, Catholics, Jews, and Moslems would agree that any version of the Ten Commandments is equally congenial – and centuries of wars and discrimination among

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various sects suggests it is more complicated than that – the attempt to exclude other individuals from the protection of the Establishment Clause has little textual or historical basis of support.

For example, a number of the framers and ratifiers were Deists, believing in a Creator, but one who did not intervene in day-to-day matters of public or private life, but whose impact was felt in the "machine-like perfection of the natural order." This would include Jefferson, almost certainly; Benjamin Franklin, probably; and George Washington, possibly.216 It may well be true, as one author has noted, that many New England Baptists took vigorous exception to Jefferson's religious views and believed that Jews, Muslims, deists, atheists, and infidels should not hold office.217 That view was rejected in clear constitutional text, which states in Article VI, § 3, “no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.” Even regarding non-believers, Justice Story noted, as quoted at § 32.1.1 n.3, that under the Establishment Clause, “The Catholic and the Protestant, the Calvinist and the Arminian, the Jew and the Infidel, may sit down at the common table of the national councils without any inquisition into their faith or mode of worship.” The term “Infidel” referred here broadly to non-believers in a monotheistic God, and not to the followers of Islam, as Justice Story distinguished them, followers of “Mahometanism,” from “infidelity” earlier in the same quoted passage.

In thinking about issues such as the display of the Protestant version of the Ten Commandments, it is not just a matter of non-Protestants, or non-believers, “adverting their eyes.” That doctrine applies where the individual has a right to speak, as in Cohen v. California, discussed at § 30.1.2 n.61, involving wearing a jacket in a courthouse. Thus, that doctrine does apply to churches, on their own property, proclaiming “God is Great,” or to bumper stickers, which read “Jesus is Lord,” on the back of individual cars. As noted at § 32.1.1 n.19, Madison indicated that the Religion Clauses must take into account “private rights.” But under a strict neutrality approach, the government has no generic right, as government, to speak on matters of religion. Non-believers do not have to advert their eyes; instead, the government should not speak.

This vision of strict neutrality was based on the experience of almost three centuries of post-

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Reformation religious strife, and the deaths of hundreds of thousands of individuals based on religious persecution by governments all over Europe, and the experience of the colonies with religious persecution. As summarized by Justice Black in *Everson*:

> With the power of government supporting them, at various times and places, Catholics had persecuted Protestants, Protestants had persecuted Catholics, Protestant sects had persecuted other Protestant sects, Catholics of one shade of belief had persecuted Catholics of another shade of belief, and all of these had from time to time persecuted Jews. In efforts to force loyalty to whatever religious group happened to be on top and in league with the government of a particular time and place, men and women had been fined, cast in jail, cruelly tortured, and killed.

These practices of the old world were transplanted to and began to thrive in the soil of the new America. The very charters granted by the English Crown to the individuals and companies designated to make the laws which would control the destinies of the colonials authorized these individuals and companies to erect religious establishments which all, whether believers or non-believers, would be required to support and attend. An exercise of this authority was accompanied by a repetition of many of the old-world practices and persecutions. Catholics found themselves hounded and proscribed because of their faith; Quakers who followed their conscience went to jail; Baptists were peculiarly obnoxious to certain dominant Protestant sects; men and women of varied faiths who happened to be in a minority in a particular locality were persecuted because they steadfastly persisted in worshiping God only as their own consciences dictated. And all of these dissenters were compelled to pay tithes and taxes to support government-sponsored churches whose ministers preached inflammatory sermons designed to strengthen and consolidate the established faith by generating a burning hatred against dissenters.218

The framers and ratifiers knew that given the passion of religious zealots, as revealed by this history, any amount of government endorsement would create the potential for harmful political lobbying. That is why they adopted, as noted by Justice Story, at § 32.1.1 nn.2-3, a prophylactic rule against government power regarding religion. It would denigrate the memory of those who fought for religious freedom to read the Establishment Clause with any less vigor than they intended.

This final observation has relevance for considering the constitutionality of programs like President George W. Bush’s “Faith-Based Initiative” program. From a formalist perspective, as long as the government aid is provided on neutral criteria to religious and secular community service programs, its constitutionality would be clear. From an endorsement perspective, however, giving money directly to religious organizations, for use in programs where religious faith will play a critical part in the program, raises endorsement concerns, particularly with respect to entanglement based on future political lobbying for such aid. Perhaps the best way to view this issue would be to acknowledge that endorsement is taking place, and then apply a strict scrutiny approach. In certain cases, like for faith-based programs in prisons, where other alternatives have failed, such a strict

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scrutiny approach could be met. \footnote{219} Similarly, one way to view the religious school voucher case, 
\textit{Zelman v. Simmons-Harris}, discussed at § 32.1.3.1.B.1 nn.135-38, is that alternatives to improving 
education in Cleveland had failed, and the limited voucher program was the least restrictive 
alternative to advance the state’s compelling interest in education. From this perspective, however, 
any broad-based voucher program, or broad “Faith-Based Initiative” program, would raise difficult 
issues of constitutional justification under a strict scrutiny approach. \footnote{220}

\textbf{§ 32.2} \quad \textbf{The Free Exercise Clause}

\textbf{§ 32.2.1} \quad \textbf{Introduction}

The Free Exercise Clause applies to protect individuals’ “sincerely held religious beliefs” from 
regulation by the government. In terms of what counts as a “religious belief,” a formalist-era Court 
stated in 1890 in \textit{Davis v. Beason}\footnote{221} that “the term 'religion' has reference to one's views of his 
relations to his Creator, and to the obligations they impose of reverence for his being and character, 
and of obedience to his will.” This definition suggested a monotheistic view of religion.

During the instrumentalist era, the Court defined the term more broadly to include a range of 
monotheistic and non-monotheistic beliefs. For example, in \textit{United States v. Seeger}\footnote{222} the Court 
interpreted the term “religious belief” in the Universal Military Training and Service Act to include 
any “given belief that is sincere and meaningful [and] occupies a place in the life of its possessor 
parallel to that filled by the orthodox belief in God.” Thus, an individual who sought a religious 
exemption from the draft, but denied any belief in a Supreme Being, was still held entitled to the 
exemption. Similarly, in \textit{Welsh v. United States}\footnote{223} the Court stated, “Most of the great religions of 
today and of the past have embodied the idea of a Supreme Being or a Supreme Reality – a God – 
who communicates to man in some way a consciousness of what is right and should be done, of 
what is wrong and therefore should be shunned. If an individual deeply and sincerely holds beliefs 
that are purely ethical or moral in source and content but that nevertheless impose upon him a duty

\footnote{219} See generally Patrick B. Cates, \textit{Comment, Faith-Based Prisons and the Establishment 
Clause: The Constitutionality of Employing Religion as an Engine of Correctional Policy}, 41 

\footnote{220} See generally Ira C. Lupu & Robert W. Tuttle, \textit{The Faith-Based Initiative and the 
Constitution}, 55 DePaul L. Rev. 1 (2005). On similar concerns for separation of church and state 
among most Western European democracies, which are moving through the Stage 5 or 6 level of 
cognitive, social, and moral development, as discussed at §§ 15.4.2 text following n.87 & 16.1 text 
following n.5, see generally Leszek Lech Garlicki, \textit{Perspectives on Freedom of Conscience and 
Religion in the Jurisprudence of Constitutional Courts}, in \textit{International Law and Religion 

\footnote{221} 133 U.S. 333, 342 (1890).

\footnote{222} 380 U.S. 163, 165-66 (1965).

of conscience to refrain from participating in any war at any time, those beliefs certainly occupy in
the life of that individual ‘a place parallel to that filled by . . . God’ in traditionally religious persons.
Because his beliefs function as a religion in his life, such an individual is as much entitled to a
‘religious’ conscientious objector exemption . . . as is someone who derives his conscientious
opposition to war from traditional religious convictions.”

Inferences from Justice Scalia’s dissent in 2005 in McCreary,224 joined by Chief Justice Rehnquist
and Justice Thomas, discussed at § 32.1.4 n.215, suggests that this dissent would disagree with these
views, and would grant Free Exercise Clause protection only to those who believe in monotheistic
religions, treating agnostics, atheists, non-monotheistic believers, or believers in “unconcerned
deities [e.g., Deists]” as outside the protection of the Free Exercise Clause. As discussed at § 32.1.4
nn.216-17, as applied to Establishment Clause concerns, such a view has little textual or historical
basis of support. Since the same term, “religion,” applies in the First Amendment to both the
Establishment Clause and the Free Exercise Clause, its reach should be the same in both.

It is certainly true that the framers and ratifiers were overwhelming monotheistic – indeed, Christian
and Protestant – in their beliefs. When they used the phrase “free exercise of religion,” they were
no doubt predominantly thinking of monotheistic, and indeed Christian, beliefs.225 However, as the
Court noted in 1970 in Welsh, cited above at § 32.2.1 n.223, an individual holding a non-
monotheistic view may confront the same tension between following those views and contrary
government laws that a traditional Christian may feel in terms of a conflict between government
laws and the will of God that the Court recognized in Davis in 1890. Any argument that the “rights
of conscience” in the two circumstances may be different, because the believer in God has to worry
about punishment in an afterlife if God is not obeyed, while the believer in a non-monotheistic moral
system may not have that concern, reduces morality to a question of punishment, a Stage 1 reason
for obedience in Kohlberg’s system.

Any attempt to limit free exercise to only monotheistic views is reminiscent of the free speech views
of John Milton, discussed at § 29.1.2 n.16, who was prepared to grant free speech to individuals, but
not for speech he disagreed with – in his case, “popery, open superstition, impiety, or evil.” Similarly,
in Locke’s A Letter on Toleration in 1689, “Locke justified placing restrictions on Catholics because of their mixed allegiance, and justified not extending tolerance to atheists because atheists do not have the moral scruples to be trusted in civil society where rights are viewed as
having derived from God, and because the atheist has no fear of a future state of punishment.”226

Such views are not consistent with a rational approach to “liberty of conscience.” A rational person
would understand that individuals basing their respect for diversity and equal concern and respect

224 McCreary, 125 S. Ct. at 1272-73 (Scalia, J., joined by Rehnquist, C.J., and Thomas, J.,
dissenting).

225 See generally Lee J. Strang, The Meaning of “Religion” in the First Amendment, 40

226 Id. at 219, citing John Locke, A Letter Concerning Toleration 46-47, in 6 The Works of John
Locke (London 1823).
for individuals on Stage 5 or Stage 6 moral reasoning premises, discussed at § 15.4.1 nn.72-81, might be even more likely to be “trusted” than an individual whose only limitation on self-interested behavior is a fear of God’s punishment, with the individual hoping for God’s grace. Further, from a Stage 3 natural law perspective, later interpreters should interpret the natural law concepts placed into the Constitution, of which the Religions Clauses would be clear examples, from the perspective of more enlightened reasoning, rather than the concrete limitations of the framers and ratifiers at the time of enactment. As discussed at §§ 12.3.3 nn.119-23 & 16.4 nn.81-83, this is a consequence of those rights being viewed as universal principles of justice, independent of any particular framer’s will, and thus the desire of the framers and ratifiers for later generations to give that concept the most enlightened interpretation of that principle’s content at later times. Both Milton and Locke would presumably agree with a modification of their views on Catholics and atheists were they alive today.

In any event, any limited view on what beliefs are protected by the Free Exercise Clause would likely be relatively futile in practice. Many Free Exercise Clause claims can be reformulated as “equal treatment” or “equal access” claims under the First Amendment freedom of speech or the Equal Protection Clause. For example, as noted at § 32.1.3.1.B nn.171-78, the access of religious groups to public school facilities and support in Lamb’s Chapel, Rosenberger, and Good News Club technically involved the First Amendment freedom of speech, not the Free Exercise Clause. Indeed, the First Amendment freedoms of speech, of the press, and the free exercise of religion all share a similar commitment to the Lockeian concept of “liberty of conscience,” discussed at § 32.1.1 nn.16-18. The Supreme Court noted as far back as 1944 in Prince v. Massachusetts,227 “If by this position appellant seeks for freedom of conscience a broader protection than for freedom of the mind, it may be doubted that any of the great liberties insured by the First Article [Amendment] can be given higher place than the others. All have preferred position in our basic scheme. All are interwoven there together.” As phrased by Justice Stevens in Wallace v. Jaffree,228 quoted § 32.1.2.1 n.6, “[T]he Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all.”

While the Court’s Free Exercise Clause doctrine officially only applies to “sincerely held” religious beliefs,229 the Court has been quite willing to assume for purposes of the litigation that indeed the person’s statement that something is a religious belief is “sincerely held.” Indeed, the belief can be “sincere” even if it is not held by most believers of that person’s religious faith, as long the individual before the court sincerely holds the view.230 Further, the relevant question is whether the

individual “sincerely holds” the belief, not whether a jury, or anyone else, would conclude that belief is true or false. As the Court stated in *United States v. Ballard*, 231 “Heresy trials are foreign to our Constitution. Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken of mortals does not mean that they can be made suspect before the law.”

Just as the First Amendment freedom of speech became incorporated into the 14th Amendment Due Process Clause as a fundamental right during the 1920s, the First Amendment free exercise of religion also became applicable to the states during this time. Thus, in 1923, in *Meyer v. Nebraska*, 232 the Court stated that one of the liberty rights protected by the 14th Amendment Due Process Clause was the right “to worship God according to the dictates of his own conscience.” However, during the formalist era, very little protection was given to the free exercise of religion, mirroring a rational basis kind of scrutiny, as discussed at § 32.2.2.2.

The incorporation of the Free Exercise Clause into the 14th Amendment was confirmed during the Holmesian era in *Cantwell v. Connecticut*, 233 discussed at § 32.2.2.3 n.238. As during the formalist era, little protection was granted to the free exercise of religion during the Holmesian era, mirroring a minimum rational review level of scrutiny.

The instrumentalist Court increased the level of protection to strict scrutiny if a law substantially burdened the free exercise of religion, as discussed at § 32.2.2.4. However, during the modern natural law era, under *Employment Division v. Smith*, 234 the contemporary Court has limited many instrumentalist precedents on free exercise, and gives only minimum rational review to a law of general applicability that incidentally burdens the free exercise of religion. Laws discriminating against religion continue to trigger strict scrutiny. This aspect of modern Free Exercise Clause doctrine is discussed at § 32.2.2.5 nn.253-56.

This modern doctrine has set off a political fight in which Congress has tried to require the Court to use strict scrutiny for all governmental regulations substantially burdening religious beliefs. In 1997, the Court rejected Congress’ attempt to overrule *Smith* by statute in *City of Boerne v.  

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231 322 U.S. 78, 86-87 (1944).
232 262 U.S. 390, 399 (1923).
233 310 U.S. 296, 303-10 (1940).
However, despite Boerne, Congress has been able by statute to require a strict scrutiny test to be applied to federal laws, as a matter of Congress’ power over federal enactments, as discussed at § 32.2.2.5 n.257-64.

§ 32.2.2 Historical Development of Free Exercise Doctrine

§ 32.2.2.1 The Original Natural Law Era

During the original natural law era, the Free Exercise Clause, like the rest of the Bill of Rights, applied only to federal government action. Because regulations touching upon religion were predominantly a matter of state law concern during this time, there were no Supreme Court cases dealing with the Free Exercise of religion during the original natural law era.

The first state case to raise a free exercise issue occurred in 1813 in People v. Philips.236 The case involved whether an Irish Catholic Priest could refuse to testify in court about matters that had been confided to the Priest during confession. At the time, the New York law did not recognize such a testimonial privilege. The court held that under § 38 of the New York State Constitution, which was similar to the First Amendment Free Exercise Clause, the refusal to testify was justified, as the state had not proven that the refusal to testify was inconsistent with the peace or safety of the state.

§ 32.2.2.2 The Formalist Era

In Reynolds v. United States,237 decided in 1878, the Free Exercise Clause was interpreted to protect religious opinions from federal government interference, but the Court said that this protection does not carry over to actions the government seeks to control, such as banning bigamy. Based upon this distinction, the Court sustained the bigamy conviction of a Mormon based on a congressional statute regulating the then-territory of Utah. The Court said that the Free Exercise Clause deprived Congress of all legislative power over mere opinion, but left Congress free to reach actions that were in violation of social duties or subversive of good order, even if the defendant entertains a religious belief that the law is wrong. The Court explained that if an offense consists of a positive act knowingly done, it would be dangerous to hold that the offender might escape punishment merely because he religiously believed that the law which he had broken ought never to have been made.


237 98 U.S. 145, 162-67 (1878). For an argument, not likely to be adopted by federal courts, that Reynolds should be overturned, and polygamy constitutionally protected, on grounds that antipolygamy statutes are not based on any rational concern, such as noted at § 16.2.4 text following n.69, with protecting individuals from exploitation, and that polygamous relationships can foster women’s self-independence and children’s welfare, see Stephanie Forbes, “Why Just Have One?”: An Evaluation of the Anti-Polygamy Laws Under the Establishment Clause, 39 Houston L. Rev. 1517 (2003).
The upshot of Reynolds appeared to be that only rational basis scrutiny under the Free Exercise Clause protected the exercise of religion from the incidental effects of laws aimed at certain actions, at least if those actions were not selected because of their religious significance. Of course, as with any social or economic regulation, there would be rational basis scrutiny anyway under the Equal Protection Clause and Due Process Clause.

§ 32.2.2.3  The Holmesian Era

In 1940, in Cantwell v. Connecticut, the Court confirmed that the Free Exercise Clause was incorporated into the 14th Amendment, and thus made applicable against the states. The Court held in Cantwell that an invalid prior restraint was created by a state statute that banned the solicitation of money except where the cause had been approved in advance by a public official who had discretion to determine whether the applicant’s purpose was religious. The Court said that such a censorship of religion was a denial of liberty protected by the First Amendment as incorporated into the Due Process Clause of the 14th Amendment. The Court added in Cantwell that although a state could not unduly infringe the free exercise of religion, it could pass laws regulating its time, place, and manner by general and nondiscriminatory legislation. However, a state could not prosecute for common law breach of the peace without a clear and present menace to public peace and order. That was not shown where the defendant merely played a religious record to a consenting listener, who became irritated and felt like striking the defendant, but did not because the defendant peacefully went away.

One example of a neutral law of general applicability occurred in Cox v. New Hampshire. For a unanimous Court, Chief Justice Hughes held that an individual could be convicted for not obtaining a permit to conduct a parade or procession on a public street. The Court noted, “The argument as to freedom of worship is . . . beside the point. No interference with religious worship or the practice of religion in any proper sense is shown, but only the exercise of local control over the use of streets for parades and processions.” Another example occurred in Prince v. Massachusetts, where the Court upheld application of child labor laws to prevent a nine-year-old girl from being permitted to sell religious literature of the Jehovah’s Witnesses on the street. Four Justices dissent in the case: moderate formalist Justice Roberts, liberal Holmesian Justice Frankfurter, centrist Holmesian Justice Jackson, and liberal instrumentalist Justice Murphy.

§ 32.2.2.4  The Instrumentalist Era

A change in the level of protection given to the free exercise of religion occurred in 1963. In that year, writing for the Court in Sherbert v. Verner, Justice Brennan said that strict scrutiny should

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238 310 U.S. 296, 303-10 (1940).
239 312 U.S. 569, 576-78 (1941).
240 321 U.S. 158, 159-61, 165-70 (1944); id. at 176-78 (Jackson, J., joined by Roberts & Frankfurter, JJ., dissenting); id. at 175-76 (Murphy, J., dissenting).
be used if application of a law burdens an individual’s free exercise of religion. A state had refused unemployment compensation to appellant, a member of the Seventh-Day Adventist Church, on the ground that the applicant had failed, without good cause, to accept available suitable work when offered, i.e., she would not work on Saturday, the sabbath day of her faith. Justice Brennan said that the effect of the law was to put pressure on appellant to forgo the practice of her religion. This was compounded by the religious discrimination in the scheme, for even in times of emergency no employee could be required to work on Sunday if he or she had conscientious objections to such work. Where a substantial burden was imposed, no showing merely of a rational relationship to some colorable state interest would suffice; the state had to show a paramount interest. None was shown in Sherbert beyond the possibility of fraudulent claims by persons claiming religious objections to Saturday work.

In reaching this conclusion, Justice Brennan distinguished the 1961 case of Braunfeld v. Brown,242 where the Court had refused to require an exception to a Sunday closing law for a Jewish merchant, who would have to close on both Saturday and Sunday. Braunfeld was said to be distinguishable because in that case there was a strong state interest in one uniform day of rest for all workers. Justice Brennan added that the Court, when it ordered compensation to be paid in Sherbert, was not fostering an “establishment” because the extending of unemployment benefits to Sabbatarians in common with Sunday worshipers reflects government neutrality and does not interrelate religions with secular institutions. No other person’s religious liberties are abridged. Nor did appellant’s religious convictions make her a nonproductive member of society.243 A similar conclusion was reached in 1981 in Thomas v. Review Board of the Indiana Employment Security Division,244 where the Court held that unemployment compensation benefits could not be denied to a claimant who terminated his job because his religious beliefs forbade participation in production of armaments.

Justice Stewart, concurring in Sherbert v. Verner, said that Braunfeld was wrongly decided and should be overruled. Justice Harlan, dissenting with Justice White, pointed out that the state law did not provide unemployment compensation for persons who are unavailable for work for personal reasons of any kind. Reflecting a Holmesian deference-to-government approach, he said the Court should not require the state to carve out an exception from that principle for those unavailable because of religious convictions. Such compulsion is particularly inappropriate in light of the indirect, remote, and insubstantial effect of the state’s decision on the exercise of appellant’s religion.245

243 374 U.S. at 409-10.
245 374 U.S. at 417-18 (Stewart, J., concurring in the result); id. at 420-23 (Harlan, J., joined by White, J., dissenting).
A strict scrutiny approach for a burden on religious beliefs was also applied in 1972 in *Wisconsin v. Yoder*. In *Yoder*, the Court held that it would violate the free exercise rights of Amish parents to require their children to attend public high school. For the Court, Chief Justice Burger said that the state did not have an interest of sufficient magnitude to overbalance the Amish claims to free exercise of religion, considering testimony that compulsory formal education after the eighth grade would gravely endanger, if not destroy, the free exercise of Amish religious beliefs. There was also evidence that additional years of formal high school for Amish children would do little to serve the state’s interests in education, especially since most Amish children plan to live in Amish society and, with respect to those who might leave, there is nothing to suggest that Amish qualities of reliability, self-reliance, and dedication to work would fail to find ready markets in today’s society.

Despite the application of strict scrutiny during the instrumentalist era, courts upheld a number of cases of government actions burdening religious beliefs as satisfying a compelling government interest, least restrictive alternative analysis. For example, in *United States v. Lee*, the Court held that Congress could require all employers, including Amish employers, to pay social security taxes, even if such payments would violate the Amish’s religious beliefs. Congress had granted self-employed Amish an exception from participation in the Social Security program, but the choice not to extend that exception to Amish employers was for Congress to make. Similarly, during the instrumentalist era, the Supreme Court, and lower federal courts, upheld against free exercise challenges other aspects of economic regulations, such as application of the Fair Labor Standards Act requirements on minimum wages and record keeping requirements to religious organizations conducting “ordinary commercial activities,” or application of other aspects of the tax code.

The Court also noted during the instrumentalist era that a strict scrutiny standard was not appropriate if the challenge was to how the government was conducting its own affairs, rather than regulating the affairs of private citizens. For example, in *Bowen v. Roy*, the challenger complained that the federal government’s requirement that his daughter have a Social Security number in order for him to collective AFDC welfare benefits violated his religious belief that assigning her a number would tend to “rob the spirit” of his daughter. The Court responded, “Absent proof of an intent to discriminate against particular religious beliefs or against religion in general, the Government meets its burden when it demonstrates that a challenged requirement for government benefits, neutral and uniform in its application, is a reasonable means of promoting a legitimate public interest.”

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Similarly, the Court held in *Goldman v. Weinberger* 250 that the United States military could apply its uniform dress regulations to deny an Orthodox Jewish service member the right to wear a yarmulke while on duty.

§ 32.2.2.5  The Modern Natural Law Era

During the first part of the modern natural law era, the Court continued to analyze Free Exercise Clause cases consistent with instrumentalist-era precedents. For example, in *Hernandez v. Commissioner of the IRS*, 251 the Court held that requiring income taxes to be paid on what the challenger alleged was a charitable contribution to the Church of Scientology, but the government characterized as a fee for “auditing” and “training” session, was not an impermissible burden on the free exercise of religion because the government could satisfy a strict scrutiny approach, as in *United States v. Lee*. In *Lyng v. Northwest Indian Cemetery Protective Association*, 252 the Court applied the doctrine of *Bowen v. Roy* to conclude under a rational basis approach that the government could permit harvesting of timber, and construction of a road, on federal government land, despite objections from three Native American tribes that such activities interfered with a portion of that land they had traditionally used for religious purposes.

In 1990, however, a majority of the Court in *Employment Division v. Smith* 253 changed Free Exercise doctrine from the instrumentalist-era precedents. In *Smith*, the facts involved persons dismissed from their jobs because of their religious use of peyote, made illegal by state law, and the resulting denial of unemployment compensation. Justice Scalia, joined by Justices Stevens, Rehnquist, White, and Kennedy, wrote that use of strict scrutiny in Free Exercise Clause cases did not extend beyond: (1) unemployment compensation cases involving denial for refusing to work for religious reasons, such as working on one’s sabbath, as in *Sherbert v. Verner*, based on that precedent being “settled law”; (2) cases involving “hybrid” claims, *i.e.*, claims based on a conjunction of free exercise claims combined with other constitutional protections, such as freedom of speech, or, as in *Wisconsin v. Yoder*, the right of parents to direct the education of their children, where the related right would trigger strict scrutiny on its own; or (3) cases involving direct discrimination against religion.

An example of this third kind of case is *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*. 254

250 475 U.S. 503, 505-10 (1986).


254 508 U.S. 520, 530-47 (1993). *See also* Fraternal Order of Police Newark Lodge No. 12 v. City of Newark, New Jersey, 170 F.3d 359, 364-66 (3rd Cir. 1999) (police department's decision to provide medical exemptions to its no-beard requirement, while refusing religious exemptions from same requirement, subject to heightened scrutiny based on religious discrimination), *cert. denied*, 528 U.S. 817 (1999). *But see* Valov v. Department of Motor Vehicles, 34 Cal. Rptr.3d 174, 178-83.
In this case, the city adopted a special rule regarding the ritual slaughtering of animals, which was different, and more burdensome, than the rules regarding slaughtering of animals for secular food purposes. The Court thus applied a strict scrutiny approach, and held the ordinance unconstitutional.

In the absence of these three circumstances, the Court held in *Smith* that where there is a general neutral regulation that has merely an incidental effect on the exercise of religion, the Court will not use a heightened level of review. To do so, said Justice Scalia, would be to allow a person, by virtue of his beliefs, to become a law unto himself. He said this would contradict constitutional traditions, such as found in *Reynolds v. United States*, and common sense. He distinguished the use of strict scrutiny in cases of race discrimination or content regulation of speech, where the heightened level produced equality of treatment or an unrestricted flow of speech, with what would be produced here: a private right to ignore a generally applicable law that denies unemployment compensation when dismissal results from using an illegal drug. Subsequently, the state of Oregon created a religious exemption for peyote use, but that is a matter of legislative choice, not constitutional mandate.

Justice O’Connor, concurring in the judgment, and Justice Blackmun, joined by Justices Brennan and Marshall, dissenting, said the essence of a free exercise claim is relief from a burden imposed by government on religious practices or beliefs, whether imposed directly through prohibitions or indirectly by the denial of a benefit. In either case, the government should have to satisfy a strict standard, as called for in *Sherbert* and *Yoder*.

Reacting to the *Smith* case, Congress passed the Religious Freedom Restoration Act of 1993. It called for courts to use strict scrutiny whenever any government substantially burdens a person’s exercise of religion, even if the burden results from a law of general applicability. In *City of Boerne v. Flores*, the Court declared the law invalid as applied to state laws. Congress had sought justify the law as an exercise of power under § 5 of the 14th Amendment. As discussed at § 28.3 nn.48-55, Justice Kennedy said that there must be congruence and proportionality between the injury to be prevented or modified and the means adopted to that end. Here, the legislative record lacked examples of modern instances of generally applicable laws passed because of religious bigotry. The RFRA, said Justice Kennedy, is so out of proportion to a supposed remedial or preventing object that

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(Cal. App. 2nd Dist. 2005) (California statute requiring full-face photograph on driver’s licenses, with no exemption for persons whose religious beliefs bar such personal photographs, constitutional as a neutral law promoting expeditious identification of persons during traffic stops and at accident scenes, deterring identity theft, and preventing fraud, relying on *Smith* and *Bowen v. Roy*.)


256 *Id.* at 893-97, 905-07 (O’Connor, J., concurring in the judgment, joined in Parts I & II by Brennan, Marshall & Blackmun, JJ.) (strict scrutiny met on these facts); *id.* at 907-16 (Blackmun, J., joined by Brennan & Marshall, JJ., dissenting) (statute unconstitutional under strict scrutiny).


258 521 U.S. 507, 516-36 (1997); *id.* at 544 (O’Connor, J., joined by Breyer, J., except as to the first paragraph of Part I, dissenting); *id.* at 565 (Souter, J., dissenting).
it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior. Justice O’Connor said that *Smith* was wrong and should be re-examined, as did Justices Breyer and Souter.

Congress did not surrender. Within three years, Congress passed the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA). The Act requires strict scrutiny of all laws regarding any land use regulation or prison regulation that imposes a substantial burden on religion if: (1) that burden affects, or removal of that burden would itself affect, interstate commerce; or (2) the burden is imposed in a program or activity receiving federal financial aid; or (3) the burden is imposed in implementation of any regulation that permits individual assessments of the proposed property use. The Act also requires strict scrutiny in any case involving a substantial burden on the religious exercise of a person residing in or confined to an institution that received federal financial assistance or affects commerce with foreign Nations, among the several states, or with the Indian tribes. The new statute does not purport to be an exercise of § 5 power.

The validity of this legislation from the perspective of the Establishment Clause was considered in the context of a prison regulation in *Cutter v. Wilkinson*. In *Cutter*, the Court ruled unanimously that the statute was merely an attempt to respect the free exercise rights of prisoners, and did not create an Establishment Clause problem as long as the statute did not “elevate accommodation of religious observances over the institution’s need to maintain order and safety.”

Although the Court did not address the issue in *Cutter*, it seems likely the other aspects of the statute, in addition to the provisions regarding prison regulations, are valid under Congress’ Commerce Clause and Spending Clause powers. The Act as applied to prisons receiving federal financial assistance is almost certainly valid under a Spending Clause analysis, discussed at § 18.3.2, as is activity affecting interstate commerce under the Commerce Clause, discussed at § 18.2.5. The Commerce Clause also probably makes valid the Act as applied to real estate interests that form part of the housing market. Part of the law might be struck down if the law were applied to affect private individual homes not up for sale or rental, and thus perhaps not in interstate commerce, although the affect of nationwide supply and demand for homes would be affected by those homes not currently up for sale or rental, and thus an affect on interstate commerce might nonetheless be found.

As discussed at § 32.1.2.4 n.79, in *Hankins v. Lyght*, the Second Circuit upheld on Commerce Clause grounds the earlier-past Religious Freedom Restoration Act, as applied to federal laws, rather than state laws struck down in *Boerne v. Flores*. In *Gonzales v. O Centro Espirita Beneficente União 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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261 441 F.3d 96, 107-09 (2nd Cir. 2006).

Meanwhile, in cases not covered by RLUIPA or the RFRA, lower courts continue to apply Smith and its holding that the court should only apply a rational relation test even when a substantial burden has been imposed on the exercise of religious behavior. As noted at § 32.1.2.1 nn.19-20, the Smith doctrine is consistent with Madison’s view that religious behavior can be regulated consistent with a concern for the “public peace,” or, as phrased by John Locke, cited at § 32.1.2.1 n.17, in the service of protecting “civil interests.”

Free Exercise and Establishment Clause issues can also arise in the context of government regulation of home-schooling with a religious perspective. Typically courts do not find such home-schooling regulations burden the fundamental right of parents to rear their children, as discussed at § 27.3.3.1.C n.192. Thus, under Smith, such regulations would trigger only minimum rational review, unless discrimination against religious home-schooling were shown. In practice, states have been relatively sensitive to parental concerns in this area.

In considering free exercise issues, the Court has been clear that while sometimes the government can grant a religious exemption, or provide for a compelling government interest analysis in statutes otherwise constitutional, that government is under no necessary obligation to do so. For example, in Locke v. Davey, the Court held that the state of Washington could deny a public scholarship to an otherwise eligible applicant solely because the applicant planned to use the monies to study for the ministry at a church-related school. Consistent with an endorsement understanding of government neutrality, such government aid to an individual, who voluntarily chooses to use the aid at a religious school, would not violate the Establishment Clause, because it would not reflect an endorsement of religion, as discussed at § 32.1.3.2.B.1 nn.108, 135-37. Similarly, the failure to give such aid does not express hostility to religion under the Free Exercise Clause. The Court explained, “‘[T]here is room for play in the joints’ between them. In other words, there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause.” This conclusion is consistent with the general doctrine that the government can choose the spend its funds as it sees fit, as discussed in the context of the freedom of speech at § 29.3.2, and is consistent with a Stage 6 approach toward constitutional issues, protecting the core constitutional right, but permitting legislative “play in the joints,” discussed at § 16.4 nn.97-105. Only Justices Scalia and Thomas dissented, pointing out that the law violated their formalist concept of literal neutrality in terms of how the funds were granted.

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263 See, e.g., Levitan v. Ashcroft, 281 F. 3d 1313 (D.C. Cir. 2002) (where prisoners did not raise RLUIPA, the court analyzed a prison rule allowing only the chaplain to consume wine during Communion services under a rational basis standard of review).


Reflecting this “play in the joints” perspective, a range of civil rights statutes have been held to provide for a religious “ministerial exception” out of respect for Free Exercise and Establishment Clause concerns. For example, the Seventh Circuit held in *Tomic v. Catholic Diocese of Peoria*, that the ministerial exception bars an Age Discrimination in Employment Act lawsuit by a 50-year-old church music director who was fired after a dispute with the bishop’s assistant over music to be played for Easter services. The church then hired a “much younger person” as a replacement. The court noted that “if the suit were permitted to go forward, the diocese would argue that he was dismissed for a religious reason – his opinion concerning the suitability of particular music for Easter services – and . . . Tomic would argue that the church’s criticism of his musical choices was a pretext for firing him, that the real reason was his age. . . . The court would be asked to resolve a theological dispute.” Similarly, in *Curay-Cramer v. Ursuline Academy of Wilmington, Delaware, Inc.*, the Third Circuit held that a teacher at a private Catholic school could not sue the school for retaliation for protected speech and sex discrimination in violation of Title VII of the Civil Rights Act of 1964, where she was terminated after signing a pro-choice advertisement in a local newspaper. The court held that her claims were not cognizable, since it would necessitate the court's assessment of the relative severity of violations of church doctrine. The Court noted, “Were we . . . to require Ursuline [Academy] to treat Jewish males or males who oppose the war in Iraq the same as a Catholic female who publicly advocates pro-choice positions, we would be meddling in matters related to a religious organization's ability to define the parameters of what constitutes orthodoxy.”

On the other hand, the Ninth Circuit held in *Elvig v. Calvin Presbyterian Church* that a Presbyterian minister could sue her former church under Title VII for sexual harassment and retaliation that occurred prior to her discharge that do not implicate the church’s protected employment decisions. In her complaint, she alleged that shortly after she was hired as the Associate Pastor of Calvin Presbyterian Church, the Church's Pastor engaged in sexually harassing and intimidating conduct toward her, creating a hostile working environment. The Court noted that as part of this lawsuit, the Church could “assert as an affirmative defense that they ‘exercised reasonable care to prevent and correct the harassment, and that [the plaintiff] failed to take advantage of these opportunities to avoid or limit harm.’ . . . Nothing in the character of this defense will require a jury to evaluate religious doctrine or the ‘reasonableness’ of . . . religious practices . . . . Instead, the jury must make secular judgments about the nature and severity of the harassment and what measures, if any, were taken by the [Church] to prevent or correct it. The limited nature of the inquiry, combined with the ability of the district court to control discovery, can prevent a wide-ranging intrusion into sensitive religious matters.” The court noted that while the decision to terminate her ministry was “clearly within the scope of the ministerial exception,” she may “nonetheless hold the Church vicariously liable for the sexual harassment itself.” A federal district

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266 442 F.3d 1036, 1037-42 (7th Cir. 2006).

267 450 F.3d 130, 138-42 (3rd Cir. 2006).

268 375 F.3d 951,955-60 (9th Cir. 2004), rehearing en banc denied, 397 F.3d 790 (9th Cir. 2005).
court held in *Redhead v. Conference of Seventh-Day Adventists* that the "ministerial exception" did not apply to Title VII sex and pregnancy discrimination claims by a teacher who was terminated from a Seventh-day Adventist school for being pregnant and unmarried, as her teaching duties were primarily secular. Her duties that were religious in nature were limited to only one hour of Bible instruction per day and attending religious ceremonies with students only once per year.

Churches have also been held liable in cases of sex abuse of children by church personnel, including priests or ministers, although it is a matter of debate whether various laws limiting damages against charitable institutions should be invoked to limit liability in such cases.

One avenue of increased litigation touching on free exercise concerns involves suits by employees who seek to require businesses to accommodate to their religious practices. In a recent case involving a private business, an employee sued under Title VII of the 1964 Civil Rights Act claiming her civil rights were violated when the employer refused to permit her to exercise her religious beliefs by saying to each customer who was leaving, “Have a Blessed Day.” In another case involving a government employer, an employee claimed her First Amendment rights were violated by a state agency’s interests in avoiding the disruptive effect of employees’ religious proselytizing of agency clientele. Under current doctrine most of these claims fail. Under Title VII, an employer’s obligation of reasonable accommodation has been held to require that the employer only take steps which do not impose an “undue hardship” on the employer, and “undue hardship” has been defined as any accommodation which imposes “more than a *de minimis* cost” on the employer. With respect to the First Amendment, the government must only show that the government’s interest in controlling the work environment and providing effective services outweigh the employee’s right of free speech under the *Pickering* test, discussed at § 30.2.2.1.

The cases, however, suggests that some religious conservatives are not satisfied with the results of traditional doctrine. One alternative approach would be to apply the reasonable accommodation standard used under the Americans with Disabilities Act. The ADA imposes a much higher burden of reasonable accommodation on businesses than under Title VII, given the clear congressional intent that the two standards ought to be different. Additionally, analyzed objectively, the two

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[^269]: 440 F. Supp. 2d 211, 220-24 (E.D.N.Y., 2006). Similar cases protecting pregnant teachers in church-run schools are cited at § 31.2.2 n.30.


[^272]: Knight v. Connecticut Dep’t of Public Health, 275 F.3d 156, 163-68 (2nd Cir. 2001).


[^274]: See, e.g., Barnett v. U.S. Air, Inc., 228 F.3d 1105, 1120 n.10 (9th Cir. 2000), *cert. granted on other grounds*, 532 U.S. 970 (2001) ("We note that the 'undue hardship' standard in the ADA is substantially more demanding than the hardship standard in Title VII in the context of 'reasonable..."
situations seem different. The ADA applies only to individuals afflicted with “a physical or mental impairment that substantially limits one or more of the major life activities of such individual.” Faced with this involuntary impairment of a major life activity, the ADA requires businesses to make serious efforts to permit these workers to become, or for existing workers to continue to be, productive employees.\(^{275}\) In contrast, the Title VII religious accommodation cases involve individuals asking their employers to adjust the employers’ employment rules to fit those individuals’ desire to practice their religion with minimal consequences. Analyzed objectively, there is little connection between the burden suffered by someone whose employer refuses to adjust the employment rules to accommodate that individual’s chosen religious practice with the burden suffered by an individual who has been involuntarily afflicted with a physical or mental disability which has substantially impaired for that person a major life activity.\(^{3}\)

Adoption of a higher standard of reasonable accommodation would likely yield counterproductive results. The complexity of the issue, along with the diversity of religions, is immense. It has been estimated there are “more than 1500 religious organizations [in America], including more than 900 Christian denominations, 100 Hindu denominations, and some [seventy-five] forms of Buddhism. With [six] million to [seven] million adherents, Islam is expected to soon pass Judaism as the second-most commonly practiced religion in the U.S.” Even for larger employers, the demands of implementing a program of religious accommodation are immense. For smaller businesses, a robust, required, and reasonable accommodation policy would be even more burdensome.\(^{276}\)

\(^{275}\) See, e.g., Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 194-96 (2002).

\(^{276}\) R. Randall Kelso, Narcissism, Generation X, The Corporate Elite, and the Religious Right Within the Modern Republican Party: A Set of “Friendly” Observations for President Bush, 24 Cardozo L. Rev. 1971, 2014-15 (2003) (citations omitted) (noting key issues regarding implementing such programs, including: “Be fair and equitable . . . Don’t exclude new or nontraditional belief systems”; “Educate yourself and others. Learn about the religious beliefs and practices of employees [including those] that command adherents to fast, change diets, pray, or . . . affect their life during working hours”; “Seek individualized solutions . . . taking the time to work with employees, co-workers, and supervisors to find individualized solutions—a worthy investment considering the high costs of defending a discrimination charge”; “Don’t forget the nonreligious. Craft guidelines so they apply equally to nonreligious employees. For example, rather than granting employees time off or flexibility solely for religious holidays, offer such policies for any personal need.”).
NEW JUSTICES ADDENDUM

A. Introduction

In his lecture, *The Path of the Law*, delivered in 1897, Justice Oliver Wendell Holmes, Jr. observed, “The development of our law has gone on for nearly a thousand years, like the development of a plant, each generation taking the inevitable next step.” That development has continued for more than a century since Holmes spoke. As Holmes noted, “Far the most important and pretty nearly the whole meaning of every new effort of legal thought is to make these prophecies [of what courts will do in fact] more precise, and to generalize them into a thoroughly connected system.” As documented in Chapters 19-32, much constitutional law is settled today. However, as long as different approaches to judicial decisionmaking are held by different Justices of the United States Supreme Court, constitutional law will remain unsettled in various parts.


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2 See generally Symposium: *The Path of the Law After One Hundred Years*, 110 Harv. L. Rev. 991-1054 (1997); Robert P. George, *One Hundred Years of Legal Philosophy*, 74 Notre Dame L. Rev. 1533 (1999) (discussing the influence in the 20th century of the analytic positivism of Bentham and Austin; Holmes’ views from 1897 in *The Path of the Law*; the Realist Movement and the instrumentalism of Karl Llewellyn during the 1930s and Post-World War II era; and various versions of modern natural law: economic (the Law and Economics Movement), political (Dworkin and Fuller), and ethical (Aquinas and others). Each of these approaches is summarized at § 13.1).


nominated Judge Merrick Garland, but the Republican majority in the Senate blocked confirmation hearings on the ground that the President elected in the November 2016 election should make the nomination. President Trump nominated Judge Neil Gorsuch and he was sworn in on April 10, 2017. Justice Kennedy retired effective July 31, 2018, and Justice Brett Kavanaugh was sworn in on October 6, 2018. As discussed in this Addendum, Chief Justice Roberts will likely adopt a Holmesian style of interpretation similar to Chief Justice Rehnquist; Justices Alito, Gorsuch, and Kavanaugh will likely adopt a formalist style, similar to Justices Scalia and Thomas; Justices Sotomayor and Kagan will likely adopt a moderate instrumentalist style, similar to Justices Ginsburg and Stevens. Based on these predictions, the placement of Chief Justice Roberts and Justices Alito, Sotomayor, Kagan, Gorsuch, and Kavanagh vis-a-vis other Justices appears at § 13.4 & Table 13.4.

**B. Chief Justice John G. Roberts, Jr.**

Chief Justice John G. Roberts replaced Chief Justice Rehnquist at the start of the 2005 Term of the Court, following confirmation in the Senate on September 29, 2005 by a 78-22 vote. His opinions as a judge on the United States Court of Appeals for the District of Columbia suggest that as a Justice he is likely to be a conservative Holmesian, in the mold of Chief Justice Rehnquist, for whom Justice Roberts served as a law clerk during the 1980 Term of the Court.

Naturally, a firm decision regarding the style that a former judge will display as a Supreme Court Justice is difficult to predict with confidence because lower court judges are supposed to follow Supreme Court precedents. For that reason, many circuit court opinions are written in substantially the same way regardless of decisionmaking style of the circuit court judge. In some cases, however, there may be clues in the way facts are characterized, in the way leeways in the precedents are perceived, and in the organization of reasoning. For example, while on the D.C. Circuit, Roberts did not reject the use of legislative history as a way to find plain meaning as would a formalist, although, like Chief Justice Rehnquist, discussed at § 6.2.3.1 nn.75-80, he had an affinity for the view, consistent with a formalist approach, that legislative history should not be used to overrule a text that is clear. Judge Roberts did not use policy analysis to help protect the unempowered, as would an instrumentalist. Nor are there examples of gauging results by background normative principles, as is often found in modern natural law opinions.

There are many suggestions in his opinions of a Holmesian approach. For example, Holmesian analysis typically begins with the objective meaning of relevant words, drawing on their underlying purpose and their context, such as related provisions. In *A.T. & T. Corp. v. FCC*, Judge Roberts held that the language of the Commission’s regulation dealing with the transfer of telephone 800

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6 In re England, 375 F.3d 1169, 1178 (D.C. Cir. 2004) (where legislative language is clear, resort to legislative history is not necessary); United States ex rel. Totten v. Bombardier Corp., 380 F.3d 488, 494-95 (D.C. Cir. 2004) (where text is clear, literal meaning and purpose must be found in the language of the statute itself, not legislative history).

service applied to transfers of the traffic aspects of a service plan so that transferees had to assume all obligations of the former customer at the time of the transfers. He rejected an argument of the Commission that the regulation applied only to the wholesale transfer of a complete plan and not the transfer of component parts. Focusing on purpose in addition to literal plain meaning, Roberts explained that the whole purpose of the tariff provision was to ensure that the benefits of 800 service contracts could not be transferred without the concurrent obligations.

Under a Holmesian analysis, finding purpose and relevant context may be aided by broad-based historical inquiry. In a number of his opinions, Judge Roberts has set forth a detailed factual history in order to gain a full understanding of context and purpose. A Holmesian approach also has a willingness to consider legislative and executive practice and judicial precedent, in addition to the contemporaneous sources of text, context, and history. In so doing, a Holmesian analysis tends to emphasize judicial restraint embodied in deference to governmental action. Judge Roberts often reflected this deference-to-government predisposition while on the D.C. Circuit. For example, in *Graham v. Ashcroft*, the petition alleged that the FBI had failed to abide by its own procedures during a disciplinary hearing which eventuated in a letter of censure. Judge Roberts wrote that the censure letter failed to qualify as a major adverse personnel action so that judicial review was precluded under the Civil Service Reform Act. With respect to the deference owed Congress, he added that an agency cannot purport to confer rights that undermine a comprehensive congressional scheme, and the Act was such a scheme.

In *Consumers Energy Co. v. FERC*, the Federal Energy Regulatory Commission had allowed the affiliates of a Canadian utility to sell power at market-based rates in the United States because it had offered transmission service “comparable” to that required of a utility in the United States even though the Canadian utility required companies serviced from point A to point B to sell power into the system at point A and buy it back at point B. The prices in this system depended on the degree of congestion at each point. Applying an abuse of discretion standard, Judge Roberts wrote that claims of abuse through creating congestion were speculative, at best, and the FERC could apply

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8 Sierra Club v. EPA, 353 F.3d 976 (D.C. Cir. 2004) (denial of petition for review of Environmental Protection Agency regulations concerning the emission of hazardous air pollution from primary copper smelters, the court holding that the EPA acted reasonably in that its standards accurately reflected the control achieved by the best-performing smelters); Midwest ISO Transmission Owners v. FERC, 373 F.3d 1361 (D.C. Cir. 2004) (examining the complex relationship between utilities that owned electric transmission facilities, the Federal Energy Regulatory Commission, and various state regulations with respect to the relation of costs and rates); Stewart v. Evans, 351 F.3d 1239 (D.C. Cir. 2003) (Fourth Amendment requires a constitutionally protected reasonable expectation of privacy, and there was no such expectation where a personal document of a government employee had been voluntarily delivered to a supervisor who put it in a locked safe to which the employee did not have access).

9 358 F.3d 931, 933-36 (D.C. Cir. 2004).

10 367 F.3d 915, 922-25 (D.C. Cir. 2004).
a flexible approach which required compatibility on a case-by-case basis, rather than letter-for-letter compliance, because FERC could find that its approach better promotes competitive markets.

In another case upholding the government’s position, *Taucher v. Brown-Hruska*, 11 a suit had been brought against the government by the prevailing party in an action resulting in a declaration that a portion of the Commodity Exchange Act was unconstitutional. Applying a federal statute on the payment of attorneys’ fees, the court affirmed a district court ruling that the Commission’s defense in the action was reasonable on the merits and, thus, attorneys’ fees were not to be paid. The issue on the merits was whether publishers who offered advice on trading in commodity futures were required to register under the Act or whether their actions were protected by the First Amendment. Roberts pointed out that there was no Supreme Court case on point and the only previous circuit court decision had upheld the government’s position. Judge Harry Edwards dissenting, saying that the district court had not abused its discretion in ordering the fees to be paid.

In *Amoco Production v. Watson*, 12 Judge Roberts gave judicial deference to an agency’s interpretation of its own regulations in a complex and highly technical regulatory program – the Department of the Interior regulation of royalties from the production of coalbed methane gas from federal land. The issue involved the presence of carbon dioxide in the gas which must be removed before the gas will be accepted by a mainline pipeline. The court upheld a determination by the government that the producers owed additional royalties. In rejecting the producers’ interpretation arguments, Justice Roberts said, “No canon of construction justifies construing the actual statutory language beyond what the terms can reasonably bear.”

Perhaps Judge Roberts’ most interesting constitutional opinion reflecting a deference-to-government approach is *Hedgepeth ex rel. Hedgepeth v. Washington Metropolitan Area Transit Authority*. 13 Here the court upheld on its face and as applied an ordinance which forbade eating in the Washington, D.C. subway system. Petitioner, a twelve-year-old girl, had been arrested for eating french fries while waiting on a subway platform. She was handcuffed and taken to a police station where some three hours later she was released to her parents. The key issues were whether the ordinance on its face or as applied violated the Equal Protection Clause, a liberty interest protected by the substantive Due Process Clause, or the Fourth Amendment prohibition on unreasonable seizure. The court found no violations.

Regarding equal protection, Judge Roberts wrote that under Supreme Court precedents rational basis was the proper standard of review because age is not a suspect classification and there is no fundamental right to freedom of movement when there is probable cause for arrest, as provided in the ordinance. True, he said, the ordinance calls for adults to be given a citation leading to a fine of $10-50, but children were to be arrested and held pending notification of their parents. In

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11 396 F.3d 1168, 1172-78 (D.C. Cir. 2005); *id.* at 1178-83 (Edwards, J., dissenting).

12 410 F.3d 722, 734 (D.C. Cir. 2005).

13 386 F.3d 1148, 1150-52 (D.C. Cir. 2004).
Roberts’ view, this distinction was rationally related to the legitimate goal of promoting parental awareness and involvement with children who commit delinquent acts. Further, Roberts said, there is no way to insure that children will provide truthful and accurate identifying information. With respect to the claim of unreasonable seizure, the precedents say that if there is probable cause to believe that an individual has committed even a minor offense, an officer may, without violating the Fourth Amendment, arrest the offender. Roberts read the precedents also to establish that an additional inquiry into reasonableness of the arrest need not be made, given the existence of probable cause. And, finally, there is no constitutional insistence on limiting discretion in the arresting officer, and thus no plausible vagueness due process argument. Judge Roberts did not express any discomfort in applying this law to the facts in order to uphold denial of a claim that the arrest be expunged from the records, although he did note, “No one is very happy about the events that led to this litigation.”

Despite a manifested willingness to defer to the judgments of government officials, Judge Roberts has insisted that government agencies base their actions on all of the tests found in authorizing statutes. For example, in *Williams Gas Processing - Gulf Coast Co., L.P. v. FERC*, the Federal Energy Regulatory Commission was given power to regulate the transportation of natural gas but not its gathering, except for actions “in connection with” transportation that would otherwise frustrate the Commission’s effective regulation of a pipeline. The Commission had sought to regulate activities by a gathering company that had been “spun-down” from a transportation company. Roberts said that before this could be done the statute required both a finding that (1) there was concerted action between a pipeline subject to its jurisdiction and a gathering affiliate and that (2) this action frustrated the Commission’s effective regulation of the pipeline. In the case at hand, the Commission had not made such a dual finding, and the fact of affiliation here did not enhance or detract from any ability to charge high rates or impose onerous conditions. Thus the government suffered a rare loss at the hands of Judge Roberts.

Judge Roberts also indicated that unsupported governmental action is not entitled to deference. In *LeMoyne-Owen College v. NLRB*, the court held that faculty members were not entitled to be certified by the NLRB as a bargaining unit because their power to make academic policies of the college meant that they had managerial status. In its explanation of the certification, the NLRB did not discuss the cases which had decided such an issue the other way. The court remanded for the NLRB to provide an adequate explanation of its apparent disregard for precedent. Roberts said that the court defers to agency decisions, but if a party makes a strong argument that similar cases have been decided differently, the agency must do more than simply ignore the argument.

An additional aspect of Holmesian analysis is a pragmatic, sharing of powers, checks and balances approach to issues of separation of powers, with conservative Holmesians, such as Chief Justice

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14 *Id.* at 1150, 1153-59.

15 373 F.3d 1335, 1341-45 (D.C. Cir. 2004).

16 357 F.3d 55, 60-61 (D.C. Cir. 2004).
Rehnquist, tending to favor the executive branch and the states. In *International Action Center v. United States*, Judge Roberts held that it was error to deny qualified immunity to police supervisors for torts allegedly committed by their subordinates who dealt with protesters at a Presidential Inaugural Parade. Roberts said that the court must define the constitutional right to be free from injury to such a degree that officials can reasonably anticipate when conduct may give rise to liability for damages. Mere negligence is not enough to justify recovery under § 1983. Without showing a pre-existing pattern of violations during parades, the effort to hold supervisors personally liable for inaction faded into *respondeat superior*, which is barred under § 1983. Similarly deferring to executive decisionmaking, in *Hamdan v. Rumsfeld*, Judge Roberts concluded that the President Bush’s plan for military tribunals for Guantanamo Bay detainees was impliedly authorized by Congress, did comply with the Uniform Code of Military Justice, and did satisfy the Geneva Conventions, positions echoed in dissent by Justice Thomas, joined by Justice Scalia and joined in part by Justice Alito, when the case reached the Supreme Court.

Consistent with the Holmesian predisposition to favor rational review in Equal Protection and Due Process cases, discussed at §§ 4.2.1 n.36 & 26.1.2.2 nn.73-79, Justice Roberts has most often reviewed government action at the low “rational basis” level, suggested by most precedents. He has not indicated discomfort with applying this test, and in almost all cases the result has been to approve the action of the government. For example, under rational basis review, Roberts had no difficulty in finding that a government agency has provided substantial support in the administrative record for its decision in *National Council of Resistance of Iran v. Department of State*. Judge Roberts pointed out that this was the fourth in a series of related cases concerning the biennial designations by the Secretary of State that certain groups are Foreign Terrorist Organizations. Here the petitioner organization’s designation as an FTO was based on a determination that it was an alias of another organization designated an FRO and there was substantive support of the Department’s conclusions in the administrative record.

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17 365 F.3d 20, 24-28 (D.C. Cir. 2004).

18 415 F.3d 33, 35-43 (D.C. Cir. 2005), rev’d, 126 S. Ct. 2749, 2759-60, 2772-75, 2795-96 (2006); 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).

19 American Federation of State, County & Municipal Employees Capital Area Council 26 v. Federal Labor Relations Authority, 395 F.3d 443 (D.C. Cir. 2005) (federal agency had made a reasonable determination that an agreement between the union and itself was tentative only so that the agency did not commit an unfair labor practice when it failed to approve the agreement); Sioux Valley Rural Television, Inc. v. FCC, 349 F.3d 667 (D.C. Cir. 2003) (FCC order rescinding preference in payment options by women or minority owned stations was held a reasonable exercise of authority over spectrum licenses, and adequate remedies had been provided for adjusting obligations arising from completed auctions).

20 373 F.3d 152, 153-60 (D.C. Cir. 2004).
In a number of other cases, Judge Roberts has held against a person who was challenging some aspect of criminal proceedings. For example, in United States v. Holmes, the court held that the police officer had acted reasonably in taking out a hard, square object he felt in the defendant’s parka pocket. Roberts pointed to the fact that defendant had hesitated to pull over, had several times reached under the seat, had been drinking, the jacket was huge, and the defendant had several times reached for the pocket, which ultimately turned out to be a scale. In United States v. West, the district court was held not to have abused its discretion by not allowing a defendant to withdraw his guilty plea where it was shown that the court made substantial effort to assure that defendant understood the consequences of the plea, no promises had been made, the defendant did not assert a viable defense, and the government would be prejudiced if the plea were withdrawn. In United States v. Smith, the defendant charged that it was an invalid ex post facto law to use sentencing guidelines as they existed when the crime was committed, given a later Court decision that the sentencing guidelines violated the Constitution. The court affirmed an enhanced sentence saying that it had not been shown that the old sentence guidelines had hurt the prisoner.

Even though most of Judge Roberts’ majority decisions for the Court of Appeals have favored the government, he has insisted that the government follow its rules. In United States v. Mellen, the defendant was convicted of receiving stolen goods from his wife which were found in his home. His sentence was based upon the assumption that he had used all of the goods. The sentence was vacated because there was no evidence that he had used all of the goods. Another such case is Public Service Comm’n of Kentucky v. FERC. Noting that by statute the Commission must set rates that are just, reasonable, and not unduly discriminatory, Judge Roberts held that the FERC had violated the due process rights of petitioners by creating a special incentive-based premium applying to one group of companies without placing petitioner on notice and creating that premium without considering any record evidence whatever. Other cases written by Judge Roberts reflected the same penchant for careful attention to the facts and procedural regularity, consistent with a Holmesian predisposition, noted at § 10.2.1.2. n.18, to defer to government where governmental operations are operating smoothly, but to be concerned that the political process is, in fact, operating properly.26

21 385 F.3d 786, 789-92 (D.C. Cir. 2004).
22 392 F.3d 450, 455-61 (D.C. Cir. 2004).
23 374 F.3d 1240, 1247-51 (D.C. Cir. 2004).
24 393 F.3d 175, 182-87 (D.C. Cir. 2004).
25 397 F.3d 1004, 1008-12 (D.C. Cir. 2005).
26 See, e.g., United States v. Lawson, 410 F.3d 735 (D.C. Cir. 2005) (affirming a conviction of bank robbery over challenges to the admission of an out-of-court identification, to the search of defendant’s car, and to evidence of a second, uncharged bank robbery); United States v. Toms, 396 F.3d 427 (D.C. Cir. 2005) (district court did not err in denying a motion to overrule a conviction for several drug and firearms offenses); United States v. Tucker, 386 F.3d 273 (D.C. Cir. 2004) (the district court made an insufficient statement of reasons to depart from the sentencing standards by a downward adjustment); BOPCS, Inc. v. FCC, 351 F.3d 1177 (D.C. Cir. 2003) (FCC’s denial of
Justice Samuel A. Alito

Justice Alito was confirmed to the Supreme Court by a 58-42 vote of the Senate on January 31, 2006. While predictions based on prior judicial or legal experience are somewhat speculative, Justice Alito’s judicial decisionmaking style appears to be more clearly in the mold of a formalist approach, rather than the Holmesian approach predicted for Chief Justice Roberts. The Senate’s confirmation of Justice Alito to replace natural law Justice Sandra Day O’Connor may shift the balance of the Supreme Court more in a formalist direction, fulfilling President George W. Bush’s campaign pledge to nominate Justices in the mold of formalist Justices Scalia and Thomas. In contrast to Holmesian deference-to-government, the formalist focus on literal text and specific historical intent may lead formalist Justices to strike down more legislation than would be true under Holmesian deference. As one author has noted, “Justices Scalia and Thomas have voted to strike down federal affirmative action provisions, state affirmative action plans, measures designed to promote minority ownership of media, campaign finance legislation that attempts to redress wealth inequities in the political process, portions of the Americans with Disabilities Act, part of the Family and Medical Leave Act, legislative attempts to promote minority representation, laws protecting women from violence, and laws protecting gays, the aged, and the disabled from discrimination.”

Justice Alito’s opinions on the Third Circuit are consistent with viewing him as a formalist in the mold of Justices Scalia and Thomas. Indeed, Justice Alito has been called by some "Scalito," meaning "Little Scalia." On the other hand, in one case during the 2006 Term, Day v. McDonough, Justice Alito departed from a literal textual reading of Habeas Rules 4 and 5 regarding waiver of a statute of limitations defense, in favor of a prudential deference-to-government view where considerations of “comity, finality, and the expeditious handling of habeas proceedings . . . counsel against an excessively rigid or formal approach.” During the 2006 Term, Justice Alito

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28 Id. at 827-28 (citations omitted).

29 See, e.g., Alliance for Justice, Report on the Nomination of Samuel A. Alito to the United States Supreme Court (2006) (at www.supremecourtwatch.org) (quoting, inter alia, Professor Cass Sunstein for the proposition that “there is a good chance that Alito will be with Justices Scalia and Thomas in their attempts to move Constitutional law in some respects to what it was long ago.”)


31 126 S. Ct. 1675, 1682-84 (2006) (Ginsburg, J., opinion for the Court, joined by Roberts, C.J., and Kennedy, Souter & Alito, JJ.); id. at 1685 (Stevens, J., joined by Breyer, J., dissenting from the judgment); id. at 1685-86 (Scalia, J., joined by Thomas & Breyer, JJ., dissenting).
also indicated a greater reluctance to reach out to decide issues presented by a case, but not necessary for case resolution, on which Justices Scalia and Thomas chose to write. Given Chief Justice Roberts’ basic Holmesian style, as reflected in Table 13.4, in practice this has meant Justice Alito has voted slightly more with Chief Justice Roberts, rather than Justices Scalia or Thomas.

D. Justice Sonia Sotomayor

On May 1, 2009, Justice David Souter announced he was retiring from the Supreme Court. President Obama nominated Second Circuit Court of Appeals Judge Sonia Sotomayor to replace Souter on May 26, 2009. The Senate voted to confirm her nomination by a 68-31 vote on August 6, and Justice Sotomayor took her oath of office on August 8, 2009. Based upon her record on the Second Circuit, and President Obama’s stated criteria that the “quality of empathy, of understanding and identifying with people’s hopes and struggles, [is] an essential ingredient for arriving at just decisions and outcomes,” it is likely Justice Sotomayor will decide cases similar to Justice Ginsburg, following a liberal, moderate instrumentalist style of judicial decisionmaking.

E. Justice Elena Kagan

On April 9, 2010, Justice John Paul Stevens announced he was retiring from the Supreme Court. President Obama nominated Solicitor General of the United States, and former Harvard Law School Dean, Elena Kagan to replace Stevens on May 10, 2010. The Senate voted to confirm her nomination by a 63-37 vote on August 5, and Justice Kagan took her oath of office on August 7, 2010. Based upon her published writings, it is likely Justice Kagan will decide cases similar to Justice Stevens, following a liberal, moderate instrumentalist style of judicial decisionmaking.

F. Justice Neil M. Gorsuch

On February 13, 2016, Justice Scalia passed away. On March 16, 2016, President Obama nominated Chief Judge of the D.C. Circuit Court of Appeals, Merrick Garland, to replace him. The Republican majority in the Senate refused to give him a hearing, awaiting the outcome of the November 2016 election. Following Donald Trump’s election as President, Trump nominated 10th Circuit Court of Appeals Judge Neil Gorsuch on January 31, 2017. To overcome a Democratic filibuster, the Republican-controlled Senate voted on April 6, 2017 to adopt the “nuclear option” to change Senate rules to require only a majority to trigger voting for Supreme Court Justices. (When the Democrats controlled the Senate in November 2013, they adopted the “nuclear option” for lower federal court judges and Executive appointments, as discussed in the 2018 Supplement, § 7.4.2, page 234, end of


section). Following this change, the Senate voted to confirm Gorsuch’s nomination by a 54-45 vote on April 7, 2017, and Justice Gorsuch took his oath of office on April 10, 2017. Based upon his writings and opinions, it is likely Justice Gorsuch will decide cases similar to Justice Scalia, with a formalist style of interpretation, with a slightly affinity for Holmesianism, like Justice Alito.34

G. Justice Brett M. Kavanaugh

At the end of the 2017 Term, Justice Kennedy announced his retirement effective July 31, 2018. Despite credible allegations of perjured testimony during his confirmation hearings, including about sexual misconduct in high school and college, and access to stolen Democrat Judiciary Committee documents while working in the Bush Administration, the Senate voted 51-49, mostly on party lines (one Democrat voted yes, one Republican voted no), to move forward President Trump’s nomination of Judge Brett M. Kavanaugh of the D.C. Circuit Court of Appeals. He was sworn in October 6, 2018. Based upon his writings and opinions, he will likely decide cases in a formalist manner, but with an affinity for Holmesian deference to government, particularly on Executive Power issues.

H. Conclusion

Since 2007, there was a “positivist” Holmesian and formalist voting bloc of Chief Justice Roberts and Justices Scalia (now Gorsuch), Thomas, and Alito, and a “normative” bloc of Justices Stevens (now Kagan), Souter (now Sotomayor), Ginsburg, and Breyer. Given these two blocs, Justice Kennedy was often the key swing vote in close 5-4 cases.35 With Justice Kennedy’s retirement, and replacement by formalist Justice Kavanaugh, Chief Justice Roberts is likely the new swing vote. The “positivist” versus “normative” distinction is summarized at §§ 2.3-2.4 and at Table 2.4. For the longer-term, the natural law style of Justice Kennedy, which was shared by Justices O’Connor and Souter, will likely predominate, not the liberal instrumentalism of the Warren Court.36 Reasoned elaboration of the law will likely reflect a Stage 6 progressivist perspective, as discussed in Chapter 16. Connection to other countries’ constitutional doctrine, particularly Europe and Canada, will likely increase given a convergence in those societies also adopting Stage 6 reasoned elaboration of the law, as discussed at § 15.4.2 & 17.1.4 nn.65-72. A 2018 Supplement, included at the end of this E-Treatise, discusses constitutional developments from October 2006 - August 2018.


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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.

**** Make-up of the Court during the Spring of 1937, during the “Court-packing Plan” and Justice Roberts’ “switch in time,” discussed at pages 229, 444, 720.
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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.

**** Make-up of the Court during the Spring of 1937, during the “Court-packing Plan” and Justice Roberts’ “switch in time,” discussed at pages 229, 444, 720. 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 filled 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. As discussed in the “New Justices Addendum,” Judge Neil Gorsuch was sworn in on April 10, 2017.

******* Justice Kennedy resigned effective July 31, 2018. As discussed in the "New Justices Addendum," Judge Brett Kavanaugh 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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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 to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United
States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

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

[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, nor 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 thirds of that House shall agree to pass the Bill, it shall be sent together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return in which Case it shall not be a Law.

[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 Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, arsenals, dock-Yards, and other needful Buildings;—And

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

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

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

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

[2] No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing 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 Controul 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 an 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 the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

[7] The President shall, at 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 executed, and shall Commission all the Officers of the United States.

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

ARTICLE III

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

Section 2. [1] The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction,—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under the Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

[2] In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction. In all 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 to 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 attainted.

ARTICLE IV

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

Section 2. [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 this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.
Section 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

ARTICLE V

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

ARTICLE VI

[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 Judges 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 be required as a Qualification to any Office or public Trust under the United States.

ARTICLE VII

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

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

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

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

AMENDMENT XV [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 so construed as to affect the election or term of any Senator chosen before it becomes 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 by law provide for the case of the death of any of the persons from whom the House of Representatives may choose a President whenever the right of choice shall have devolved upon them, and for the case of the death of any of the persons from whom the Senate may choose a Vice President whenever the right of choice shall have devolved upon them.
Section 5. Sections 1 and 2 shall take effect on the 15th day of October following the ratification of this article.

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

AMENDMENT XXI [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 has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of 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 Representatives in Congress to which the District would be entitled if it were a State, but in no event more than the least populous state; they shall be in addition to those appointed by the states, but they shall be considered, for the purposes of the election of President and Vice President, to be
electors appointed by a state; and they shall meet in the District and perform such duties as provided by the twelfth article of amendment.

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

AMENDMENT XXIV [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 tax 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 the removal of the President from office or of his death or resignation, the Vice President shall become President.

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

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

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

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

**AMENDMENT XXVI [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 and 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 to 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 blessings 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.
DEDICATION, AUTHOR INFORMATION, ACKNOWLEDGMENTS & NOTE ON CITATIONS

DEDICATION

We dedicate this book to the late Richard McKeon, a distinguished professor at the University of Chicago. In the 1940s, Professor McKeon taught a course on Jurisprudence in which he argued that it would be useful to study the legal system by making use of Aristotle’s analysis of material, formal, efficient, and final causes. This book is an effort to implement Professor McKeon’s thesis, with particular emphasis on constitutional law. The authors hope that Professor McKeon would have been pleased with our efforts.

AUTHOR INFORMATION

Charles D. Kelso is an Emeritus Professor at University of the Pacific, McGeorge School of Law. He received an A.B., 1946, and J.D., 1950, from the University of Chicago; an LL.M., 1962, and J.S.D., 1968, from Columbia University, and an LL.D., in 1966, from John Marshall. He clerked for Justice Minton on the United States Supreme Court from 1950-51. He was a Professor at Indiana School of Law – Indianapolis from 1951-80, and has been a Professor at McGeorge School of Law since 1980. During 1966-68, he served as a Professor and Associate Dean at the University of Miami School of Law. He was the Director of the AALS Study of Part-Time Legal Education from 1963-72; Chair of the ABA Section of Legal Education & Admissions to the Bar in 1973-74; Editor of Learning and the Law magazine from 1974-78; and President of the Law & Society Association in 1979. He is the author of numerous monographs and over 70 articles. He is also the co-author of CHARLES D. KELSO & R. RANDALL KELSO, AMERICAN CONSTITUTIONAL LAW: AN E-COURSEBOOK (2017 ORIG. ED. 2014), and R. RANDALL KELSO & CHARLES D. KELSO, STUDYING LAW: AN INTRODUCTION (2d ed. 2010). Like CHARLES D. KELSO & R. RANDALL KELSO, THE PATH OF CONSTITUTIONAL LAW (2007) (with 2017 Supplement) (E-Treatise on the Constitution), these books are available online at: http://libguides.stcl.edu/kelsomaterials

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The title of this book is a paean to Justice Oliver Wendell Holmes, Jr.’s famous article, The Path of the Law, 10 Harv. L. Rev. 457 (1897). In the opening paragraph of that article, Holmes observed:

When we study law we are not studying a mystery but a well known profession. We are studying what we shall want in order to appear before judges, or to advise people in such a way as to keep them out of court. The reason why it is a profession, why people will pay lawyers to argue for them or to advise them, is that in societies like ours the command of the public force is intrusted to the judges in certain cases, and the whole power of the state will be put forth, if necessary, to carry out their judgments and decrees. People want to know under what circumstances and how far they will run the risk of coming against what is so much stronger than themselves, and hence it becomes a business to find out when this danger is to be feared. The object of our study, then, is prediction, the prediction of the incidence of the public force through the instrumentality of the courts. Id. at 457.

This book is both a description of the past and a prediction of the future. It has been inspired by the following observations with which Holmes concluded his article:

To an imagination of any scope the most far-reaching form of power is not money, it is the command of ideas. If you want great examples read Mr. Leslie Stephen’s “History of English Thought in the Eighteenth Century,” and see how a hundred years after his death the abstract speculations of Descartes had become a practical force controlling the conduct of men. Read the works of the great German jurists, and see how much more the world is governed to-day by Kant than by Bonaparte. We cannot all be Descartes or Kant, but we all want happiness. And happiness, I am sure from having known many successful men, cannot be won simply by being counsel for great corporations and having an income of fifty thousand dollars. An intellect great enough to win the prize needs other food besides success. The remoter and more general aspects of the law are those which give it interest. It is through them that you not only become a great master in your calling, but connect our subject with the universe and catch an echo of the infinite, a glimpse of its unfathomable process, a hint of the universal law. Id. at 478.

A number of the sections in this book are based upon passages from one of 16 articles published between 1992-2003 by one, or both, of the co-authors of this book, or are based on a few passages from a book written by the co-authors, R. RANDALL KELSO & CHARLES D. KELSO, STUDYING LAW: AN INTRODUCTION (West Pub. Co. 1984). These sections are:

§ 2.4: A simplified version and explanation of Table 2.4, presented in this section, first appeared in R. RANDALL KELSO & CHARLES D. KELSO, STUDYING LAW: AN INTRODUCTION 113-19 (1984). A

§ 3.1: This section is based on *R. RANDALL KELSO & CHARLES D. KELSO, STUDYING LAW: AN INTRODUCTION* 109-13, 123-24, 161-70, 278-82 (1984).


§ 4.1: This section is based on *R. RANDALL KELSO & CHARLES D. KELSO, STUDYING LAW: AN INTRODUCTION* 46-52 (1984).


§ 4.4: This section is based on R. Randall Kelso, *Styles of Constitutional Interpretation and the Four Main Approaches to Constitutional Interpretation in American Legal History*, 29 Valparaiso L. Rev. 121, 147-50 (1994).

§§ 5.1-5.4.3: These sections are based on R. Randall Kelso, *Styles of Constitutional Interpretation and the Four Main Approaches to Constitutional Interpretation in American Legal History*, 29 Valparaiso L. Rev. 121, 125-38, 140-47, 153-54 (1994).

§ 6.2.1.2: This section is based on R. Randall Kelso, *Styles of Constitutional Interpretation and the Four Main Approaches to Constitutional Interpretation in American Legal History*, 29 Valparaiso L. Rev. 121, 150-52 (1994).


§§ 6.2.3.2-6.3.2 & 6.4.1-6.4.2: These sections are based on R. Randall Kelso, *Styles of Constitutional Interpretation and the Four Main Approaches to Constitutional Interpretation in American Legal History*, 29 Valparaiso L. Rev. 121, 138-40, 154-65 (1994).


§§ 7.3.1.2-7.3.4.4: These sections are based on R. Randall Kelso & Charles D. Kelso, *How the Supreme Court is Dealing with Precedents in Constitutional Cases*, 62 Brooklyn L. Rev. 973, 990-1036 (1996).


§§ 9.2 & 9.3.4: These sections are based on R. Randall Kelso, *Styles of Constitutional Interpretation and the Four Main Approaches to Constitutional Interpretation in American Legal History*, 29 Valparaiso L. Rev. 121, 184-95 (1994).

§ 10.2: This section is based on R. Randall Kelso, *Styles of Constitutional Interpretation and the Four Main Approaches to Constitutional Interpretation in American Legal History*, 29 Valparaiso L. Rev. 121, 195-213 (1994).

§ 11.2: This section is based on R. Randall Kelso, *Styles of Constitutional Interpretation and the Four Main Approaches to Constitutional Interpretation in American Legal History*, 29 Valparaiso L. Rev. 121, 213-25 (1994).

§ 12.2: This section is based on R. Randall Kelso, *Styles of Constitutional Interpretation and the Four Main Approaches to Constitutional Interpretation in American Legal History*, 29 Valparaiso L. Rev. 121, 150-84 (1994).


§ 15.3: This section is based on R. Randall Kelso, *Speculative Philosophy and Developmental Psychology: A Primer on the Moral and Legal Relevance of Cognitive, Social, and Moral Developmental Psychology* (1980) (unpublished manuscript on file with author).


§ 17.3.1: This section is based on Charles D. Kelso & R. Randall Kelso, *Standing to Sue: Transformations in Supreme Court Methodology, Doctrine, and Results*, 28 U. Toledo L. Rev. 93, 93-146 (1996).


Additional articles by one or both of the co-authors of this book cited in the E-Treatise are:


The following cited articles are also available at: [http://libguides.stcl.edu/kelsomaterials](http://libguides.stcl.edu/kelsomaterials)


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THE PATH OF CONSTITUTIONAL LAW:
EXECUTIVE SUMMARY OF THE BOOK

by

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This Executive Summary is the text of the Companion Book to the E-Treatise, “The Path of Constitutional Law,” the first comprehensive work on American constitutional law to be published online. The E-Treatise details the usual doctrinal areas of constitutional law with copious supporting scholarship, but extends beyond doctrine to present the unique theme that American constitutional law can be divided into five eras characterized by distinctively different decisionmaking styles used by the decisive Justices (original natural law, formalist, Holmesian, instrumentalist, and modern natural law). Differences in decisionmaking style affect the choice and weight given to the various sources for interpretation: text; context; history; legislative, executive, and social practices; judicial precedents; and prudential considerations. Further, the Justices have had different style related predispositions regarding structural issues such as states’ rights, perceptions on executive versus legislative powers, and preferences on economic versus civil and political rights. The E-Treatise goes on to describe systematic differences in how different interpretation styles reason in terms of deduction versus induction, use of categorical versus balancing tests, doctrine phrased as elements to meet or factors to weigh, doctrine phrased as rules or standards, and whether any particular decision is a question of law rather than a question of fact. The E-Treatise identifies Justices who use the various styles, but goes beyond composition of the Court to describe political and social events that have influenced the Court’s composition and reasoning of the Justices during each era.

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Note on Citations

All citations to the material discussed in this Executive Summary of The Path of Constitutional Law appear in the ET treatise, under the section where that topic is discussed in greater depth.
This Companion Book to The Path of Constitutional Law serves two main purposes. The first is to summarize the main themes detailed in the E-Treatise (ET), The Path of Constitutional Law, and to highlight doctrines the ET sets forth in greater detail. The second is to introduce features of the ET and how it is used. References below to Chapters or Sections refer to the ET. The text of this Companion Book is also included in the ET under the file heading, “Executive Summary,” where all references to the ET are active electronic links to ET Chapters or Sections. A left click on the link will send users to relevant pages in the ET.

THE MAIN THEMES IN “THE PATH OF CONSTITUTIONAL LAW”

INTRODUCTION

The most important theme of the book is that four styles of interpretation have characterized the approach of Supreme Court Justices to the interpretation and application of the Constitution during five eras of constitutional interpretation. The four styles of interpretation are natural law, formalism, Holmesian, and instrumentalism. The five eras are:

| Table 1 |
| Eras of United States Constitutional Interpretation |
| Styles of Interpretation | Years Adopted by Controlling Votes on the Supreme Court |
| Traditional Natural Law | 1789-1873 |
| Formalism | 1873-1937 |
| Holmesian | 1937-1954 |
| Instrumentalism | 1954-1986 |
| Modern Natural Law | 1986-Today |

Part I of the ET treatise (Chapters 1-4) shows how the foundation of the four styles of interpretation are views on the nature of law (analytic or functional) and the role of courts (positivist or normative). Depending on how these two questions are resolved, the four approaches to decisionmaking are: formalism (analytic positivism); Holmesian (functional positivism); instrumentalism (functional normative); and natural law (analytic normative). Part I also discusses the predispositions of these four styles toward the form of legal doctrine adopted (categorical tests versus balancing tests; whatever test adopted phrased as elements to meet or factors to weigh; elements or factors phrased as rules or standards; and rules or standards phrased as questions of fact or questions of law).

Part II of the ET treatise (Chapters 5-8) shows how the four styles of interpretation influence the weight given by the Justices to contemporaneous and subsequent sources of interpretation of the Constitution. Also considered are relationships between the styles and their treatment of precedents, how the styles relate to a Justice’s preference for one or more of the levels of review found in the cases, and how goals or purposes for constitutional interpretation are identified and weighed.
Part III of the ET treatise (Chapters 9-16) contains an analysis in detail of each of the four styles of interpretation: formalism, Holmesian, instrumentalism, and natural law (Chapters 9-12). Part III also sets forth how and why the predominant style has changed during various eras of American legal history. Also presented is how the judicial styles have been related to the political eras in American history and to the development in individuals, and thus ultimately of nations, of styles of moral reasoning (Chapters 13-16).

Part IV of the ET treatise (Chapters 17-32) considers areas of constitutional law dealing with structural areas of judicial review, federalism, separation of powers, and checks and balances (Chapters 17-20), and individual rights protections (Chapters 21-32). Part IV indicates how the doctrines produced in each of the five eras of constitutional interpretation can be seen as outcomes of the decisionmaking style that predominated in the opinions of a majority of the Justices during each era. Part IV also shows how and why changes have occurred in the styles, doctrines, and case results, and what that may portend for the future. While that is a focus of the discussion of every doctrine in the ET, particularly clear and detailed discussion of transformations between each of the five eras of interpretation is presented in the ET for standing (§ 17.3.1); political questions (§ 17.3.4); federal power to regulate commerce (§ 18.2); the Tenth Amendment (§ 18.4); the dormant Commerce Clause (§ 20.3.2); the Article IV, § 2 Privileges and Immunities Clause (§ 20.3.3); the state action requirement of the 14th Amendment (§ 21.1); the Contracts Clause (§ 22.1); the Takings Clause (§ 22.2); the Ninth Amendment (§§ 24.1-24.4); equal protection review of racial classifications (§ 26.2); incorporation of the Bill of Rights into the 14th Amendment Due Process Clause (§ 27.2); First Amendment free speech doctrine (§ 29.1); Establishment Clause doctrine (§ 32.1); and Free Exercise Clause doctrine (§ 32.2).

PART I OF THE ET

CHAPTER 1: THE MATERIAL OF JUDICIAL DECISIONMAKING

Chapter 1 discusses how the new products today in constitutional law embody a combination unique in United States Supreme Court history. This is the gradual transformation from precedents and law designed by Justices who adhered to one style of constitutional interpretation – the instrumentalist, result-oriented, judicially-activist, situation-sense perspective that flourished on the Warren Court during the 1960s, and predominated generally on the Supreme 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 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 of this usage 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.

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 constitutional text 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 “static,” the term “originalism” has 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 so used in this book, as explained in the ET at § 8.4. This approach has also been called a “formalist” approach, and was most popular on the Supreme Court from 1873-1937. The term “formalism” is used in this book, not “textualism,” since each approach to interpretation discussed in this book 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.

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 book, 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 was most popular among a majority of Supreme Court Justices from 1937-54. As noted in the ET at § 3.2, 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 constitutional law how the framers and ratifiers would have gone about interpreting the provision in question. In this book, this approach will be called a natural law approach, 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. Under this approach, which predominated on the 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, as well as to the subsequent events of legislative, executive, and social practice and judicial precedents.

CHAPTER 2: THE FORM OR SHAPE OF JUDICIAL DECISIONMAKING

Chapter 2 notes that there are two main questions that lie behind any act of judicial interpretation. The first concerns the nature of law: analytic versus functional. The second concerns the nature of the judicial task: positivist versus normative. Depending on how these two questions are resolved, there are four approaches to decisionmaking: formalism (analytic positivism); Holmesian (functional positivism); instrumentalism (functional normative); and natural law (analytic 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.

Concerning the nature of the judicial task, any judge must ask before deciding how to resolve a legal dispute whether judicial decisionmaking should be separable from morals or social values, that is, 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. 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, 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 background norms, and regularly do so, covertly as well as overtly. For analytic normative theorists (natural law), these background norms are limited to background moral principles; for functional normative theorists (instrumentalists), these background norms can include moral principles and social policies. The final cause or end of the judicial task for normative theorists is whether the law has a defensible substantive content. Given these considerations, the four styles can be summarized as follows:

<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; Analytic or Conceptualist Attitude; Law as Library Science</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Formalism/ Analytic Posativism</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Natural Law</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Holmesian/ Functional Positivism</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Instrumentalism</td>
<td></td>
</tr>
</tbody>
</table>

Table 2
Styles of Judicial Decisionmaking

Presenting these four decisionmaking styles in the context of this two-dimensional Table based upon the nature of law and the nature of the judicial task can help to clarify the confusion that may result from jurisprudential discussion that attempts analysis along a single, one-dimensional scale.
For example, one kind of confusion results from failing to appreciate the differences among the terms “formalism,” “analytic jurisprudence,” and “positivism.” As Table 2 indicates, there are two basic kinds of “positivist” theories: the analytic positivism of formalism and the functional or pragmatic positivism associated with Holmes. These two kinds of positivism differ, for example, with the emphasis placed upon the logic of existing rules under the analytic formalist approach versus the emphasis placed upon the purpose lying behind existing rules to advance some social policy, which is emphasized under the functional Holmesian approach. Similarly, there are two kinds of “analytic jurisprudential” theories: the analytic positivism of formalism and the analytic normative theories associated with the natural law tradition. Although both adopt analytic approaches to the nature of law, for natural law the idea of morally legitimate power is critical, while for positivism what is critical is the morally neutral concept of socially organized effective power.

This two-dimensional Table can also help clarify the confusion among functional approaches to law. For example, some authors have grouped Holmes, John Chipman Gray, Karl N. Llewellyn, and Felix S. Cohen, among others, as all sharing the same jurisprudential philosophy of pragmatic instrumentalism. Each of these individuals did share a functional or pragmatic approach toward law, and thus rejected the analytic presuppositions of a formalist approach. However, as noted in the ET at §§ 3.2-3.3, Holmes and Gray are best understood as having adopted a positivist approach toward the judicial task, while Llewellyn and Cohen adopted a more normative approach associated with the instrumentalist “Grand Style” of judicial decisionmaking. All these individuals were part of the early 20th century “Realist Movement” in the law, which was a functional assault on the analytic presuppositions of the formalist style of decisionmaking. Nevertheless, despite all being “realists,” there are clear differences between the Holmesian style of interpretation and Llewellyn’s “Grand Style” of interpretation that apply across the fields of common-law, statutory, and constitutional interpretation.

CHAPTER 3: THE FOUR JUDICIAL DECISIONMAKING STYLES

Chapter 3 notes that a short-hand reference for the major differences among the four interpretation styles identified in Chapter 2 is the following: formalist judges emphasize the logical elaboration of existing legal categories; Holmesian judges add to this focus a functional emphasis on the purpose of 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 the analytic balancing of background moral principles embedded in the law; instrumentalist judges add to this normative enterprise an emphasis on functional consideration of background social policies embedded in the law, which become particularly relevant when existing legal categories yield indeterminate or ambiguous results, and thus leeways exist in the law. Chapter 3 of the ET considers these various differences in greater depth.

These differences can be summarized in a more detailed version of Table 2:
CHAPTER 4: THE STRUCTURE OF LAW AS DETERMINED BY JUDGES

Chapter 4 discusses the fact that 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.

Similar relationships exist for the four most important kinds of decisions that determine the form or shape of any legal doctrine. The first decision is whether doctrine should bephrased 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 4 suggests how these decisions tend to be made by the Justices who use various styles of decisionmaking:

Table 3
More Detailed Version of Table 2: Styles of Judicial Decisionmaking

<table>
<thead>
<tr>
<th>Nature of the Judicial Task</th>
<th>Judicial Decisionmaking Style</th>
<th>Emphasis of Judicial Decisionmaking</th>
</tr>
</thead>
<tbody>
<tr>
<td>Positivism: Judges as Neutral Declarers of the Law</td>
<td>Formalism/Analytic Positivism</td>
<td>Logic; Analogy; Symmetry</td>
</tr>
<tr>
<td>Neutral Declarers of the Law</td>
<td>All of the Above Plus</td>
<td>Purpose; History of a Rule; Convenience</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>Formalism/Analytic Positivism</td>
<td>Logic; Analogy; Symmetry</td>
</tr>
<tr>
<td>Law as Library Science</td>
<td>Functional Positivism</td>
<td>History of a Rule; Convenience</td>
</tr>
<tr>
<td>Law as Means to Ends; Functional or Pragmatic Approach; Law as Empirical Science</td>
<td>Functional Positivism</td>
<td>History of a Rule; Convenience</td>
</tr>
<tr>
<td>Normative: Judges as Normative Actors</td>
<td>All of the Above Plus</td>
<td>Background</td>
</tr>
<tr>
<td>Nature of Law</td>
<td>Natural Law</td>
<td>Moral Principles; Customary Norms; Justice</td>
</tr>
<tr>
<td>Law as Logical; Analytic or Conceptualist Attitude</td>
<td>Natural Law</td>
<td>Moral Principles; Customary Norms; Justice</td>
</tr>
<tr>
<td>Law as Library Science</td>
<td>Functional Positivism</td>
<td>Social Policies; Social Welfare; Social Conscience</td>
</tr>
<tr>
<td>Law as Means to Ends; Functional or Pragmatic Approach; Law as Empirical Science</td>
<td>Functional Positivism</td>
<td>Social Policies; Social Welfare; Social Conscience</td>
</tr>
</tbody>
</table>
Table 4
Judicial Predispositions in Legal Reasoning and the Form of Legal Doctrine

<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</td>
</tr>
<tr>
<td>Holmesian</td>
<td></td>
</tr>
<tr>
<td>Natural Law</td>
<td></td>
</tr>
<tr>
<td>Instrumentalism</td>
<td>Inductive</td>
</tr>
</tbody>
</table>

With respect to deduction and induction, there is a tendency for all Justices to reason deductively where the Constitution’s terms are relatively detailed and specific. For terms phrased more generally, like equal protection or due process, judicial elaboration has tended to be more inductive. 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 of Holmes, Benjamin Cardozo, and Llewellyn, and triumphed on the Supreme Court after 1937. In modern times, however, the natural law judge’s great respect for precedent, discussed in depth in the ET at §§ 7.3.3 & 12.2.2.2, and willingness to consider background moral principles embedded in the law, discussed in the ET at § 12.2.2.3, has pushed natural law judges more in the direction of a willingness to accept balancing tests. The precedents and background moral principles embedded in Court doctrine since 1937 during the Holmesian and instrumentalist eras are filled with more balancing tests than the precedents and doctrine considered by natural law judges between 1789-1873. 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 substantive landscape of judicial precedents and background moral principles.

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. Not surprisingly, instrumentalists 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 to weigh 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. As noted in the ET at § 4.2.3, formalist Justice Scalia has led the charge on the Court for rules, while instrumentalist Justice Stevens has been his most consistent, standard-bearing opponent. Reflecting the connections indicated in Table 4 among balancing tests, factor analysis, and standards, on the one hand, and categorical tests, elements, and rules, on the other hand, 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.”

The desire for certainty in existing legal categories typically has meant that formalist and Holmesian judges prefer legal doctrines to be phrased as issues of law for court resolution. Indeed, as noted in the ET at § 4.2.4, 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 noted that a totality of the circumstances or a balancing test makes judges resemble a finder of fact more than a determiner of law. 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 more 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 reasons from their general predisposition with respect to a particular doctrine do not upset the general predisposition of the judicial decisionmaking styles noted here.

**PART II OF THE ET**

**CHAPTER 5: THE MATERIAL SOURCES OF CONSTITUTIONAL INTERPRETATION**

Chapter 5 discusses the sources judges use to interpret the Constitution. These sources of interpretation can be divided into two broad categories: contemporaneous sources and subsequent
sources. Contemporaneous sources are those existing when the Constitution was framed. 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 or policy maxims of construction, 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 practices or specific intent, and general historical evidence (general background societal history), particularly as related to general concepts or principles in which the framers and ratifiers believed.

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 of construction; specific historical evidence, particularly involving specific historical practices or specific intent; 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 in 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. Given that the formalist style of interpretation is the style most comfortable with deductive modes of reasoning, the formalist style is naturally the most comfortable with placing greater reliance on specific interpretive tasks, such as only considering “general” arguments of purpose if the provision’s “specific” literal meaning is ambiguous or absurd. Holmesian judges, with their functional focus on a doctrine’s purposes, are more willing to embrace the general kinds of contemporaneous source reasoning, like arguments of purpose, than are formalist jurists. The main differences between natural law and instrumentalist judges are the natural law great respect for precedent and reasoned elaboration of law, not shared by instrumentalists, versus the instrumentalist greater focus on prudential considerations.

Table 5 summarizes each of these sources of interpretation, divided into the categories of contemporaneous versus subsequent sources, and specific interpretive tasks versus more general kinds of reasoning. Detailed discussion of each of these sources appears in the ET in Chapter 5.
Table 5
Sources of Constitutional Meaning

<table>
<thead>
<tr>
<th>Contemporaneous Sources</th>
<th>More Specific Interpretive Tasks</th>
<th>General Kinds of Reasoning</th>
</tr>
</thead>
<tbody>
<tr>
<td>Text</td>
<td>Literal or Plain Meaning of Text</td>
<td>Purpose or Spirit of Text</td>
</tr>
<tr>
<td>Context</td>
<td>Verbal Maxims</td>
<td>Policy Maxims</td>
</tr>
<tr>
<td>History</td>
<td>Specific Historical Evidence</td>
<td>General Historical Evidence</td>
</tr>
<tr>
<td></td>
<td>Specific Historical Intent</td>
<td>Specific Historical Intent</td>
</tr>
<tr>
<td></td>
<td>General Historical Intent</td>
<td>General Historical Intent</td>
</tr>
</tbody>
</table>

| Subsequent Considerations       | Legislative or Executive Practice                      | Social Practice                             |
| Practice                        | Core Holdings of Precedent                              | Reasoned Elaboration of Law                 |
| Precedent                       | Judicial Restraint Considerations                      | Other Prudential Concerns                   |
| Prudential Considerations       | (1a) Text (e.g., prudential principles of standing, ripeness, mootness) | (2) Practice & Precedent;                   |
|                                 | (1b) Context/Structure (e.g., political questions and Ashwander factors) | (3) Principles of Justice and/or Social Policy Embedded in the Law |
|                                 | (1c) Purpose/History (e.g., sensitivity to the needs of government) | (4) Justice and/or Social Policy Not So Embedded |

CHAPTER 6: THE FORM OR SHAPE OF CONSTITUTIONAL INTERPRETATION

Chapter 6 addresses each of the sources of interpretation – text, context, history, practice, precedent, and prudential considerations – and discusses the various interpretive choices that judges must make in considering use of each source.

TEXT

For all judges and all styles of interpretation, the text of the Constitution is the starting point in determining the intention of the framers and ratifiers of the Constitution. However, there is a debate within constitutional interpretation, as within statutory interpretation, whether text should be given a subjective or an objective interpretation.

The case for subjective interpretation is that it attempts to reflect accurately the actual subjective intent of the drafters of any instrument to be interpreted. That is, after all, what interpretation attempts to do. However, two major criticisms have been leveled against subjective interpretation. First, there is no “single” person whose subjective intent we are endeavoring to discover when interpreting a statute. Applied to constitutional interpretation, the same objection would be that the framers and ratifiers were a large and heterogeneous group, each member of which may have had a different subjective intent. Further, even if one could surmount this problem, there is the additional problem of how to determine the actual subjective intent of even a single drafter or ratifier. Evidentiary problems with determining internal mental intent pose problems for a subjective theory of interpretation. This is particularly true the farther one moves from the
document’s initial drafting, so that the judge does not necessarily share, or have experienced, the background of the drafting.

In contrast to the subjective intent approach to interpretation, the objective approach states that the search is for an “objectified” intent – the intent that a reasonable person would gather from the text of the law, placed next to the general body of legal doctrine. In support of objective interpretation, it has been noted that it is simply incompatible with fair government to have the meaning of a law determined by what the lawmaker meant, rather than by what the lawgiver promulgated. It is the law that governs, not the intent of the lawgiver. As noted in the ET at § 6.2.1.1, for Chief Justice Marshall, and most judges in the founding era, the “intent” of the Constitution was not the subjective “intent” of the minds of the framers, but rather the “intent” gleaned from applying traditional modes of interpretation and canons of construction to the document’s text.

In response, it has been noted that whichever rubric is adopted – “legislative intent” or “objective meaning” – the role of purpose is preeminent, and that in most cases ascribing purposes to groups and institutions can be done without many practical difficulties. Indeed, in most cases, subjective focus on the intent of the framers and ratifiers, or objective focus on the text interpreted from the perspective of a reasonable person, will yield similar results, particularly to the extent the framers and ratifiers were reasonable people and used words in a reasonable way.

In considering constitutional text, as in considering statutory text, a judge must also decide whether to read the text only literally, and thus risk missing the spirit, or purpose, behind why the text was adopted, or whether to interpret the provision in light of both its letter and spirit. Once the spirit or purposes of a constitutional provision are determined, the judge must also decide to what extent those purposes will be allowed to override the literal meaning of the text when conflicts arise. Factors which might be relevant in making this determination include the clarity of the textual language (the more clear the language, the more weight it is given); how much conflict exists between the letter and spirit of the provision (a clear conflict between letter and spirit suggests either that the language’s text was not well-drafted or the judge has misidentified the provision's purposes); and does the literal meaning trample on fundamental rights otherwise protected (suggesting that the literal meaning is not well-drafted, given the commitment to protect the fundamental right).
Regarding context, any interpreter must decide whether to give arguments of context a restrictive or receptive use. The differences among judges relate to relative weight, particularly with respect to maxims of construction. The most widely-used verbal maxims, such as the expression of one thing implies exclusion of others (*expressio unius est exclusio alterius*), and policy maxims, such as ambiguities in criminal statutes should be resolved in favor of the defendant, are discussed in the ET at § 5.2.2.1. While most judges fully embrace contextual review, some judges, notably formalists, may minimize elements of context, particularly certain maxims of construction, on grounds of promoting certain, predictable, mechanical application of literal text.

Regarding the structural issue of judicial review, judges in the analytic tradition – formalist and natural law – typically take the view that courts should be willing to rule that certain governmental action is unconstitutional if the court concludes that the other sources of meaning support that finding. There is no policy of any special deference to legislative or executive action. As Justice Scalia has noted, this is not “strict construction” but “reasonable construction.” On the other hand, there is no view that the courts have a special role to play in protecting certain kinds of constitutional rights that calls for a special interpretive technique when considering those rights.

Under the Holmesian deference-to-government style of interpretation, courts should defer to governmental action, unless the unconstitutionality of the governmental action is "so clear that it is not open to rational question." Under this “strict construction” approach, only if the sources of interpretation clearly indicate that the government's action is unconstitutional – rather than merely on balance leading to that conclusion – should the Court find the action unconstitutional.

At the other extreme from this posture of judicial deference, a judge might conclude that courts have a special role to play in our democratic system by protecting certain kinds of constitutional rights. For example, some judges may believe that courts have special obligations to provide extra protection for the disadvantaged or unempowered in society. Other judges may believe that courts have special obligations regarding protecting individuals' civil rights or civil liberties. This is the approach adopted by most instrumentalist jurists, who perceive flaws in the Holmesian deference-to-government approach when applied to issues of civil rights and civil liberties.

In addition to this predisposition regarding judicial review, judicial approaches toward the structural issues of judicial review, federalism, separation of powers, and general approach toward individual rights tend to be driven by whether the judge is conservative or liberal. As referenced in the ET at § 6.4, with regard to judicial review, conservative individuals 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. On issues of federalism, conservative judges tend to prefer states’ rights, while liberal judges tend to favor exercises of federal power. 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, for both individuals and businesses, while liberal judges tend to focus on the protection of non-economic, civil or political rights.
Table 6
Judicial Predispositions on Structural Issues of Interpretation

<table>
<thead>
<tr>
<th>Styles of Decisionmaking</th>
<th>Political</th>
<th>Federalism</th>
<th>Separation of Powers</th>
<th>Individual Rights</th>
</tr>
</thead>
<tbody>
<tr>
<td>Formalism (static constitution)</td>
<td>Conservative</td>
<td>States’ Rights</td>
<td>Executive Branch</td>
<td>Economic Rights</td>
</tr>
<tr>
<td>Holmesian (deference to gov’t)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Natural Law (reasoned elaboration)</td>
<td></td>
<td>Federal Power</td>
<td>Legislative Branch</td>
<td>Civil/Political Rights</td>
</tr>
<tr>
<td>Instrumentalism (aid unempowered)</td>
<td>Liberal</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

HISTORY

Regarding history, any interpreter must decide which historical sources to use: (1) legislative history of the provision in question, like notes of the Constitutional Convention, records of state ratifying conventions, or House or Senate statements made during consideration of constitutional amendments; (2) thoughtful contemporaneous statements during ratification of the Constitution, like The Federalist Papers; (3) existing legislative and executive practice, and existing judicial precedents, at the time the provision was drafted and ratified, mostly in the United States, but also English practice and precedent, to the extent history suggests that the English experience is relevant to understanding the choices made by the framers and ratifiers; and (4) other typical sources of historical inquiry (evidence of general social practice on a particular issue, newspaper accounts, statements of respected organizations, or other reliable evidence of public opinion generally).

Historical sources (2) and (3) listed above are routinely viewed by judges as appropriate to use. With regard to legislative history, source (1) listed above, most commentators have stated that in the late 18th and early 19th century the prevailing mode of interpretation, in both England and the United States, was that the legislative history of a provision should not be considered in determining its meaning. Thus, notes of the Constitutional Convention, or statements made on the floor of the Congress while considering constitutional amendments, were not proper to consider, while contemporaneous statements about the meaning of the Constitution, like The Federalist Papers, were proper to consider. There is some evidence, however, that traditional common law courts in England and courts in the early post-revolutionary period in the United States did rely, to some extent, on drafting history, as did the First Congress in debating issues of constitutional power. All commentators agree, however, that any limitation on using documents like notes of the Constitutional Convention gradually died out during the 19th century in America. Thus, notes of the Constitutional Convention, or House or Senate statements about amendments, became proper to use as history to determine the framers and ratifiers’ intent during the second half of the 19th century.

Justice Scalia’s appointment to the Supreme Court in 1986 reinvigorated questioning the use of legislative history, in both statutory and constitutional cases. Under Justice Scalia’s literal, textualist, formalist approach focused on objective meaning, the subjective intent of the legislature is not important in interpretation. Thus, legislative history should not be used as an indication of a provision’s meaning. Interpretation should focus instead on the plain meaning of text, augmented by consideration of the text of related provisions, traditional maxims of statutory construction, plus any objective historical evidence of meaning, such as for the Constitution, The Federalist Papers. During the 1980s, Justice Scalia’s “New Textualism” approach gained some support, particularly among Chief Justice Rehnquist and Justices O’Connor and Kennedy, although their support was not consistent. During the 1990s, Justice Thomas also indicated support for the New Textualism model.
of interpretation. During the 1990s, however, support waned on the Court for Justice Scalia's New Textualism model of interpretation. Only Justice Thomas remained a consistently faithful ally. Justices Stevens, Souter, Ginsburg, and Breyer clearly rejected the New Textualism model of interpretation. Although initially sympathetic to Justice Scalia's approach, Chief Justice Rehnquist, and Justices O'Connor and Kennedy, typically rejected it as well. The one limitation on this rejection may be for cases where the statutory or constitutional text is crystal clear, where these Justices were reluctant to let legislative history “cloud” a text that is “clear.”

With regard to source (4) – various kinds of social practice – formalist and most Holmesian judges have rejected its use. As positivists who believe that all law emanates from the sovereign will, formalist and Holmesian jurists have been reluctant ever to permit use of mere social practice as evidence to determine the meaning of constitutional provisions. Despite this view, there is an argument, discussed in the ET at § 10.2.2.1, that a true Holmesian would reject the view that evidence of social practice should never be used. This approach would follow Justice Holmes' view in *Lochner v. New York* that our tradition derives from both "our people and our laws," although not foreign laws. Nevertheless, perhaps because of the Holmesian posture of deference to government, many Holmesian jurists have adopted the limitation of looking only to legislative and executive practices to determine our Nation’s “history and traditions.”

Natural law and instrumentalist jurists, as followers of a normative approach to law, are more willing to consider normative considerations from whatever source, including social practice, particularly in the United States, but also the world community generally. The classic example regarding practice in the United States, as noted in the ET at § 6.3.1, involved James Madison, who while President in 1815-16 relied 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" to support the constitutionality of Congress creating a national bank, although he had opposed the bank’s creation when first proposed in 1791. With regard to social practice in the world community generally, this can be justified for instrumentalist judges as part of prudential consideration of sound social policy, as discussed in the ET at § 11.2.2.1. For natural law judges, this can be justified to the extent the provision being interpreted is viewed as incorporating a natural law principle of universal applicability, whose contours can better be understood by considering social practice from around the world, as discussed in the ET at § 12.2.2.1.

Another issue with respect to history is determining the level of generality within which historical insights should be viewed. For example, a judge engaged in an historical inquiry could remain focused on the specific examples seemingly held by the framers and ratifiers about a particular provision of the Constitution. On the other hand, a judge could focus on the general concept held by the framers and ratifiers about a provision. An intermediate position holds that whether the interpreter should focus on the specific examples held by the framers and ratifiers about a provision, or their general concepts, depends on the provision in question. To the extent a provision is "relatively direct, specific, and focused," this may suggest that the framers and ratifiers intended the provision to reflect only detailed, specific choices. If so, judges should naturally remained focused on those choices. Where history suggests instead that the framers and ratifiers embedded in the Constitution broad concepts, like those dealing with the First Amendment, Equal Protection Clause,
and Due Process Clause, history may suggest that the framers and ratifiers intended to provide no hard-and-fast answers and to let the answers develop over time in common-law fashion.

For example, natural law judges tend to view the Establishment Clause as reflecting an Enlightenment-based general concept of separation of church and state. That general concept would likely counsel a judge to find unconstitutional such practice as officially organized prayer in public schools, despite the fact that such prayer would likely be an example thought constitutional by the framers and ratifiers as determined by specific historical practices and understandings. Given their greater focus on specific historical practices, formalist judges tend to support prayer in schools.

**PRACTICE**

Regarding legislative and executive practice, one approach states that a court should be sensitive to such practice only to the extent it aids understanding of, and is faithful to, the meaning of the constitutional provision at ratification. This approach is adopted by those who believe in the “static” Constitution whose meaning does not change over time, typically formalist judges. From this perspective, the alternative view of a living Constitution is incompatible with the antievolutionary purpose of a constitution. For such judges, events occurring after ratification are relevant only to the extent they illuminate what the Constitution meant at the time of ratification. For example, the views of the First Congress in 1789, filled with persons who played a large role in drafting the Constitution, have been held to have special relevance in determining constitutional meaning.

A second approach toward legislative or executive practice states that later legislative or executive practice under a particular constitutional provision can provide a gloss on meaning. For example, James Madison consistently thought that “*usus,*” the exposition of the Constitution provided by actual governmental practice and judicial precedents, could help settle the meaning and the intention of the authors. Under this approach, the Constitution is a “living” document whose meaning can change pursuant to legislative or executive practice under the Constitution.

**PRECEDENT**

In theory, there are two different approaches to precedent. Under one approach, a court will change its mind, that is, overrule a prior decision, if the court decides that the earlier court "got it wrong." A second approach holds that a sequence of court decisions can provide a gloss on meaning to the Constitution. This can change what the Constitution means in the same fashion as legislative and executive practice can provide a gloss on meaning.

This “gloss on meaning” approach is grounded in the way documents had been interpreted for centuries under the English common law, and was so understood by the framers and ratifiers of the Constitution. Common law had long regarded usage as evidence of the meaning of ancient instruments, and had regarded judicial determinations of that meaning even more highly. Under this approach, which is adopted by natural law judges grounded in traditional common-law ways of adjudication, a sequence of court decisions can provide a gloss on meaning that alters a constitutional provision's interpretation as gleaned from examining the other sources of constitutional meaning. Thus, it would take something more to overrule a prior decision than just a later court deciding that the earlier court "got it wrong." The factors that might be used to provide
this extra impetus to overrule a precedent, discussed in the ET at §§ 7.3.3-7.3.4, include: (1) the prior decision turns out to be unworkable in practice; (2) the decision has been rendered inconsistent or irreconcilable with related doctrines or its conceptual underpinnings have been removed or weakened by later decisions, or later legislative or executive action; (3) a changed understanding of facts has undermined the factual basis of the precedent; (4) the decision is inconsistent with some strongly held principle of justice or social welfare policy; or (5) the decision is inconsistent with the “rule of law.”

For positivist judges, as a theoretical matter, precedents should have no force of law, as the positive law exists independent of the judge. Thus, any prior judicial opinion, if viewed as erroneous by a current judge, should be entitled to no weight. Despite this theoretical model, as a practical matter most positivist judges will give some respect to the core holdings of precedent either as a matter of following “settled law” or following decisions on which there has been “substantial reliance.” Examples in the context of constitutional adjudication of formalist and Holmesian judges following precedents based on “settled law” or “substantial reliance” are discussed in the ET at § 7.3.2.

For instrumentalist judges, the normative nature of the judicial task means that as a theoretical matter the judge should give some “gloss on meaning” respect to judicial precedents because of the normative role of judges in developing legal doctrine. However, as discussed in the ET at § 3.3, as a practical matter, under the instrumentalist “Grand Style” of judicial decisionmaking “precedent' is carefully regarded, but if it does not make sense it is ordinarily re-explored.” This willingness to “re-explore” precedent based on whether the judge concludes the precedent “makes sense” has meant that in practice instrumentalist judges tend to be the least faithful to following existing precedents. Specific examples in the context of constitutional adjudication of this instrumentalist predilection for not following precedents are discussed in the ET at § 7.3.2.

**PRUDENTIAL CONSIDERATIONS**

Issues involving prudential considerations concern the weight to be given to four kinds of prudential arguments: (1) the contemporaneous sources of constitutional text, purpose, context, and history; (2) the subsequent event sources of practice and precedent; (3) the mainstream normative concern with whether the decision would advance a particular background principle of justice or social policy embedded in the law; or (4) the more radical normative concern with whether the decision would advance a principle of justice or social policy that is not so embedded in existing legal doctrine.

Judicial consideration of arguments of justice or social policy that are not embedded in existing legal doctrine, category (4) listed above, involve what is often termed “non-interpretive” review. Such review is non-interpretive because the Court reaches the decision without really interpreting text, context, history, practice, or precedent. As opposed to text, context, history, practice, precedent, or resort to background principles of justice or social policy that the judge believes are embedded in the Constitution, non-interpretive review involves a judgment about the impact of a particular constitutional interpretation in light of value considerations that the judge determines should be part of the Constitution. These non-interpretive sources of value can derive from a supposed community consensus or societal tradition, or values the judge thinks the community eventually will hold, or
the judge's own values. As discussed in the ET at §§ 6.4.1 & 6.4.2, only “radical” instrumentalist or “Platonic Guardian” natural law jurists feel comfortable engaging in non-interpretive review.

With regard to the other three categories of prudential considerations, the formalist style, with its static model of constitutional interpretation, believes that judges should resort only to category (1)’s contemporaneous sources of prudential argumentation. The Holmesian style, with its “deference-to-government” model of interpretation, is willing to add category (2)’s subsequent events of legislative and executive practice. The natural law style is willing to add category (3)’s prudential consideration of background principles of justice. The instrumentalist style is willing also to consider category (3)’s prudential consideration of social policy. Reflecting a positivist theory of decisionmaking, formalist and Holmesian judges reject category (3)’s resort to background principles or policies claimed to be embedded in the law, since they are not clearly part of existing legal doctrine.

CHAPTER 7: EFFICIENT CAUSES OF CONSTITUTIONAL INTERPRETATION

Chapter 7 addresses various issues involved with the Supreme Court’s decisionmaking process. In many cases, the central issue is what level of scrutiny should be used to analyze the constitutionality of the government action before the Court. The most deferential standard of review, used by Chief Justice Marshall in 1819 in *McCulloch v. Maryland*, and today described as minimum rational review, is found most prominently in cases on substantive due process review (§ 27.1.2) or equal protection review (§ 26.4.1) of economic legislation. Under this level of review, a burden is placed on the challenger to show that the challenged government action has no legitimate end, or that the means are not rationally related to that end, or that the means impose an irrational burden on individuals. Substantial deference is given to the government in applying this test. Among other areas, this level is used to review most aspects of congressional power to legislate under Article I, § 8 (§ 18.3).

In addition to this “base” level of minimum rational review, the Court has adopted six higher levels of review. In second-order rational review, no substantial deference is given to the government, and the relationship of means to legitimate ends, considering the benefits and burdens of the government action, must be reasonable and not excessive, in an overall factor-weighing approach. This level of review is used, among other areas, for dormant Commerce Clause review of even-handed state regulations which burden interstate commerce under *Pike v. Bruce Church* (§ 20.3.2); Contract Clause review where the state impairs the value of its own contracts (§ 22.1); Takings Clause review of standard economic regulations (§ 22.2); procedural due process cases under the *Mathews v. Eldridge* test (§ 27.4), and less than undue burdens on unenumerated fundamental rights under a substantive due process analysis (§ 21.2.3).

In a slightly higher level, called third-order rational review, the burden is shifted to the government to justify the constitutionality of its action. This level is used, among other areas, for dormant Commerce Clause review of state action that discriminates against interstate commerce under *Maine v. Taylor* (§ 20.3.2); Takings Clause review of exactions under *Dolan v. Tigard* (§ 22.2); and rights of government workers to speak on matters of public concern under the *Pickering* test (§ 30.2.2).
The next level of review is called intermediate review. Under intermediate review, the government must show that its interests are important or substantial, the means are substantially related to the ends, and the means are not substantially more burdensome than necessary. Among other areas, this level appears in equal protection cases involving discrimination based on gender (§ 26.3.1) or illegitimacy (§ 26.3.2), and for content-neutral regulations of speech in a public forum (§ 29.2). The term “intermediate with bite” is used in this book to describe the next higher standard that is used for reviewing content-based regulations of commercial speech (§ 30.3.2). It is the same as intermediate review, except that the means must be directly related to the governmental end, rather than being merely substantially related.

Finally, the Court has adopted two versions of strict scrutiny. Both require the government to justify its actions in terms of a compelling interest, and the means must be directly related to achieving that interest. For the highest level of strict scrutiny, the law must also be the least restrictive effective alternative. Among other areas, this level is used in cases of race discrimination (§ 26.2.1), content-based regulations of speech in a public forum (§ 29.2), and substantial burdens on unenumerated fundamental rights under a substantive due process analysis (§ 21.2.3). However, in a few cases, such as involving racial redistricting (§ 26.2.1.5), the Court has used a loose form of strict scrutiny, where it is enough if the means are not substantially more burdensome than necessary, rather than having to be the least burdensome effective alternative that the government could have adopted. Chapters 17-32 provide many examples of this “base plus six” model of levels of review:

<table>
<thead>
<tr>
<th>Level of Scrutiny</th>
<th>Gov’t Ends or Interest to be Advanced</th>
<th>Statutory Means to Ends Relationship to Benefits</th>
<th>Relationship to Burdens</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>&quot;Base&quot; Minimum Rational Review</strong></td>
<td>Minimum Rational Review: Burden on challenger to prove unconstitutionality (substantial deference to government)</td>
<td>Legitimate Rational deference to government</td>
<td>Rational (substantial deference to government)</td>
</tr>
<tr>
<td><strong>Heightened Rational Review</strong></td>
<td>Basic Rational or Second-Order Review: Burden on challenger to prove unconstitutionality (no substantial deference to government)</td>
<td>Means Are “Reasonable/Not Excessive” Given Legitimate Ends (no substantial deference to government)</td>
<td>(no substantial deference to government)</td>
</tr>
<tr>
<td><strong>Intermediate Review Standards</strong></td>
<td>Intermediate Review: Important Not Substantially Related More Burdensome Than Necessary</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Table 7
Levels of Review of Government Action: The “Base Plus Six” Model of Levels of Review

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In addition to discussing this “base plus six” model of the levels of review, Chapter 7 builds on Chapter 4’s discussion of judicial predispositions with respect to legal reasoning and the form of legal doctrine. Discussed with specific reference to constitutional law, Chapter 7 addresses the approach to judicial reasoning as predominantly deductive or inductive, discussed at § 7.1; the adoption of legal doctrine as categorical rules or balancing tests, as elements to meet or factors to weigh, as rules or standards, and as questions of law versus questions of fact, discussed at § 7.2; the treatment of precedent in a narrow or broad fashion or as having a gloss on meaning or not, discussed at § 7.3; and aspects of the judicial process, including the nomination and confirmation process for Supreme Court Justices; the process by which cases get decided, including the rules regarding Supreme Court adoption of cases through grants of petitions for certiorari, mechanism of Supreme Court consideration of cases in judicial conference, the process of selecting a Justice to write the Court’s opinion, and the possible writing of concurring and dissenting opinions; and rules of judicial recusal, discussed at § 7.4.

**CHAPTER 8: THE PURPOSES OR ENDS OF CONSTITUTIONAL INTERPRETATION**

Chapter 8 discusses the purposes behind various constitutional provisions. It might be supposed that constitutional decisions would contain evaluations of consequences in terms of the goals stated in the preamble to the Constitution. That preamble 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.”

Opinions of the Justices, however, have not dealt with this language as if it were operative text. Instead, to find intended ends, they have looked to the specific details of constitutional text, context, history, practice, precedent, and prudential considerations. Among the goals discovered there are: government efficiency, advanced by the twin ends of competent decisionmaking and uniformity of results; the prevention of tyranny; certainty and predictability in law; fundamental fairness in each case; the protection, either directly or indirectly, of individual rights or group rights; the protection, either directly or indirectly, of autonomy rights or rights to substantially equal results; civil peace; material prosperity through economic growth; scientific progress; and rational liberty.

Although the Court has not organized its consideration of ends in this way, they can be organized consistent with the preamble to the Constitution. So organized, these ends can be viewed as falling under one of the following four general categories:
Table 8
Purposes of the Constitution Organized According to the Preamble

(1) Allocate government power (“form a more perfect Union, . . . insure domestic Tranquility, provide for the common defence, [and] promote the general Welfare”)

(2) Produce well-formed doctrine that gives principled treatment to constitutional text and precedent (“establish Justice”)

(3) Reconcile government power and individual rights (“secure the Blessings of Liberty to ourselves and our Posterity”)

(4) Conduct search for original intent (“We the People . . . do ordain and establish”).

Decisions whose primary ends involve the structure of government include relations among government and the people, among the federal government and state governments, and among the branches of the federal government. These cases are dealt with in Chapters 17-20, involving judicial review, federalism, separation of powers, and checks and balances. A summary of the ends involved in these cases, particularly balancing the ends of government efficiency versus the prevention of tyranny, is discussed at § 8.1. These ends primarily reflect those aspects of the preamble that focus on forming “a more perfect Union, . . . insure domestic Tranquility, provide for the common defence, [and] promote the general Welfare.”

References in opinions to ends that relate to producing well-formed doctrine, including the Court’s treatment of constitutional text and precedent, are discussed at § 8.2. These ends, which particularly involve balancing the goals of certainty and predictability in law versus the goal of fundamental fairness in each case, relate to the language in the preamble regarding the goal to “establish Justice.” Chapters 21-24 deal with the development of those constitutional doctrines that are principally connected to “establish Justice.”

The Court must also address the problem of how to accommodate the need for adequate governmental power with the need to protect individual rights, particularly in areas of the law like due process, equal protection, the freedom of speech, and the religion clauses. In a broad sense, all of these issues are related to the language in the preamble regarding the need to “secure the Blessings of Liberty to ourselves and our Posterity.” As discussed at § 8.3, these cases particularly involve the protection, either directly or indirectly, of individual rights or autonomy rights, or less often the protection, either directly or indirectly, of group rights or rights to substantially equal results, such as the Sixth Amendment right each individual has to counsel if indigent. Treatment of these issues in the context of the Civil War Amendments, including the right to due process and equal protection of the laws, is discussed in Chapters 25-28. Treatment of these issues in the context of the First Amendment, including freedom of speech and the religion clauses, is discussed in Chapters 29-32.

The final cause of the ends of constitutional law involves the purpose of constitutional interpretation, that is, whether the judge adopts an originalist or non-originalist decisionmaking approach. An originalist approach aims at arriving at interpretations of the Constitution that comport with what the framers and ratifiers intended. A non-originalist approach believes that constitutional decisionmaking should also reflect concepts of justice and social policy that are not necessarily part
of what the framers and ratifiers intended. A typology of non-originalist approaches includes: (1) what is the judge’s own view as to the best interpretation theory in terms of yielding the best consequences for society in terms of principles of justice and/or social policy, a “consequentialist” approach; (2) what theory of interpretation is best reflected in existing doctrine, a “current consensus” or “tradition” approach, sometimes called a “Dworkian” approach; (3) what theory of interpretation is most likely to be reflected in the future, what the “community eventually will hold,” if that can be determined, a “progressive historicist” approach; or (4) a “pluralist” model of interpretation reflecting some “unspecified combination” of original intent, consequentialist, current consensus, and progressive historicist reasoning.

This issue of originalist versus non-originalist interpretation is related to how one should interpret that part of the preamble which states, “We the People of the United States . . . do ordain and establish this Constitution for the United States of America.” As noted at § 8.4.1, from an originalist perspective, four goals of the framing and ratifying generation were critical: civil peace; material prosperity through economic growth; scientific progress; and rational liberty. These ends are reflected in the specific goals stated in the preamble to “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.”

A practical impact of considering all of these arguments of purpose is that it behooves advocates before the Court always to consider the value of identifying what consequences or values may hinge on the decision, and to consider how they relate to the advocate’s formal argumentation on constitutional meaning.

PART III OF THE ET

CHAPTER 9: FORMALIST CONSTITUTIONAL INTERPRETATION

As discussed in Chapter 9, between 1873 and 1937, the predominant approach to constitutional interpretation was formalism. Today, Justices Scalia and Thomas typically make use of that style, and they may be joined by Justice Alito, as discussed in the New Justices Addendum in the ET. Formalists believe that the Constitution has a fixed, static meaning that can be changed only by amendment. Thus, they rely almost exclusively on contemporaneous sources, particularly literal meaning and specific historical intent, although they will follow well-established precedent as “settled law.” They prefer bright-line rules rather than standards, and prefer doctrine to reflect categorical elements rather than a balancing or factor-weighing approach. Table 9.3 in the ET at § 9.3.1 summarizes this approach.

CHAPTER 10: HOLMESSIAN CONSTITUTIONAL INTERPRETATION

As discussed in Chapter 10, from 1937 until 1954, a majority of the Supreme Court Justices adopted the interpretation theories of Justice Oliver Wendell Holmes, Jr. Holmes shared the formalist emphasis on literal meaning and specific historical intent, but was willing to consider purpose or general intent arguments because of his focus on the fact that all law has a purpose. Since Holmes also thought that law should reflect the will of the people, he gave considerable deference to the subsequent sources of legislative, executive, and social practice. Holmes also followed precedents
which were settled law or on which persons had substantially relied. The Constitution thus can be a living document, particularly to the extent its interpretation reflects legislative and executive practice, or judicial precedents. A recent follower of this style was Chief Justice Rehnquist. Chief Justice Roberts appears likely to be a Holmesian, as discussed in the New Justices Addendum in the ET. Table 10.3 in the ET at § 10.3.1 summarizes this approach.

CHAPTER 11: INSTRUMENTALIST CONSTITUTIONAL INTERPRETATION

As discussed in Chapter 11, between 1954 and 1986, the controlling votes on the Supreme Court were typically held by instrumentalists, who viewed the Constitution as a living document that should be interpreted as an instrument to bring about just results. For instrumentalists, all of the sources of constitutional interpretation are relevant in the interpretation process, including consequences considered in terms of policy considerations. Influential instrumentalists on the Court during the 1960s included Chief Justice Warren, and Justices Douglas, Brennan, Fortas, and Marshall. On today’s Court, Justices Stevens, Ginsburg, and Breyer embody a moderate form of instrumentalism in their decisions. Table 11.3 in the ET at § 11.3.1 summarizes this approach.

CHAPTER 12: NATURAL LAW CONSTITUTIONAL INTERPRETATION

As discussed in Chapter 12, from 1789 until 1873, and again in recent key votes since 1986 of Justices Powell, O’Connor, Kennedy, and Souter, the judges followed the 18th-century tradition of reasoned elaboration of the law in light of the law’s purposes and history, with fidelity to precedent and to a considered and consistent legislative, executive, or social practice. Chief Justice John Marshall, and modern natural law Justices, have also considered whether certain consequences of decisions reflect faithful adherence to background principles that are embodied in constitutional text, context, history, practice, or precedent. Table 12.3 in the ET at § 12.3.1 summarizes this approach.

CHAPTER 13: FORMAL CAUSES AND THE FIVE ERAS OF AMERICAN LAW

Chapter 13 discusses the fact that in the more than 200 years since ratification, the Constitution's interpretation and application have been determined by Supreme Court Justices whose members have reflected different combinations of the four interpretation styles discussed in Chapters 9-12. In general, there have been five eras of Supreme Court decisionmaking: (1) the original natural law era of 1789-1873, which corresponds roughly to the Marshall and Taney Courts, with Justice Story as a bridge between the two; (2) the formalist era of 1873-1937, which corresponds to the Court’s treatment of the 1873 Slaughter-House Cases as precedent during the last third of the 19th century and the Lochner v. New York/Hammer v. Dagenhart era of the first third of the 20th century; (3) the Holmesian, New Deal Court era of 1937-54, which involved the rejection of Lochner and Dagenhart against the backdrop of President Roosevelt's “Court-Packing Plan” in 1937; (4) the modern instrumentalist era of 1954-86, which was inaugurated by Brown v. Board of Education and lasted through the Warren and Burger Courts; and (5) the emerging modern natural law era of the Court since 1986. Table 13.4 in the ET at § 13.4 summarizes the interpretation style of all Justices on the Court since 1968; text at § 13.4 summarizes the interpretation style of all Justices on the Court since 1937; the entry “Justices” in the Name Index in the ET refers to the interpretation style for all 110 Justices who have been confirmed as Supreme Court Justices between 1789-2006. The file named “Table of Justices” in the ET indicates when each Justice served on the Supreme Court.
CHAPTER 14: MATERIAL CAUSES OF THE FIVE ERAS OF AMERICAN LAW

Chapter 14 notes that, as its most elementary level, the cause of each of the five eras of American constitutional law were the Presidents who nominated, and the members of the Senate who confirmed, the Justices who sat on the Supreme Court. Identifying the political currents underlying the elections of these Presidents and Senators can help better define the form or shape of these eras of American law. Similar to the four judicial decisionmaking styles, there are four approaches to political issues. At one extreme are traditional conservatives who are conservative on both fiscal and social policy. At the other extreme are modern liberals who are progressive on both fiscal and social policy. Third, there is the traditional liberal approach of the 18th and 19th centuries, which was conservative on fiscal policy, but progressive on social policy. Finally, there is a modern conservative position, progressive on fiscal policy, but conservative on social policy.

During the original natural law era of 1789-1873, the traditional liberal approach of the 18th and 19th centuries predominated as a matter of politics. During the formalist era of 1873-1937, a traditional conservative approach predominated. During the Holmesian era of 1937-54, a modern conservative position was prominent. During the instrumentalist era of 1954-86, a modern liberal approach predominated. The predominant approach of the modern era suggests a modern version of the traditional liberal approach. Details regarding each of the five eras, both in terms of politics and the economic and social issues that defined these eras, are discussed at § 14.2. Fuller discussion of the nature of society and politics in the modern natural law era occurs at § 14.3. A few comments on the possible shape of social, political, and judicial decisionmaking in the future occur at § 14.4.

CHAPTER 15: EFFICIENT CAUSES OF THE FIVE ERAS OF AMERICAN LAW

The basic thesis presented in Chapter 15 is that when a critical mass of social actors in any society attain a particular level of cognitive development, social perspective-taking, and moral reasoning, the legal and political institutions in that society will change to reflect that fact. Part of that change in the United States will be the appointment of Justices to the Supreme Court whose views will more likely reflect the new level of reasoning. These appointments help create and support the progression in American legal history, discussed in Chapters 13 and 14, from the traditional natural law era, through formalism, Holmesian, and instrumentalism, into a period of modern natural law.

The analysis in Chapter 15 begins with Professor Michael Walzer’s views describing five general kinds of societies that have existed in world history: individual nations in international society, multinational empires, consociations, nation states, and immigrant societies. Next, Professor Lawrence Kohlberg’s theory is addressed. Professor Kohlberg’s theory postulates that there is a fixed set of six stages of moral reasoning through which individuals progress from childhood to becoming an adult: self-interest, except to avoid punishment; self-interest, but others have the right to demand the same; follow local customs; follow societal rules and traditions; follow rules of a social contract; follow universal principles of justice based on reason. Each one of Professor Walzer’s societies can be seen to be related to one of Professor Kohlberg’s moral reasoning stages: international society/self-interest, except to avoid punishment; multinational empires/self-interest, but others have a right to the same; consociations/local customs; nation state/societal rules and traditions; immigrant societies/social contract. A sixth kind of society, post-modern society, could
be based on following Kohlberg’s sixth stage of following universal principles of justice based on reason.

These stages of moral reasoning development in turn replicate what happens during the cognitive maturing process of each individual, as described by Professor Jean Piaget, and during the related advances in social perspective-taking ability, as described by Professor Robert Selman. Piaget’s stage of pre-operational thought, which is connected to childish egocentricism and inability to take other’s perspectives, is related to Kohlberg’s stages 1 and 2 of moral reasoning based on self-interest. Piaget’s next level of concrete operational thought is related to Kohlberg’s stages 3 and 4 of moral reasoning based on concrete local customs and concrete societal rules and traditions. Piaget’s highest level of cognitive development is formal operational thought, where individuals can take other individual’s perspectives fully into account and fully apply the hypothetico-deductive reasoning techniques of the scientific method. Applying formal operational thought to the basic question of the justification for moral rules would cause the adoption of the view that moral choice is “personal and subjective” and that whatever values are adopted are merely the product of the dominant forces in society, what Kohlberg defined as a transitional stage 4½ between his moral reasoning stages 4 and 5. Applying formal operational thought to the question of the means by which social ends are advanced would cause a push for fair procedures reflective of other individual’s perspectives in addition to one’s own to implement values that are the product of social contract choice, Kohlberg’s moral reasoning stage 5. Finally, applying formal operational thought to basic ends themselves would cause adoption of Kohlberg’s stage 6 of universal principles of justice based on reason.

When a critical mass of social actors in any society attain a particular level of cognitive, social perspective-taking, and moral reasoning development, then attitudes toward the political and legal institutions of that society should tend to reflect that new stage of moral development. In both American legal and political history in particular, and in the development of societies in world history in general, this is what one tends to see. The relationships among the stages described by Piaget, Selman, and Kohlberg, and legal and political history, are discussed at § 15.4. For American legal history, the relevant connections are Kohlberg’s stage 3 of local customs and traditional natural law based on viewing customs as reflecting reason; Kohlberg’s stage 4 of following society’s rules and traditions and formalist focus on rules, literal text, and specific historical practices in a society reflective of Walzer’s nation state; Kohlberg’s stage 4½ of values the product of the dominant forces in society and Holmesian deference to the dominant forces represented by legislative and executive practice; Kohlberg’s stage 5 social contract and instrumentalist embrace of social policy emerging from participatory democracy respectful of the diversity of Walzer’s immigrant societies; and Kohlberg’s stage 6 of universal principles of moral reasoning based on a modern natural law style of reasoning. Tables 15.1-15.4 in the ET at the end of § 15.4 summarize all of these connections.
CHAPTER 16: FINAL CAUSES AND THE FIVE ERAS OF AMERICAN LAW

As noted in Chapters 13-15, ideas on what is good have differed from one society to another and have changed from time to time within individual societies. The concern in Chapter 16 is what has been, is, and will be considered the good in American society, to the extent that it becomes reflected in constitutional law. Based on the discussion in Chapter 15 suggesting that a modern version of natural law will likely predominate in the future, the central question addressed in Chapter 16 is what universal rational principles of justice based on this modern natural law are likely to emerge for guiding the social, cultural, and legal systems of the United States. The principle that rational thought is non-ego-centric, combined with the assertion that moral thought should be rational, supports as moral the foundational principle of most moral traditions: the principle of love of neighbor as oneself, as reflected in most religious traditions; the similar principle behave according to the logic of the impartial spectator, as phrased by Adam Smith in the 18th century; or the similar principle behave with equal concern and respect for others, as phrased by Professor Ronald Dworkin in the 1970s and 1980s. Moral conclusions directly derivable from this principle are also rational. These include such widely-shared principles such as not taking innocent life, respecting other persons’ bodily integrity and personal property, and not lying to other people for one’s personal gain.

PART IV OF THE ET

Part IV of the ET (Chapters 17-32) considers Supreme Court decisions in the following order: structural issues of judicial review, federalism, separation of powers, and checks and balances (Sub-Part One, Chapters 17-20); general consideration of individual rights (Sub-Part Two, Chapters 21-24); discussion of the Civil War Amendments (Sub-Part Three, Chapters 25-28); and discussion of the First Amendment (Sub-Part Four, Chapters 29-32). Emphasis is placed on the nature and causes of change in the controlling decisionmaking style, and how the changes have influenced the form, substance, and purposes of the governing standards of review and the legal doctrine adopted in decided cases.

SUB-PART ONE: STRUCTURAL ISSUES IN CONSTITUTIONAL LAW

CHAPTER 17: JUDICIAL REVIEW

JURISDICTION

Certain principles of judicial review have not changed much over the past 200 years. It has been accepted since Marbury v. Madison, decided in 1803, that the judiciary has the final word on the meaning of the Constitution and may invalidate governmental action that violates its provisions as interpreted by the Court (§ 17.1). Once it is conceded that the Court can declare what is federal law, the Supremacy Clause makes that declaration the Supreme Law of the Land, and the judges in every state are bound, “any thing in the Constitution or law of any state to the contrary notwithstanding.”

Article III defines the nature of the federal judicial power. Under Article III, § 1, “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.” 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.” This clause 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.” (§ 17.2.1)

The Supreme Court has original jurisdiction over “all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party.” (§ 17.2.2.1.A) In all other cases within the federal judicial power (both federal question cases and those involving states or parties from different states, so-called diversity jurisdiction), the Supreme Court has appellate jurisdiction (§ 17.2.2.1.B), unless its jurisdiction has been limited “with such Exceptions, and under such Regulations as the Congress shall make.” (§ 17.2.3.1) The Court has jurisdiction to review decisions by state courts that raise federal issues, but no jurisdiction over appeals from decisions by state courts based on adequate and independent state grounds. The Court will assume, however, that any federal grounds mentioned by a state court were considered decisive unless the state court makes a clear statement to the contrary. (§ 17.2.2.3)

Most constitutional challenges are brought under 42 U.S.C. § 1983. It provides a cause of action for deprivation by state action of any federal rights. A similar action for denials of constitutional rights by federal officials has been held provided for by 28 U.S.C. § 1331. Exhaustion of administrative remedies is not required in § 1983 actions. For reasons of comity, state judicial proceedings that are underway will not be enjoined by a federal court if the state has a substantial interest in the outcome, as it does in criminal cases, civil cases brought by the state, and issues involving its power to enforce judgments (§ 17.2.4.4). When the constitutionality of an ambiguous state law depends on its meaning, federal courts may withhold action pending a state court action to resolve the state issue (§ 17.2.2.3). New rules of constitutional law are typically applied to all pending cases (§ 17.4.3).

ELEVENTH AMENDMENT IMMUNITY OF STATES

States have some sovereign immunity protection from actions brought to enforce federal law against them. Under the Eleventh Amendment and related state sovereign immunity doctrines, states and state agencies have sovereign immunity from damage lawsuits other than those brought by the United States or other states, unless that sovereign immunity has been waived. However, state officials may be sued for injunctive relief to prevent future violations of federal law. States and state officials can also be sued for damages if Congress has expressed that intent in unmistakably clear language and has appropriately exercised its enforcement power under the Civil War Amendments, discussed in Chapter 28, since those later amendments trump the 11th Amendment. However, Congress cannot subject states or state officials to liability by exercise of its power under the Commerce Clause, as the 11th Amendment protection of state sovereignty trumps provisions in the original Constitution. (§ 17.2.4)
STANDING

Federal jurisdiction is granted by Article III in “cases” and “controversies.” During the natural law and formalist eras, it was thought that a plaintiff could bring a case in federal court any time the plaintiff had a common law cause of action. During the Holmesian deference-to-government era, the plaintiff was required to have an “injury” for there to be a case or controversy. During the instrumentalist era, when the Court was expanding individual rights, the Court held it was sufficient that a dispute was presented in adversary form. However, in the modern era, the Court has again required that the plaintiff must have an injury-in-fact that was caused by the challenged conduct and that is redressable by the court. Congress may define injuries and causation beyond what would otherwise be recognized by the Court as adequate, provided Congress identifies the injury it seeks to vindicate and relates the injury to the class of persons entitled to bring suit. (§ 17.3.1)

In addition to satisfying Article III requirements for standing, the Court has adopted certain prudential principles to guide access to courts. These include: parties may not bring suit to vindicate “generalized grievances”; parties must be within the “zone of interests” of the constitutional or statutory provision to bring suit; a “third-party” rule limiting who may argue the rights of third parties not before the court if practical obstacles prevent those parties from bringing the action on their own; limitations on representational standing for organizations, states, and elected representatives to sue on behalf of members or constituents; and a general category of equitable discretion. (§ 17.3.1.4)

RIPENESS AND MOOTNESS

The Supreme Court does not render advisory opinions. A case is not ripe for resolution unless the alleged injury either has occurred or is certain enough to occur. In deciding on whether a case is ripe for resolution, the Court will weigh the factors of the hardship to the party if the Court decides to wait versus whether waiting will help further “crystallize” the issue for judicial review. (§ 17.3.2)

Federal courts will not decide cases that are moot, that is, cases where there is no longer an active controversy between the parties, unless the issue is capable of repetition and yet may evade review (such as a challenge to election procedures, which often are not decided until after the election); the defendant has voluntarily ceased the conduct, but it may reoccur; in a class action suit, other members of the class have on-going claims, even though the named members of the class no longer have a live controversy; or if collateral consequences exist that are not moot (convicted prisoner challenging conviction even after release from prison to get the record of the conviction expunged). (§ 17.3.3)

POLITICAL QUESTIONS

The Court will not decide “political questions,” which are defined as issues for the other branches of government to resolve, not the courts. In determining whether political questions exist, the Court looks to six factors: does there exist a textually demonstrable constitutional commitment of the issue to a coordinate branch of government; do judicially manageable standards exist to resolve the issue; does the issue call for an initial non-judicial policy decision; is there a special concern with expressing lack of respect for a coordinate branch of government; is there a special need for finality;
and the potential embarrassment from multifarious pronouncements if the court second-guessed how the coordinate branch has acted. Under current doctrine, typical issues which are viewed as political questions involve questions of a “Republican” form of government under the Guarantee Clause; the circumstances regarding valid ratification of constitutional amendments or political gerrymandering; military matters of proper training of troops or valid declarations of war; foreign policy issues regarding matters like termination of treaties; issues of legislative discretion, such as what conduct is a high crime or misdemeanor for purposes of impeachment or procedures to try impeachments; and issues of executive discretion, like placing names on a commodity control list. (§ 17.3.4)

CHAPTER 18: FEDERALISM

GENERAL APPROACH TO ISSUES OF FEDERAL POWER

In *McCulloch v. Maryland*, decided in 1819, Chief Justice John Marshall wrote for a unanimous Court that the Constitution has given Congress great powers and ample means for their execution, a result underscored by the Necessary and Proper Clause of Article I, § 8, cl. 18. That clause grants Congress the power “To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers [of Article I, § 8, cls. 1-17], and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.” The actions of Congress are valid, said Marshall, if the end is legitimate (within the scope of the Constitution), the means appropriate (plainly adapted to that end), and the means are not prohibited but consistent with the letter and spirit of the Constitution. (§ 18.1)

THE COMMERCE CLAUSE

The power of Congress in Article I, § 8, cl. 3 to regulate “Commerce with foreign Nations, among the several States, and with the Indian Tribes” has expanded and contracted in various eras. During the natural law era, Chief Justice Marshall wrote for a unanimous Court that the power to regulate commerce is a plenary power to enact laws for the purpose of regulating all forms of commercial activity except 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.” States could also regulate for internal purposes in an area over which Congress has power, if Congress had taken no action preempting state power to regulate. (§ 18.2.1)

During the formalist era, the term “commerce” was limited to buying and selling – the core literal dictionary definition of commerce – and transporting goods to be bought and sold. Activities such as manufacturing, mining, and agriculture were viewed as separate from commerce, as involving producing goods, or mining raw materials, or growing crops, which would later be bought and sold in commerce. This view left regulation of such activities completely up to the states. (§ 18.2.2)

In response to the Great Depression, and federal New Deal regulation in response, the Court shifted its Commerce Clause jurisprudence in 1937 to abandon formalist limitations on what is “commerce.” During the Holmesian era, any activity in the “stream of commerce,” including manufacturing, mining, and agriculture, could be regulated by Congress as long as the activity had a “substantial affect” on interstate commerce, and thus was truly commerce “among the states.” In applying that
test, the Court looked in Wickard v. Filburn to aggregate effects of the regulation on all parties whom the statute regulated. Given the wide applicability of most federal statutes, that aggregation principle has meant that almost every congressional statute passed can satisfy the Wickard test. (§ 18.2.3)

During the instrumentalist era, the Court dropped the requirement that the activity be in the “stream of commerce,” in favor of asking only whether the activity had a “substantial affect” on interstate commerce, or sometimes merely a “significant affect” or “any affect.” The Court’s cases, however, all involved activity with an “economic nexus” to commerce, such as civil rights laws banning discrimination in selling hotel rooms or restaurant food, or criminal laws dealing with extortionate credit transactions, so the activities were in the “stream of commerce” anyway. (§ 18.2.4)

During the modern natural law era, the Court has rejected the reasoning of the instrumentalist era, and returned to the view that for Congress to regulate under the Commerce Clause the activity must be in the “stream of commerce” or have some “economic nexus” to commerce. Thus, a federal statute that declared illegal the possession of a gun around a school was held invalid as a pure criminal law unrelated to any economic activity. Similarly, the Court held invalid a federal civil rights action for victims of gender-motivated violence. Although gender-motivated violence has a “substantial affect” on interstate commerce under a Wickard aggregation analysis – since many victims of violence will miss days at work in recuperation – the violent activity regulated is not economic in any respect. Thus, the regulation was not one regulating “commerce,” and thus could not be justified as an exercise of Commerce Clause power. Under this approach, pure criminal laws, such as federal hate crimes laws, or laws making it an independent crime to do violence to a fetus under the Unborn Victims of Violence Act of 2004, are of questionable constitutionality. (§ 18.2.5)

OTHER ENUMERATED POWERS IN ARTICLE I, § 8

Actions of Congress under the other enumerated powers in Article I, § 8 are given deference consistent with the Court’s approach in McCulloch v. Maryland. Under Article I, § 8, cls.1-2, Congress has broad power to “lay and collect Taxes,” to provide for the “general Welfare of the United States,” and to “borrow Money on the credit of the United States.” The Court has interpreted these powers broadly, granting Congress the power to use the taxing power to create incentives for behavior, and to spend for any purpose that Congress considers to be within the general welfare, including placing conditions on spending to create incentives for behavior, unless the incentives are not rationally related to the spending or are coercive, which is almost never found. Under Article I, § 8, cls. 4-17, the federal government has broad powers to deal with fiscal matters, including coining money and passing laws on bankruptcy; regulate immigration and naturalization; establish post offices; provide for copyright and trademark protection; regulate admiralty and maritime matters, including punishing piracies and offenses against the law of nations; declare war; raise and support armies and navies, and make rules for their regulation, as well as provide for organizing, arming, and disciplining state Militias; and deal with federal land and property thereon. (§ 18.3)
UNENUMERATED POWER OVER FOREIGN AFFAIRS

All domestic powers of Congress and the President must come from express or implied delegations in the Constitution. However, the Court wrote in 1936 in United States v. Curtiss-Wright Export Co. that a congressional delegation of power to impose an embargo on certain foreign commerce was governed by a different principle because matters of external sovereignty vested in the United States government as a necessary concomitant of nationality. Also as a matter of foreign affairs, Congress can implement a treaty with legislation that it might not be able to enact without the treaty, at least where it deals with an important national problem and does not violate a specific prohibition in the Constitution. State policy cannot interfere with the foreign relations power of the United States, whether exercised by Congress or by the President in an executive agreement with another country. (§ 18.3.9)

TENTH AMENDMENT LIMITS ON FEDERAL POWER

The Tenth 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.” Consistent with this text, the 10th Amendment was originally understood to mean that states are free to legislate in areas not covered by specific prohibitions in the Constitution, or preempted by federal laws under the Supremacy Clause, but the 10th Amendment did not create any state immunity from federal action or create any areas of exclusively state power (§ 18.4.1). During the formalist era, the Court shifted its focus to the powers of the states, reflecting a conservative predisposition for states’ rights. However, the Court protected states’ rights through limiting federal power directly, such as the formalist limited reading of “commerce” to exclude federal power to regulate manufacturing, mining, and agriculture, rather than by employing a 10th Amendment analysis (§ 18.4.2). During the Holmesian era, based on the liberal predisposition of the New Dealer era Justices in favor of federal power, the Court returned to the view that the 10th Amendment merely states a truism that power is retained by the states that has not been delegated to the federal government (§ 18.4.3).

That approach continued until National League of Cities v. Usery in 1976. In that case, four more conservative Justices (Chief Justice Burger, and Justices Rehnquist, Stewart, and Powell) stated that Congress could not displace a state’s power to structure its “integral” operations in areas of “traditional” government functions. They were joined by moderate instrumentalist Justice Blackmun, who added the requirement in his concurrence, unless “state facility compliance with imposed federal standards would be essential.” Four more liberal Justices dissented (Justices Brennan, White, Marshall, and Stevens). In 1985, in Garcia v. San Antonio Metropolitan Transit Authority, Justice Blackmun abandoned his concurrence in National League and joined with liberal instrumentalists Justices Brennan, Marshall, and Stevens, and liberal Holmesian Justice White, to overrule National League. Justice Blackmun said that it was unworkable for the Court to seek limits on Congress’ power in terms of governmental functions, whether ”traditional” or ”integral.” Such distinctions invite judges to decide on what state policies they favor or dislike. Blackmun noted that any 10th Amendment limits on Congress' delegated power are in the 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, and the National
League of Cities, not the courts. Four more conservative Justices dissented in *Garcia* (Chief Justice Burger, and Justices Rehnquist, Powell, and O'Connor). (§ 18.4.4)

During the modern natural law era, state governments have been given 10th Amendment protection by the courts against federal efforts to “commandeer” their legislative or executive functions in pursuit of federal policies. In order to preserve a balance in federal/state relations, what is called the “Dual Theory of Sovereignty,” immunities have been recognized with respect to how the two levels of government relate to each other. Under the Dual Theory, each sovereign entity – federal and state – gets to decide how to regulate people under its jurisdiction. Thus, in *New York v. United States*, the federal government could not “commandeer” state legislatures by coercing them to pass state laws regulating their state citizens in accord with a federal standard. In *Printz v. United States*, the federal government could not require local sheriffs to enforce a federal regulatory program, as that would be telling state executive or administrative officials how to regulate their own state citizens. On the other hand, consistent with *Garcia*, the federal government can regulate state officials directly under valid federal programs – such as telling state workers at a Department of Motor Vehicles not to sell driver’s license information to mass marketers in *Reno v. Condon* – as long as the federal government enforces that regulation itself. In addition, based on specific historical practice and constitutional text, which provides in Article VI, § 2 that “the Judges in every State shall be bound thereby,” state courts are required to comply with federal law in cases before them. (§ 18.4.5)

**ADDITIONAL LIMITATIONS ON FEDERAL AND STATE POWER**

Article I, § 9 of the Constitution contains eight clauses providing for specific textual limitations on federal power (§ 18.5). The meaning of these clauses tends to be clear, and they have been litigated rarely. They can be read directly in original constitutional text (see Annotated Constitution).

A range of limitations on state power also appear in the Constitution. These appear principally at Article I, § 10 (§ 18.6.1) and the Article IV provisions dealing with Admittance of New States, State Power over Property, and the Guarantee Clause (§ 18.6.2). These clauses have also not provided the source for many cases, and can be read in original constitutional text (see Annotated Constitution, Art. I, § 10 & Art. IV).

**CHAPTER 19: 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. As Justice Story noted in his 1833 treatise, *Commentaries on the Constitution of the United States*, the true meaning is that no department should possess an “overruling influence” in the administration of their respective powers. 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. Similarly, the doctrine bars
Congress from delegating to executive or judicial officers the legislative power to make rules without also creating “intelligible principles” by which the power is to be used.

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. As 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.”

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 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. The Constitution contemplates that legislative, executive, and judicial practice will integrate the dispersed powers into a workable government.

Separation of powers doctrine reflects the four different styles of interpretation. Formalists, such as Justices Scalia and Thomas, prefer bright-line rules that mark off boundaries between the branches, and they have dissented from using balancing tests to achieve convenient results. In their view, there should be a 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.”

At the other extreme Holmesians, such as Chief Justice Rehnquist and Justice White, prefer to defer to arrangements agreed upon by the other branches of government. In between are the modern natural law Justices, such as Justices O’Connor, Kennedy, and Souter, who hold the sharing of power, checks-and-balances view of Madison and Story. Instrumentalists, such as Justices Stevens, Ginsburg, and Breyer, have also asked whether the general policies of separation of powers doctrine would be advanced or retarded in practice by the challenged law. (§ 19.1)

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 policy-making power from the legislative branch. To prevent this, the Court has required Congress to provide the delegated agent with congressionally developed standards or policies to guide application of the delegated power. This helps ensure that the ultimate policy choice is made by the legislature. During the formalist era, this doctrine was applied in a relatively strict manner, with the Court requiring relatively detailed congressional standards or policies. Since 1937, the Court has applied the doctrine regarding delegation of legislative power consistent with the non-formalist view that sharing of powers suggests the Court should find that an “intelligible principle” was given by Congress to guide delegations, rather than to apply the doctrine in a strict manner. Under this approach, delegations as general as regulate “in the public interest” are routinely upheld. (§ 19.2)
Regarding aspects of Presidential power, the foundational case of the modern era is *Youngstown Sheet & Tube Co. v. Sawyer*, decided in 1952. In *Youngstown Sheet*, the Court ruled that the President cannot make policy by seizing steel mills to avert a nationwide strike during wartime. Adopting a formalist strict separation of powers approach, Justice Black said that the President cannot make national policy at all. Justice Black said that the President’s powers are limited to the textually enumerated powers, such as faithfully executing the laws and serving as Commander in Chief. Although acknowledging that the “theater of war” may be “an expanding concept,” Justice Black stated that the Commander-in-Chief power cannot be used to give the President power to take possession of private property to keep “labor disputes from stopping production. This is a job for the Nation’s lawmakers, not for its military authorities.” Further, the requirement that the President “faithfully execute” the laws “refutes the idea that he is to be a lawmaker. . . . The Founders of this Nation entrusted the lawmaking power to the Congress alone in both good times and bad.”

Based upon legislative and executive practice, and Court precedents, no other Justice agreed in *Youngstown Sheet* that the President's power was that limited. Focusing on arguments addressed to legislative and executive practice, Holmesian Justice Frankfurter noted in his concurrence, “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.”

Holmesian Justice Jackson's analysis in the case also suggested that Presidential power is dependent upon a functional analysis based upon prior legislative and executive action. Justice Jackson’s three-part analysis in *Youngstown Sheet* was that the President’s power is at its maximum when used in accord with Congress, at a minimum if contrary to the express or implied will of Congress, and subject to a zone of twilight, to be judged by circumstances, when there is no congressional grant or denial of authority. Cases have also discussed presidential power 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 with presidential decisionmaking.

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 in 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, the following Table 9 summarizes these factors that the Court considers under the post-1937 non-formalist approach to presidential powers, in addition to Justice Black’s formalist focus on literal text, and Justice Frankfurter’s focus on “glosses” on executive power. Where the case involves a category nearer the top of Table 9, the President’s authority to act will be greater than when the case involves a case near the bottom of the Table:
Table 9  
Basic Factors Used to Predict Results in Determining Constitutionality of Exercises of Executive Power  
Based Upon Justice Jackson’s Non-Formalist Approach

<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</td>
<td>2. Subsequent Congressional Ratification</td>
</tr>
<tr>
<td>3. Mixed Foreign/Domestic</td>
<td>3. Action Taken Pursuant to Congressional Silence</td>
</tr>
<tr>
<td>4. Primarily Domestic</td>
<td>4. Subsequent Congressional Disapproval of Action</td>
</tr>
<tr>
<td>5. Pure Domestic (e.g., Impounding Funds Passed Pursuant to Cong. Enactment)</td>
<td>5. Action Taken Pursuant to Implied or Express Congressional Disapproval</td>
</tr>
</tbody>
</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 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 of 1947, as Justice Burton noted in his concurrence.

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. Chief Justice Vinson’s opinion reflects the general predisposition of more 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. 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.’”

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*, “Today a kindly President uses the seizure power to effect a wage increase [based on the Wage Stabilization Board’s 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.” (§ 19.3.1)

In cases involving both legislative and executive decisionmaking, 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, that text will prevail. This has been the result in cases like INS v. Chadha, which required Congress to comply with the literal text of the Bicameralism and Presentment Clauses for congressional acts to have legal effect (both houses of Congress must pass legislation and the President must sign the bill, or have his veto overridden by a 2/3 vote in both houses of Congress) (§ 19.4.2.1); Clinton v. City of New York, where the President’s veto power, as provided in clear constitutional text, was limited to vetoing entire bills, not a line-item veto, which Congress had tried to grant him (§ 19.4.2.2); and Public Citizen v. United States Department of Justice, where limitations on the President’s power to nominate certain federal officials would be inconsistent with clear text in the Appointment Clause placing no limitations on presidential nomination power (§ 19.4.3.1). In other cases, where the text is clear but supports the constitutionality of the action, the Court has gone beyond text to consider legislative and executive practice and general checks and balances reasoning to determine if there are any constitutional problems with the government action.

That checks and balances reasoning is based upon the twin separation of powers concerns of efficiency of government action versus the prevention of tyranny and no impermissible aggrandizement of power. This was done with respect to judges appointing independent counsels in Morrison v. Olson (§ 19.4.3.1), judges serving on the United States Sentencing Commission in United States v. Mistretta (§ 19.4.3.1), a ruling that Congress has no ability to remove executive officials except by impeachment in Bowsher v. Synar (§ 19.4.3.2), and a ruling that Congress can limit the President’s ability to remove executive officials for “good cause” as long as that would not “impede” presidential authority in Morrison v. Olson (§ 19.4.3.2). On this last doctrine, the general rule is that Congress can limit the President’s power to remove heads of Independent Agencies, such as the Federal Communications Commission, Food and Drug Administration, or Securities and Exchange Commission, but that members of the President’s Cabinet and other core policy-making officials must be able to be fired at-will. Under this general separation of powers approach, unilateral action by the President without express or implied congressional consent outside the core “Commander-in-Chief” power or the power to “take Care that the Laws be faithfully executed” raise serious separation of powers concerns, whether in Youngstown Sheet (§ 19.3.1), international matters (§ 19.3.2), war and national defense (§ 19.3.3), or domestic policymaking (§ 19.3.4).

CHAPTER 20: CHECKS AND BALANCES

RULES REGARDING GOVERNMENT STRUCTURE AND AMENDMENT

Checks and balances operate in part to improve the effectiveness and quality of governmental decisionmaking. This can be done by providing the option of a broader perspective, such as the presidential power to veto legislation, which itself is subject to a 2/3 override by both Houses of Congress, or by requiring broadly-based consideration, such as the President can be impeached, but the House brings impeachment and trial is by the Senate. The second main function of checks and balances is to guard against abuse of power and tyranny. For example, the President is Commander in Chief, but Congress controls the purse and can make rules for the armed forces.
Prior to September 11, 2001, little attention was paid to ensuring the continuity of government in times of war or terrorist attack, other than ensuring a line of Presidential succession in case the President dies of natural causes or is assassinated, becomes incapacitated, resigns, or is removed through the impeachment process. Following 9-11, greater attention has been focused on the fact that ensuring there is an ongoing federal government means ensuring three ongoing branches – legislative, executive, and judicial – each “with a different nature and structure and each with different constitutional, statutory, and administrative rules governing that structure and the continuity of its operations.” Separation of powers means there can be no continuity of the Federal Government “unless there is continuity of all three branches, in particular both political branches to enact new legislation.” (§ 20.1.1.1) Continuity problems were also present as an historical matter at the time the newly-ratified Constitution replaced the Articles of Confederation as the nation’s governing document in 1789. In Owings v. Speed, the Supreme Court held that the Constitution became effective only on March 4, 1789, the date Congress was to convene, not June 21, 1988, the date the ninth state ratified the Constitution (§ 20.1.1.2).

Some checks and balances can be found in the express text of the Constitution, as when it divides federal power into three branches – legislative, executive, and judicial – and then further subdivides legislative power so that both the House and Senate must approve legislation under the Bicameralism Clause. Similar checks and balances are provided for in the process of amending the Constitution, 2/3 vote in both houses of Congress and ratification by 3/4 of the states, or 3/4 of the states call for a Constitutional Convention (§ 20.1.1.3); the process of election of the President through the Electoral College (§ 20.1.2.1); the process of election to, and rules regarding running of, the two houses of Congress (§ 20.1.2.2); and the process of congressional impeachment (majority of the House of Representatives to impeach and 2/3 of the Senate to convict) (§ 20.1.3).

CONGRESSIONAL IMMUNITIES

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 protection from arrest only applies to civil arrest, not criminal offenses. The Court has stated that the terms “Treason, Felony, and Breach of the Peace” excepts from the operation of the privilege all criminal offenses. Regarding the Speech or Debate Clause, the Court has ruled that the privilege applies to all legislative activities, whether on the floor of Congress or in committee meetings, and it applies to the staff of the Representative or Senator, since without staff much legislative work would not get done. This departure from the literal text of the Clause is based on reading the clause in light of its purpose to support checks and balances theory and permit the legislative process to function without the threat of executive-inspired and judicially-supported investigations. (§ 20.1.4.1)
EXECUTIVE IMMUNITIES

Although no text in the Constitution refers to executive immunities, in *Nixon v. Fitzgerald* the Court granted the President absolute immunity from damage actions filed against the President for performance of the President’s official duties. This was based on the conclusion that anything less might subject the President to lawsuits for practically everything done, thus undermining efficient operations of the executive branch. Regarding the concern with tyranny, the Court noted that there remains enough protection against Presidential misconduct because of impeachment, other checks and balances, the power of the press, a desire to earn re-election, the need to maintain prestige, and a President's traditional concern for historical stature. In *Clinton v. Jones*, the Court indicated that the President does not have such an immunity from civil actions based on behavior that occurred before being elected, or non-official conduct in office, such as sexual harassment, and trial in such cases need not be delayed until after the President leaves office, although the trial court should seek to accommodate the President’s needs. Although the issue has never been ripe for resolution, the predominant view is that the President cannot be indicted for a criminal offense while in office, but that any statute of limitations would be tolled until the President left office. 

Regarding requiring the President to be a witness in criminal or civil cases, the Court applies a balancing test 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 applying that balancing test, the Court has drawn distinctions 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 has drawn distinctions 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 *United States v. Nixon*, the Court held that the President's generalized interest in confidentiality must yield to a demonstrated, specific need for evidence in a criminal trial. Whether the result would have been the same had the balance of needs been different seems questionable. Thus, had the President been able to argue that he had a specific need for confidentiality in the case, or had the case involved a generalized need for confidentiality balanced against a generalized need for information at trial, the result in *Nixon* 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. (§ 20.1.4.2.A)

Other federal officials and state officials have a form of qualified immunity. They may be sued as individuals for deprivations of federally-protected rights. However, they have qualified immunity and are liable only if reasonable persons, acting in the circumstances, would have known that they were violating clearly established constitutional or statutory law. (§ 20.1.4.2.B)

JUDICIAL IMMUNITIES

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 for accepting bribes, or actions taken in the complete absence of all jurisdiction. An additional kind of protection exists for federal judges appointed pursuant to 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.” (§ 20.1.4.3)

SOVEREIGN IMMUNITY FOR THE UNITED STATES GOVERNMENT

Waivers of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text. They may not be implied or inferred. Thus, because any waiver must appear clearly in the statutory text, legislative history cannot be used to clarify an ambiguity. Many federal statutes waive the United States’ immunity from suit. Among these are the Tucker Act of 1887, which authorizes suits seeking damages against the United States based on the Constitution, statutes, regulations, or contracts; the Federal Tort Claims Act of 1946, which waives the United States' sovereign immunity from certain tort claims arising from the conduct of federal employees; the Quiet Title Act of 1972, which waives the government's immunity from civil actions to adjudicate title disputes involving real property in which the United States claims an interest; and the Administrative Procedure Act, which in 1976 was amended to provide a cause of action and a waiver of sovereign immunity in suits against federal agencies seeking relief other than money damages. (§ 20.1.4.4)

DOCTRINE OF INTERGOVERNMENTAL IMMUNITIES

Under the Dual Theory of Sovereignty (§ 18.4.5), the genius of our founding generation was to split sovereignty in the United States system into two parts: states and federal government. The founding generation established dual systems of government – states and federal government – each deriving its authority independently from the consent of the people. Reflecting that theory, states may not directly tax the federal government or any of its instrumentalities. However, states can tax subjects that fall 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. (§ 20.2.1) Similarly, Congress can tax state activities that earn revenue if it also lays a tax on similar private activities. (§ 20.2.2)

Federal instrumentalities are immune from state control in the performance of their duties. For example, a state cannot 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. For Congress to authorize state regulation of federal activities there must be a clear and unambiguous declaration by Congress. Similarly, states do not possess the power to alter the exclusive qualifications set forth in constitutional text. Thus, state laws fixing term limits for members of Congress, whether done directly or by ballot-access procedures, are unconstitutional. (§ 20.2.3)

States naturally have immunity from federal regulation in areas where the federal government does not have power to act, such as modern limitations on federal power to act under the Commerce Clause (§ 18.2.5), limitations on federal power because of the 21st Amendment, which repealed Prohibition (§ 20.4), or limitations on federal power to act in Article I, § 9 (see Annotated Constitution). Even where the federal government does have power to act, the 10th Amendment provides some state immunity from federal regulations which “commandeer” state legislative, executive, or administrative systems (§ 18.4.5). (§ 20.2.4)
PREEMPTION OF STATE LAW BY FEDERAL LAW

The doctrine of preemption is based on the Supremacy Clause of Article VI, § 2, which expressly declares, “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.” Thus, whether a state law has been trumped at the federal level by congressional action depends upon whether Congress intended its law to preempt the state law. In early days the Congress was relatively inactive and few preemption cases arose. Thus, there were only a few cases in which preemption was considered outside of situations where the state law was in direct conflict with a valid federal law. During the formalist era, Congress became more active in regulating the economy. Consistent with a formalist approach, the formalist-era 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, congressional action would preempt all state laws in the area, even though there may have been no federal rule on the specific particular matter in question.

After 1937, the Holmesian Court rejected this bright-line categorical approach, and instead adopted a more functional weighing of factors that respected both state and federal concerns. In 1947, the Holmesian Court held 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.

From 1954-86, the instrumentalist-era Court 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. 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. As noted in 1978 in *Ray v. Atlantic Richfield Co.*, state 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. However, even if Congress has not foreclosed state legislation in an area, state law is void if it conflicts with federal law. A conflict exists when compliance with both sets of regulations is impossible or the state law stands as an obstacle to accomplishing the purposes of Congress.

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 tests, however, the Justices do not always agree on: (1) when Congress has expressed an intent to preempt; or (2) whether the Court should find that the state law sufficiently obstructs federal law to be impliedly preempted. 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. (§ 20.3.1)

DORMANT COMMERCE CLAUSE REVIEW OF STATE LAW

With respect to the Commerce Clause and its relation to state power, Chief Justice Marshall held in 1829 in *Willson v. Black Bird Creek Marsh Co.* that a state could erect a dam in navigable waters subject to congressional power if Congress had done nothing and, thus, left the Commerce Clause dormant. The formalist-era Court developed a theory that the states had power to regulate intrastate commerce and commerce that only indirectly related to interstate commerce. Under this doctrine, states were able to enact economic regulations indirectly affecting interstate commerce, but states could not directly burden interstate commerce even if Congress had not acted. Despite this attempt to create a bright-line rule, questions of degree were sometimes involved in drawing the line between "directly" or "indirectly" affecting interstate commerce.

That doctrine became discredited during the Holm esian era. Instead, reflecting the Holmesian functional emphasis on purpose and effects, the Holmesian-era Court focused on the supposed purpose of the dormant commerce clause doctrine to protect nationwide free trade from state protectionism. Building on this approach, the instrumentalist-era Court responded to nuances presented by later factual cases. The Court 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 clearly placed the burden on the state to establish the validity of the enactment 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 balancing test is the same in all sets of cases, with only the burden shifting. In practice, the instrumentalist Court stated that there is “a virtual *per se* rule of invalidity” for state legislation facially discriminating against interstate commerce or involving a discriminatory purpose or effect. As the “virtual *per se*” language suggests, it can prove very difficult for the state to meet its burden in cases of discriminatory legislation.

Because dormant commerce clause review, like preemption, is based on implied congressional intent – in this case, implied intent to promote free trade – 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. In addition, the Court has created an additional exception to dormant commerce clause review under the “market
participant” exception. Beginning in 1976, in *Hughes v. Alexandria Scrap Corp.*, 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 is 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. Despite this reasoning, the Court has 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. (§ 20.3.2)

**ARTICLE IV, § 2 PRIVILEGES AND IMMUNITIES CLAUSE**

Another check-and-balance relating to state power is the Article IV, § 2 Privileges and Immunities Clause. It provides, “The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.” Although this language seems comprehensive, it has never been interpreted in that way. In 1823, Justice Washington wrote in *Corfield v. Coryell* that the Privileges and Immunities Clause 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 by the Court in 1871 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. 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, states are not required to refrain from all discrimination between local citizens and citizens of other states, and thus are permitted to have resident and non-resident fees for hunting and fishing licenses, or resident and non-resident tuition to public universities.

The Holmesian Court refined the definition of what was fundamental for this purpose and introduced a balancing test which, as expressed today, bans discrimination against non-resident individuals in matters that are “sufficiently basic to the livelihood of the nation,” unless the state can justify the discrimination by showing that the law is closely related to advancing a substantial government interest and that non-residents are a cause of the problem. As cases like *Supreme Court of New Hampshire v. Piper* make clear, the “substantial interest/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 necessary. In *Piper*, the Court struck down a requirement that an attorney must live in New Hampshire to practice law in New Hampshire. (§ 20.3.3)
FEDERAL COMMON LAW

Federal common law falls into 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. With regard to uniquely federal interests, federal common law exists with respect to the rights and obligations of the United States, such as federal government contracts, federal property transactions, or obligations under commercial paper issued by the federal government; interstate and international disputes implicating the conflicting rights of states or federal government relations with foreign nations; and admiralty and maritime cases. Those areas where the Court had held Congress has given the federal courts power to develop substantive law include antitrust issues concerning what constitutes an unreasonable restraint of trade; aspects of labor law dealing with collective bargaining; congressional statutes that incorporate generic state common law in statutory definitions, such as the term “domicile” under the Indian Child Welfare Act of 1978 or the term “burglary” under the Career Criminals Amendment Act of 1986; and certain "inherent powers" that cannot be dispensed with because they are necessary to the exercise of all others, such as managing litigation, imposing sanctions, and supervising the administration of criminal justice.

In addition, during the original natural law era, Chief Justice Marshall noted in *Gibbons v. Ogden* that the right to engage in commerce “derives its source from those laws whose authority is acknowledged by civilized men throughout the world.” This principle was adopted by the Supreme Court most famously in the 1842 case of *Swift v. Tyson*, where the Court held that a "federal general common law" existed to govern diversity cases involving state contract and state commercial law issues. The *Swift* doctrine of a “federal general common law” of contracts was continued during the formalist era based on the literal holdings of cases following *Swift v. Tyson*. It also was supported by the pro-business, conservative policy of the federal courts during this era, as the *Swift* approach permitted the federal courts to ensure contract and commercial law decisions under diversity jurisdiction reflected appropriate pro-business policies elaborated by the federal judiciary.

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* that there is "no federal general common law." The Court noted in *Erie* that the common law of contracts and commercial law 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 contract and state commercial law, state law should be applied in such state cases that are in federal court pursuant to diversity jurisdiction. As for which state law would apply when the parties reside in different states, and thus diversity jurisdiction applies, 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, and based more exclusively on physical site of performance, 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. (§ 20.3.4)
TWENTY-FIRST AMENDMENT PROTECTION OF STATE LAW

There is one area of law where state regulations may preempt federal law. That area is created by the 21st Amendment, which provides that 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.” This provision seems absolute, and the Holmesian Court indicated that states were thereby released from the negative implications of the dormant commerce clause. However, decisions in the instrumentalist era, which have now been continued as precedents, have read together the 21st Amendment and the Commerce Clause, and have balanced the free trade policy implicit in the dormant commerce clause with the central purpose of the 21st Amendment, which provides for state control over alcohol delivery and use as part of the bargain to repeal the 18th Amendment that imposed Prohibition. Thus, state laws designed to protect a local liquor industry have been struck down under a dormant commerce clause analysis as violating free trade and advancing state protectionism, and state laws not substantially contributing to temperance have been preempted by federal law with which they were in conflict. (§ 20.4)

SUB-PART TWO: INDIVIDUAL RIGHTS DOCTRINES GENERALLY

CHAPTER 21: INDIVIDUAL RIGHTS PROTECTION UNDER THE CONSTITUTION

STATE ACTION

Most constitutional protections regarding individual rights apply to government action, with the exception of the 13th Amendment, which protects against both governmental and private acts of slavery or involuntary servitude. This is indicated by the literal text of most 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* 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.

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. Similarly, the passing of a state law or state constitutional amendment, whether by legislative action or referendum, is routinely viewed as state action. 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. The Court noted in *Brentwood Academy v. Tennessee Secondary School Athletic Association*, “[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 considerations, which can be organized around three basic factors:
(1) The extent to which the individual is burdened by “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;

(2) The extent to which the individual and the government are “entwined,” 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; and

(3) The extent to which the individual is performing an activity considered by the Court to be a “public function,” that is, a function associated with government, like providing police or fire protection, or conducting primary elections for public offices, or running a jail.

As might be expected, a formalist approach to state action looks for examples which clearly, that is, literally, involve “overt official involvement”; or shared control because the private organization is clearly “created, coerced, or encouraged by the government,” or is in a “symbiotic relationship with the government”; or the organization is performing a clear “public function.” Among Holmesian judges, there tends to be a difference between a conservative and a liberal Holmesian judge. The conservative Holmesian position tends to reflect traditional Holmesian deference to government, and thus be less likely to find state action, as was true for Chief Justice Rehnquist. The liberal Holmesian position tends to support enforceable remedies if clear constitutional violations exist, as was true for Justice White. Because of a policy desire to provide greater constitutional protection for individual rights, liberal instrumentalist Justices tend to bring many more private actions within the concept of state action. Natural law Justices tend to reject the extremes of the limited state action doctrine of formalist and conservative Holmesian Justices, and the expansive state action doctrine of liberal instrumentalist Justices.

Given the natural law Justices have the controlling votes on the Court today, and natural law Justices have great respect for precedent, the Court has continued to following the received precedents of earlier state action cases and has continued to judge state action according to the three basic factors of overt official involvement, entwinement, and public function. (§ 21.1)

STRUCTURE OF INDIVIDUAL RIGHTS LAW

Once state action is established, the Court must determine whether the protected rights are absolute, and thus a categorical approach should be used, or whether the Court should balance the protected right against government interests to determine which prevails in the case. Balancing calls for a cost-benefit analysis in terms of the ends of government action, the benefits achieved by the means, and the burdens imposed on individuals by those means (§ 21.2.1). This means/ends consideration can be phrased as separate elements to meet or as part of a weighing of factors. Similarly, categorical approaches can be phrased as elements to meet or a weighing of factors (§ 21.2.2).
Another issue involved in many cases involving individual rights is determining what kind of burden on a protected right triggers what standard of review. For example, the Court has applied strict scrutiny to substantial burdens on the fundamental right to marry or to travel. However, in cases involving less than substantial burdens on these fundamental rights, the Court has applied some version of rational review, typically second-order rational review, as in restrictions on a prisoner’s right to marry in *Turner v. Safley* (held unreasonable) or state imposition of a one-year residency requirement before individuals could obtain a divorce in *Sosna v. Iowa* (held reasonable) (§ 21.2.3).

Under the Court’s current approach, the various balancing tests regarding individuals rights under the Equal Protection Clause, Due Process Clause, First Amendment, Contracts Clause, Takings Clause, and other doctrines involving individual rights typically are phrased as involving different tests. When combined together, the number of tests number more than 40. An approach more focused on analytic rigor, however, would note that there are really just 7 different kinds of balancing tests used in all of these doctrines: the base level of minimum rational review, plus six heightened levels of scrutiny – the “base plus six” model of levels of review discussed in Chapter 7. A Court committed more to the analytic side of reasoned elaboration of the law would note that a danger of increased confusion and unpredictability exists if proliferation of levels continues past these 7 levels of review. This could happen if: (1) the Court adopts additional kinds of inquiries different than the basic inquiries used under rational review, intermediate scrutiny, and strict scrutiny; (2) additional mixings and matchings occur for different kinds of scrutiny for the governmental interests, relationship to benefits, and burden inquiries; or (3) the "base plus six" standards are not clearly acknowledged. Increased confusion and unpredictability can also result if (4) juries are given too much leeway in the application of these tests in individual cases. (§ 21.2.4)

**CHAPTER 22: ECONOMIC RIGHTS: THE CONTRACTS AND THE TAKINGS CLAUSES**

**THE CONTRACTS CLAUSE**

The Contracts Clause provides that no state may pass any “Law impairing the Obligation of Contracts.” During the natural law era, the Court laid the foundation for the clause to become a significant restraint upon state action by holding in 1810 in *Fletcher v. Peck* that the clause not only covers state interference with private contracts, but also various contractual dealings with the states themselves. In applying the doctrine, courts distinguished between direct impairments of contract rights, where any impairment, no matter how small, triggered Contracts Clause problems, and state statutes focused on remedies for breach of contract, where only substantial impairments of rights would trigger an objection. During the first part of the formalist era, from 1873 to 1900, the Contracts Clause continued as a significant limit on state power. Between 1900 and 1937, however, the clause was less frequently applied for two main reasons: (1) the states more carefully defined and protected the extent of their regulatory powers, and (2) the Court began to rely primarily on substantive due process as a restraint of state action affecting contract or property interests under the doctrine associated with *Lochner v. New York*, discussed at § 27.3.2.1. During the Holmesian era, from 1937-1954, *Lochner* review of economic legislation under equal protection or substantive due process theories was replaced with minimum rational review, with the result that those clauses became only slight restraints on state power. Similarly, review under the Contracts Clause took on the deference-to-government aspects of minimum rational review. This situation continued during most of the instrumentalist era, from 1954-1986. Near the end of that era, however, when several
particularly severe retroactive adjustments of contract rights were enacted by states without emergency justification, the Contracts Clause was brought back to life to a limited extent. By the end of the instrumentalist era, the Court had developed a formulaic methodology for Contracts Clause analysis, which in some cases constitutes a level of review more exacting than minimum rational review. The doctrine is still in place today.

The steps in this Contracts Clause analysis follow modern 3-part means/end reasoning (ends, benefits achieved, burdens imposed), with a substantial burden requirement before the Clause is triggered. The relevant questions are:

1. Has a state law, in fact, operated as a substantial impairment of a contractual relationship (preliminary substantial burden requirement).
2. If so, the state must have a legitimate public purpose (the end requirement).
3. If that is shown, the next inquiry is whether the adjustment of rights and responsibilities of contracting parties is of a character appropriate to the public purpose justifying the legislation's adoption (the means requirement). This test mirrors minimum rational review under the Equal Protection and Due Process Clauses, including a focus on both the benefits achieved by the statute and the statute's burdens. In contrast, if the subject-matter of the state law raises special concerns, such as when the state is impairing the contract obligations of the state's own contracts in a manner that favors the state, or if the legislation is not one of general application, but only touches a more narrowly defined group of individuals in society, less deference is given to the state's action and the Court will apply a second-order kind of rational review analysis. As is true of both minimum and second-order rational review, the challenger has the burden to establish that the law is unconstitutional. (§ 22.1)

THE TAKINGS CLAUSE

The Takings Clause provides that "private property" shall not be "taken for public use, without just compensation." The Court looks primarily to state law to determine what is property. Property is taken if the government acquires physical possession or regulates its use "too far." The concept of "public use" is quite broad as it includes public purposes even if they are not entirely served on public property. Just 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. (§ 22.2)

During the natural law era, the Court enforced the Takings Clause when the case involved physical invasions of property. This was clear from Justice Chase's statement in 1798 in Calder v. Bull that it would be unconstitutional to "take property from A and give it to B." The Court would also find a taking where a regulatory act had direct physical consequences (§ 22.2.1). Most opinions from the formalist era similarly allowed just compensation only if state action resulted literally in a physical taking and not merely a diminution in the value of the land based on regulation (§ 22.2.2). For a Holmesian, the focus of Takings Clause doctrine should be on the functional consequences of regulation, rather than whether literally there was a physical taking. In 1922, Justice Holmes was able to express those views when writing for the Court in Pennsylvania Coal Co. v. Mahon, saying that when a regulation goes "too far" in terms of diminishing property values there must be compensation (§ 22.2.3). In 1978, in Penn Central Transportation Co. v. City of New York, the Court indicated that the decision on whether a regulation goes "too far" should be based on
considering the economic impact on the property as a whole in light of three factors: the economic impact of a regulation, its interference with reasonable investment backed expectations, and the character of the government action. This factor-balancing test, focused on the overall “reasonableness” of the government’s action, is best understood as a species of second-order rational review. (§ 22.2.4)

The modern natural law Court has given owners two additional protections. First, in *Lucas v. South Carolina Coastal Council*, the Court held as a *per se* rule that there is a taking for complete deprivations of property value, as a complete deprivation is the equivalent of a physical occupation. Second, in *Dolan v. Tigard*, the Court held that if the government makes an adjudicative decision to condition the approval of a building permit relating to an individual parcel on the owner giving up some property rights, such a condition is a taking unless the city shows that there is a nexus between a legitimate state interest and the permit condition and, also, that the degree of the exaction demanded by the city bears a “rough proportionality” to the projected impact of the proposed development. By placing the burden on the government to show their action is not a taking, this test is best understood as a species of third-order rational review (§ 22.2.5).

Thus, under current law, there is a taking of private property if the government, by its actions:

1. acquires physical possession of all or part of an owner's property, or denies all economically viable use of property, as in *Lucas*;
2. regulates the use of property where it creates a substantial deprivation of property rights, and is so unduly harsh so the owner is forced to bear burdens which, in fairness, should be born by all, under the *Penn Central* test; or
3. requests a dedication of some property from a specific individual in return for consent to develop the rest of the property, as opposed to a generally applicable government statute or zoning ordinance, and the government cannot show a "rough proportionality" between the harm caused to the public by the individual’s proposed development and the burden on the individual of the government-imposed dedication, as in *Dolan*.

The Takings Clause is not triggered, however, if the state’s use restriction is based on nuisance law, limitations placed on land ownership when titled was acquired, or special circumstances, such as the property being destroyed in time of war. In such cases, no just compensation is required.

Five consequences of a taking are: (1) compensation is due, even if the taking is temporary; (2) value is determined at the time the taking occurs; (3) value is measured by the owner's loss, not the taker's gain; (4) fair market value is the normal measure of recovery – what a willing buyer would pay in cash to a willing seller at the time of the taking; and (5) if a temporary taking has occurred, the government must provide just compensation for the period when the taking was effective.

A taking has been found in circumstances where: (1) the government acquired possession of property permanently or temporarily; (2) the government activity made private use of the property impracticable or impossible; (3) the government barred a use, creating a commercial impracticability; (4) government regulation did not sufficiently advance a legitimate interest; or (5) the government imposed retroactive liability on a limited class of parties that could not have anticipated the liability, and liability was substantially disproportionate to the parties' experience.
A taking was not found in which a public purpose was sufficiently furthered or economically viable uses remained where: (1) part of the property was destroyed as a nuisance; (2) particular uses were prohibited; (3) use was regulated to achieve a public benefit; (4) price or rent control was imposed; or (5) entitlement payments were terminated.

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. (§ 22.2.6)

CHAPTER 23: NON-ECONOMIC INDIVIDUAL RIGHTS

Chapter 23 describes and follows the path of constitutional law regarding protections given individual non-economic rights, other than those protected by the Civil War Amendments (discussed Chapters 25-28) and the First Amendment (discussed Chapters 29-32). These rights fall into two broad categories: non-economic civil rights and non-economic criminal defendants’ rights.

NON-ECONOMIC CIVIL RIGHTS

Other than the First Amendment and the Civil War Amendments, the Constitution provides non-economic civil rights protections to four main rights: the Second Amendment, the Third Amendment, the Seventh Amendment, and the Full Faith and Credit Clause, Article IV, § 1. None of these provisions have spawned much litigation.

SECOND AMENDMENT

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.” Three possible ways have been identified to interpret the Second Amendment. The first way is that the Second Amendment merely recognizes the right of a state to arm its militia. This has been called a “collective rights” interpretation of the Amendment. A second way is that the Second Amendment recognizes an individual right to bear arms, but only for members of the militia, and then only if the federal and state governments fail to provide the firearms necessary for such military service. This has been referred to as the “sophisticated collective rights” model. The third way recognizes the right of individuals to keep and bear arms regardless of whether they are actually a member of a militia. This is called the “individual rights” model. Even under this approach, the right to keep arms is subject to reasonable regulation (the possession of guns may be denied to minors, incompetent persons, felons, or an individual under a restraining order granted to a wife against her husband in the context of a divorce). As of October, 2006, under any of these models, no statute ultimately has ever been struck down as unconstitutional under the Second Amendment. (§ 23.1.1)

THIRD AMENDMENT

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 had the occasion to interpret or apply this Amendment. (§ 23.1.2)
SEVENTH AMENDMENT

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. However, 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.

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. 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. Jury trials, for example, have not been made available in the Court of Claims. . . . In tort actions against the United States, Congress has similarly provided that trials shall be to the court without a jury.” (§ 21.1.3)

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 1948, Congress amended its 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 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 explained in *Franchise Tax Board of California v. Hyatt* that “[o]ur precedent differentiates the credit owed to laws (legislative measures and common law) and to judgments.” The full faith and credit command “is exacting” with respect to a final judgment rendered by a court, but is “less demanding” with respect to choice of laws. The Court noted 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." For example, since a marriage license is not a judgment rendered by a court, but adopted pursuant to state laws, the “exacting” standard would not apply on whether one state had to give full faith and credit to marriages adopted in other states under different eligibility criteria.

With respect to the issue of whether one state would have to give full faith and credit to same-sex marriages in another state, the issue is complicated by the provision in the federal Defense of Marriage Act of 1996, codified as 28 U.S.C. § 1738C, dealing with the obligation to recognize same-sex marriages. It provides: “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.” Given Congress’ ability under the text of the Full Faith and Credit Clause to prescribe the “Effect” of proceedings in another state, this would make it more difficult to justify requiring one state to have to give same-sex marriages in another state preclusive effect. (§ 23.1.4)

NON-ECONOMIC CRIMINAL DEFENDANTS’ RIGHTS

The Bill of Rights provisions involving criminal defendants’ rights are the Fourth Amendment, the Fifth Amendment, the Sixth Amendment, and the Eighth Amendment. Criminal rights provisions in the original Constitution include the Bill of Attainder Clause, Ex Post Facto Clause, Habeas Corpus Clause, and the Extradition Clause.

FOURTH AMENDMENT

The Fourth Amendment provides, “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” The first issue under the Fourth Amendment is whether a “search” or “seizure” has in fact occurred. The burden is on the challenger to establish that in fact a search or seizure, which could include an arrest, has taken place to trigger the Amendment. Once the defendant meets the burden of establishing that a search, seizure, or arrest has occurred, the burden shifts to the government to establish the “reasonableness” of the action, both as to the initial stop, and whether later actions were “reasonably related” to the circumstances that justified the stop. In determining whether any particular search, seizure, or arrest is “reasonable,” the Court uses a “third-order” rational review balancing test. The Court weighs the government’s interest and needs in law enforcement against individual privacy rights and the availability to the government of less burdensome means of operation.

For most searches, a warrant and probable cause to search are required, and that warrant must describe with particularity the place to be searched and the person or things to be seized. However, consistent with a natural law focus on purpose and practicality, the Court has permitted exceptions to the warrant and probable cause requirements when “special needs, beyond the normal need for law enforcement” make those requirements impracticable. The Court has used the special needs exception to uphold sobriety traffic checkpoints, certain kinds of drug testing programs at schools, drug testing programs in employment, or for administrative inspections for a variety of administrative reasons, provided those searches are appropriately limited. Like most constitutional rights, the Fourth Amendment protection against search and seizures can be waived by the individual, as long as that waiver is “voluntary.” For searches in violation of the Fourth Amendment, the Court applies an exclusionary rule to deny the fruits of that search in most later criminal proceedings. The Court has indicated, however, that exclusionary rule only applies for “bad faith” violations of the Fourth Amendment. The Court held in United States v. Leon that the exclusionary rule would not apply where officers in “good faith” rely on a search warrant issued by a detached and neutral magistrate, even if that warrant is ultimately found to be unsupported by
probable cause. The Court indicated that the test for “good faith” is one of “objective reasonableness,” based on what a “reasonably well-trained officer would have known.” (§ 23.2.1.1)

FIFTH AMENDMENT

Regarding criminal matters, the Fifth Amendment provides for four separate protections: grand jury indictment for “infamous” crimes, the double jeopardy protection from being tried twice for the same crime, the privilege against self-incrimination, and the right to due process of law. The Supreme Court noted in Schneckloth v. Bustamonte, “Almost without exception, the requirement of a knowing and intelligent waiver has been applied . . . to those rights which the Constitution guarantees to a criminal defendant in order to preserve a fair trial.” This higher standard of a “knowing and intelligent” waiver usually requires the government to advise the person of the right, rather than the “lack of any advice” being merely a factor in the decision regarding “voluntariness,” as is true for waivers of Fourth Amendment rights.

The Fifth Amendment requires a legally constituted and unbiased grand jury for a valid federal felony indictment. A federal district court is authorized to summon "legally qualified" citizens for grand jury service. Once impaneled, the grand jury serves until discharged by the court, generally for a term no longer than 18 months. The grand jury determines whether there is probable cause to believe that a crime has been committed, and is intended to protect citizens against unfounded prosecutions. To preserve secrecy, only jurors, witnesses, and the prosecuting attorney are permitted in the grand jury room. About half the states, through their respective state constitutions or by state statutes, also guarantee the right to grand jury indictment in most state criminal cases. However, in other states, state prosecutors have the flexibility to charge individuals through means other than grand jury indictment, such as filing an “information” with the court and then submitting the case to an “arraignment” hearing conducted by a judge or magistrate.

The Fifth Amendment also provides that no person shall “be subject for the same offense to be twice put in jeopardy of life or limb.” Under a long line of Court precedents, the Double Jeopardy Clause protects against re-prosecution after acquittal, re-prosecution after conviction (which might be attempted to get conviction of a greater offense or imposition of a longer sentence), or multiple punishments for the same crime. Although the text of the Clause mentions only harms to "life or limb," it is well settled that the Double Jeopardy Clause covers imprisonment and monetary penalties. This is based on a purpose of the Clause to protect individuals from unfair prosecutions.

The Fifth Amendment also provides that no person “shall be compelled in any criminal case to be a witness against himself.” Two main consequences flow from this: (1) except in limited circumstances, such as to impeach the testimony of an accused who testifies at trial, no “testimonial” evidence of an accused can be used by the government at trial without the accused’s consent; and (2) the accused failure to testify cannot be used against the accused to raise an inference of guilt. As an aspect of trial procedure, a “knowing and intelligent” waiver is required to waive the privilege against self-incrimination under Miranda v. Arizona. As stated in Miranda, “Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed.” This Miranda right applies to any “custodial interrogation.” The Court stated in Miranda that by “custodial interrogation, we mean questioning initiated by law
enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.”

The Supreme Court has also held that the Due Process Clause of the Fifth Amendment provides for a number of protections in criminal cases that are not specifically enumerated in the Constitution, as are the protections regarding grand jury indictment, double jeopardy, and the privilege against self-incrimination. For example, the Court held in *In re Winship* that the Due Process Clause protects the accused against conviction except on proof beyond a reasonable doubt. The Court has created some liberty interests for prisoners while they are incarcerated in jail. In *Sandin v. Conner*, the Court asked whether some prison management decision imposed an “atypical and significant hardship” on the inmate. The Court has also stated that government actions which “shock the conscience” can give rise to a deprivation of a life, liberty, or property interest. The classic case of this kind occurred in *Rochin v. California*, in which the Court held that the forced pumping of a suspect’s stomach to obtain evidence “shocked the conscience.” In the modern natural law era, the Court has been reluctant to expand the list of criminal defendants’ due process rights. For example, in *Medina v. California*, the Court held that a state could require a defendant to carry the burden of proving his incompetence by a preponderance of the evidence. More recently, the Court held in *Dixon v. United States* that the government could require the defendant to prove duress to excuse criminal liability for knowing or willful violations of federal firearms laws. (§ 23.2.1.2)

**SIXTH AMENDMENT**

The Sixth Amendment provides for three basic protections: a right to a speedy and public trial by an impartial jury; a right to confront witnesses; and a right to compulsory process for obtaining witnesses, and to assistance of counsel.

Regarding the right to speedy trial, the Court has held that the right attaches at the time of arrest or formal charge, whichever comes first. The remedy for violation of this right is to dismiss the indictment or vacate the sentence. Regarding the right to a public trial, the Court has held that normally all procedures in criminal cases must be done in open court, unless compelling reasons, sufficient to satisfy strict scrutiny, justifying closing the proceedings. Regarding the right to an impartial jury, a defendant must show to establish a violation that: (1) the group alleged to be excluded is a distinctive group in the community; (2) the representation of this group is not fair and reasonable; and (3) the underrepresentation was due to a systematic exclusion of the group in the selection process. In 2000, in *Apprendi v. New Jersey*, a combination of formalist Justices (Justices Scalia and Thomas) and centrist to liberal Justices (Justices Stevens, Souter, and Ginsburg) held that any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond reasonable doubt – other than the fact of a prior conviction, which would already have been based on a prior jury decision based on a “beyond a reasonable doubt” standard. This conclusion was based on a literal reading of the Sixth Amendment right to a “jury” trial, and the Fifth Amendment requirement of proof in criminal cases of guilt “beyond a reasonable doubt.”

The Sixth Amendment provides for the right “to be confronted with witnesses against him.” The major issue raised by cases dealing with the right to confront witnesses is whether certain departures from face-to-face confrontation of witnesses in court can be permitted. Historically, as a matter of
legislative and executive practice, and a reasoned elaboration of court precedents, the Court permitted departures from a strict, literal requirement of confrontation. This occurred in cases such as *Maryland v. Craig*, which involved a child witness in a child abuse case testifying against the defendant at trial, outside the defendant's physical presence, by a one-way closed circuit television, and in *Ohio v. Roberts*, which conditioned the admissibility of hearsay evidence on whether it falls under a "firmly rooted hearsay exception" or bears "particularized guarantees of trustworthiness." Similar to *Apprendi*, in 2004, in *Crawford v. Washington*, a combination of formalist and instrumentalist Justices formed a majority to overrule *Roberts* and adopt a strict requirement that "testimonial" statements of witnesses absent from trial can be admitted "only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." The *Crawford* decision has raised questions about its impact in cases where emotional trauma, physical safety concerns, or other factors historically have suggested some flexibility in terms of face-to-face confrontation in court. Such cases include testimony of children in child abuse cases, cases involving battered spouses, cases involving physical safety of witnesses or compromising natural security secrets, such as in terrorist prosecutions, or cases where ensuring the physical presence of witnesses would be costly, such as for foreign witness testimony. There is also a concern with the impact of the *Crawford* rule regarding dying declarations.

Regarding the appropriate remedy for a violation of the Confrontation Clause, the Court typically applies a “harmless error” analysis, which holds that “an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt.” While some constitutional errors in the criminal justice system are “structural,” in that they are so fundamental that they require reversal without regard to the facts or circumstances of the particular case, such as denying a defendant the assistance of counsel at trial, or the absence of an impartial judge, most errors in the criminal justice system are subject to “harmless error” analysis. (§ 23.2.1.3)

**EIGHTH AMENDMENT**

The Eighth Amendment provides, “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”

The Excessive Fines Clause has provoked few cases. In *United States v. Bajakajian*, a 5-4 Court held that forfeiture of the entire $357,144 that respondent failed to declare under a federal law requiring the individual to report that he was transporting more than $10,000 in currency was excessive as grossly disproportional to the gravity of his offense. In other cases, courts routinely approve large fines and forfeitures with little extended discussion. The prohibition of Excessive Bail has provoked even fewer cases. Bail becomes excessive when a court sets it higher than is reasonably necessary either to ensure a defendant's appearance at trial or to promote other compelling governmental interests, such as denying bail to persons “charged with serious felonies who are found after an adversary hearing to pose a threat to the safety of individuals or to the community which no condition of release can dispel.” Only in rare cases has imposition of bail been deemed excessive.

In determining the content of “cruel and unusual punishment,” formalist Justices have argued for a static interpretation fixed at the time of ratification. Natural law and instrumentalist jurists, as
followers of a normative approach to law, are more willing to consider normative considerations from whatever source, including social practice, to determine what is “cruel and unusual” punishment. In 2002, in *Atkins v. Virginia*, a 6-3 Court majority, composed of natural law and instrumentalist Justices, discussed social practice, in addition to evidence of legislative and executive practice, raising concerns about the constitutionality of the death penalty for mentally retarded criminals. A similar pattern of voting occurred in 2005 in *Roper v. Simmons*, a case where the Court ruled that the execution of persons under 18 was cruel and unusual punishment. As in *Atkins*, the majority looked to an evolving standard of decency. The Court noted that among the 50 states, 12 bar executions altogether and 18 bar executions of all persons under 18 years of age. Thus, only 20 states permit executions of juveniles in some circumstances, and even in those states “imposition of the juvenile death penalty has become truly unusual over the last decade.” Further, since 1989, no state had changed their law to impose the death penalty on juveniles, and 5 states had banned it either by legislation or state constitutional law. The Court also noted that no other country on earth permits the death penalty to be imposed on juveniles. Even before *Roper*, the Court had ruled in *Thompson v. Oklahoma* that it was unconstitutional for persons under 16 to be executed.

The greater respect for precedent in the natural law approach than in the formalist approach is reflected in the Court’s doctrine regarding the principle of proportionality in Eighth Amendment law. In *Harmelin v. Michigan*, without regard to whether a natural law approach would apply a principle of proportionality to help determine what is “cruel and unusual punishment,” as it likely would, Justices O’Connor, Kennedy, and Souter concluded that in any event principles of *stare decisis* counseled the Court to follow its precedents and apply a proportionality principle under the Eighth Amendment. In contrast, Justice Scalia’s emphasis on literal text and specific historical intent led him to conclude that the framers and ratifiers rejected any proportionality requirement under the Eighth Amendment, and thus later Supreme Court cases adopting that requirement, like *Solem v. Helm*, should be overruled, since those precedents are not “settled law.” (§ 23.2.1.4)

**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. The first element focuses on determining whether the end of the governmental action is “legislative”; the second element focuses on whether the benefit to be achieved by the government regulation is directed against an “identifiable individual”; the third element focuses on whether the burden of the government action involves “punishment” within the constitutional proscription against Bills of Attainder.

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 branded 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. (§ 23.2.2.1)

PROHIBITION ON 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, “I will state what laws I consider ex post facto laws, within the words and the intent of the prohibition. 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.”

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 not to be given a literal reading, but to be read in light of its purpose, the maxim of construction that technical words are to be interpreted in light of their textual meaning, and use of the phrase in existing state constitutions at the time the Constitution was drafted and ratified. (§ 23.2.2.2)

RIGHT TO 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.” Since included in Article I, this suggests that Congress can suspend the writ, not the President, unless an emergency situation exists where Congress cannot meet and act in time. While President Lincoln did suspend the writ of habeas corpus at the beginning of the Civil War, a district court held that suspension unlawful in *Ex parte Merryman*, reasoning that suspension is for Congress, not the President.

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.” Where the issue involves purpose versus literalism, Justices O’Connor, Kennedy, and Souter usually can be found on one side of the case, and Justices Scalia and Thomas on the other side. For example, in *Stewart v. Martinez-Villareal*, the majority held that petitioner’s claim, raised for a second time after the first claim was
dismissed as not ripe for resolution, was not a “second” application barred by the Antiterrorism and Effective Death Penalty Act, because the first application was not heard on the merits. Justice Scalia’s and Thomas’ literal approach would have produced a “perverse” result.

In *Hamdi v. Rumsfeld*, the Court considered the power of Congress or the President to limit habeas corpus rights. A plurality of natural law and Holmesian or Holmesian-leaning Justices concluded that, consistent with legislative and executive practice, Congress had a power to alter the writ, and that Congress can impliedly delegate that authority to the President. Justices Souter and Ginsburg required a clear statement from Congress to alter the writ, which they said did not exist in this case. Justice Scalia read the clause literally to give the Congress no independent power absent suspension of the Writ, a position joined by Justice Stevens. Justice Thomas would have given the President blanket power, reflecting a conservative predisposition to defer to the President. (§ 23.2.2.3)

**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 Jurisdiction of the Crime.” The states’ rights Taney Court held in 1861 in *Kentucky v. Dennison* that the federal courts could not require states to comply with the Extradition Clause. In contrast, the Court held in 1987 in *Puerto Rico v. Branstad* 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, such as complying with the 14th Amendment in *Brown v. Board of Education*. Thus, *Dennison* was overruled. (§ 23.2.2.4)

**CHAPTER 24: CONSTITUTIONAL IMPACT OF 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.” One way to construe the Ninth Amendment is that it means just what it says, that the enumerated of certain rights in the Constitution should not be construed to deny or disparage others retained by the people. 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. Virtually all commentators agree that the framers and ratifiers of the Bill of Rights believed in natural rights as a general matter.” (§ 24.1)

At the opposite extreme, the formalist position about the Ninth Amendment, stated by Justice Black in *Griswold v. Connecticut*, was that the federal courts, as well as the other branches of the federal government, have limited powers and should not recognize unenumerated rights. As discussed at § 27.3.2, the more moderate formalist majority on the Court between 1873 and 1937 did not agree, and during the 1920s, in cases like *Meyer v. Nebraska*, spoke of unenumerated fundamental rights to contract and engage in the common occupations, acquire knowledge, marry, establish a home, and raise children, as an aspect of substantive due process doctrine. (§ 24.2)
Based upon their inclination to defer to the legislative and executive branches, Holmesian Justices have been reluctant to expand the concept of substantive due process. As Chief Justice Rehnquist said for the Court in *Washington v. Glucksberg*, “We ‘ha[ve] always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended.’ . . . We must therefore ‘exercise the utmost care whenever we are asked to break new ground in this field,’ . . . lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the members of this Court.” Reflecting an even more extreme deference to the government approach, it could be argued that the Ninth Amendment is not addressed to courts at all, but merely reflects the Lockean idea that people have a reserved right of revolution against tyrannical government. (§ 24.3)

A final way of thinking about the Ninth Amendment would be to consider it an independent source of constitutional rights that judges can appeal to when no other provision of the Constitution seems to grant individuals such a right. Since the text of the Ninth Amendment does not provide any specific limitations on what those rights would be, such an approach would enable a judge more easily than any of the other approaches to read that judge’s policy values into the Constitution under the guise of interpreting the Ninth Amendment. This approach has never been adopted by any Justice on the Supreme Court, not even the liberal instrumentalists of the Warren Court. Instead, liberal instrumentalist, such as Chief Justice Warren, and Justices Goldberg and Brennan, have been willing to refer to the Ninth Amendment merely as an interpretive guidance to justify the Court’s adoption of the unenumerated rights analysis of substantive due process doctrine, discussed at § 27.3. (§ 24.4)

**SUB-PART THREE: CIVIL WAR AMENDMENTS AND DUE PROCESS GENERALLY**

The Civil War Amendments – the 13th, 14th, and 15th Amendments – outlawed slavery and involuntary servitude; granted citizenship to persons born or naturalized in the United States; provided that no state shall deny to any citizen the privileges or immunities of United States citizenship, nor deny to any person life, liberty, or property without due process of law, nor deny any person equal protection of the laws; and provided protections for the right to vote without regard to race. In addition, they grant power in Congress to enforce the Amendments by appropriate legislation.

The two provisions in the Civil War Amendments that have spawned the most litigation are the Equal Protection and Due Process Clauses of the 14th Amendment. For ease of presentation, the other provisions in the Civil War Amendments are discussed first in Chapter 25. Then, the Equal Protection Clause is discussed in Chapter 26. The Due Process Clause of the Fifth and 14th Amendments are discussed in Chapter 27. Chapter 28 discusses congressional power to enforce the Civil War Amendments, a power used to supplement judicial power to enforce the Amendments.

**CHAPTER 25: THE CIVIL WAR AMENDMENTS GENERALLY**

In addition to the Equal Protection and Due Process Clauses of the 14th Amendment, the Civil War Amendments provide four major individual rights protections. These are the 13th Amendment ban on slavery or involuntary servitude; the 14th Amendment Citizenship Clause; the 14th Amendment...
Privileges or Immunities Clause; and the 15th Amendment ban on race discrimination in the right to vote.

THE THIRTEENTH AMENDMENT

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 “inalienable.” Any attempt to waive this right would be unenforceable. (§ 25.1)

THE FOURTEENTH AMENDMENT’S CITIZENSHIP CLAUSE

The Citizenship Clause of § 1 of the 14th Amendment 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.” The central purpose of this clause was to overrule that part of the 1857 holding in Dred Scott v. Sandford that blacks were not and could not be citizens. Having citizenship is an important right because, among other things, a citizen may not be deported or excluded from the United States. Nor may Congress take away an American’s citizenship without his assent. Further, a citizen may chose to reside in any state and thus become a citizen of the state, with the same right as every other citizen in that state. (§ 25.2)

THE FOURTEENTH AMENDMENT’S PRIVILEGES OR IMMUNITIES CLAUSE

The Privileges or Immunities Clause of § 1 of the 14th Amendment provides, “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.” One way to read this clause would be to say that all the “fundamental” privileges and immunities which had been based upon state citizenship in the Article IV, § 2 Privileges and Immunities Clause, discussed in Chapter 20, were now transferred to all United States citizens as defined by the 14th Amendment’s Citizenship Clause. This would include those rights recognized in Corfield v. Coryell as “fundamental,” e.g., rights to pass through, reside in, own property in, make contracts in, and engage in common occupations in a state on equal terms with citizens of that state. A second way to read the 14th Amendment Privileges or Immunities Clause would be to say that those “fundamental” rights are still protected only under Article IV, § 2, and thus determined by state practice, and that the 14th Amendment clause only protects rights uniquely a product of United States citizenship, not state citizenship.

General historical evidence surrounding the passage of the 14th Amendment suggests that the framers of 14th Amendment intended to adopt the first approach. For example, as has been noted, “[T]he 1866 campaign was a referendum on the congressional plan for Reconstruction, the centerpiece of which was the Fourteenth Amendment. Republicans reminded voters of Southern denials of free speech and other basic liberties and insisted that the Fourteenth Amendment would protect the fundamental rights of American citizens.”
In contrast to viewing the 14th Amendment through the lens of this history of federal concern over state actions denying civil rights, the Supreme Court held in 1873 in the *Slaughter-House Cases* that the Privileges or Immunities Clause protects only a short list of rights relating primarily to relationships between citizens and the federal government. This decision reflects more a formalist emphasis on the literal text in the 14th Amendment Citizenship Clause distinguishing “citizens of the United States” and citizenship “of the State wherein they reside,” and the fact the Privileges or Immunities Clause applies to citizens of the United States, not citizens of a state, rather than the natural law greater focus on general historical evidence like the 1866 congressional campaign.

In determining what are the privileges and immunities of United States citizenship, the Court mentioned in the *Slaughter-House Cases* the rights: (1) to come to the seat of government and there do business with it, (2) to have free access to seaports, through which all operations of foreign commerce are conducted, and to the subtreasuries, land offices, and courts of justice in the several States, (3) to demand protection from the federal government while on the high seas or within the jurisdiction of a foreign government, (4) peacefully to assemble and petition government for redress of grievances, (5) to have the privilege of the writ of habeas corpus, (6) to use the navigable waters of the United States, (7) to become a citizen of any State of the Union by *bona fide* residence therein, with the same rights as other citizens of that State, and (8) to be protected by the 13th, 14th, and 15th Amendments. The Court concluded the list by saying that “a citizen of the United States can, of his own volition, become a citizen of any State of the Union by *bona fide* residence therein, with the same rights as other citizens of that state.” The individual would then also have the privileges and immunities belonging to state citizenship in that state. (§ 25.3)

**THE FIFTEENTH AMENDMENT’S BAN ON RACE DISCRIMINATION IN VOTING**

The 15th Amendment provides, “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.” The 15th Amendment was an improvement over the provisions in the 14th Amendment on voting. The provisions in § 2 of the 14th Amendment merely punished states that denied individuals the right to vote by providing that the denial of the right to vote to any male citizen otherwise qualified to vote (21 years of age and a citizen), except on grounds of “participation in rebellion, or other crime,” would result in reduction of the state’s number of representatives to Congress “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.”

In practice, the reconstituted Southern state governments established during Andrew Johnson’s presidency immediately after the Civil War limited suffrage to white males. Indeed, as has been noted, “As late as 1867, blacks were enfranchised in only five New England states and, subject to a discriminatory property requirement, in New York. State after state rejected black suffrage proposals in popular referenda between 1865 and 1867: Minnesota, Wisconsin, Connecticut, Kansas, Ohio, and New York.” Ratified in 1870, the 15th Amendment changed all of those practices as a constitutional imperative. (§ 25.4)
CHAPTER 26: THE EQUAL PROTECTION CLAUSE

THE SCOPE OF THE EQUAL PROTECTION CLAUSE

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* 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 a later case, *Weinberger v. Wiesenfeld*, the Court noted 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." (§ 26.1)

STANDARDS OF REVIEW UNDER THE EQUAL PROTECTION CLAUSE

As the Court noted in *Nordlinger v. Hahn*, “[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.” 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 involve the health, safety, or general welfare of the people. In practice, 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 Court has always held that a bare desire to discriminate on racial grounds constitutes an illegitimate governmental interest. The Court has also held that “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.” 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.

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. 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 some 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 those 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. 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 has stated, “[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 of the problem 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.’” On the other hand, a statute that burdens innocent persons for no rational reason will be held to be irrationally overinclusive. As the Court has noted, “The question is whether Congress achieved its purpose in a patently arbitrary or irrational way.”

In addition to minimum rational review, the Court has also developed two forms of “heightened review.” Under intermediate review, the legislation must (1) advance important or substantial governmental ends, (2) be substantially related to advancing those ends, and (3) not be substantially more burdensome than necessary to advance those ends. Under strict scrutiny, the statute must (1) advance compelling governmental ends, (2) be substantially and directly related to advancing those ends, and (3) be the least restrictive effective means to advance those ends.

As these tests indicate, with respect to government 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 “compelling.” 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. On the other hand, certain interests, like diversity in broadcast programming, may be important, but are not compelling. 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. Examples of other interests that have been assumed to be compelling by judges while deciding cases are national security and military defense, compliance with the Voting Rights Act, improving the delivery of health-care services to communities currently underserved, operation of a research-oriented elementary school dedicated to improving the quality of education in urban public schools, and the reduction of racial isolation in a situation that appeared to be de facto segregation.

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. A statute which is so poorly drafted that it does not regulate such a “substantial” number of problem individuals will be too underinclusive to
satisfy intermediate review. With regard to overinclusiveness, the statute at intermediate review must not burden “substantially more individuals than necessary” to achieve its ends.

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. 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 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 ends. This means that any unnecessary underinclusiveness will render the statute unconstitutional at strict scrutiny. 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 some problem with the regulation, will satisfy the strict scrutiny underinclusiveness test. While this test is possible for the government to meet, in most cases the government fails to prove that its chosen course really is the least restrictive effective alternative to advance directly a compelling government interest. (§ 26.1.1)

CLASSIFICATIONS TRIGGERING STRICT SCRUTINY

Given the backdrop to the 14th Amendment of the Civil War and the 13th Amendment’s ban on slavery, the Court has consistently held that statutes discriminating against racial minorities trigger strict scrutiny. In addition, statutes which are neutral on their face, but passed with an intent to discriminate on grounds of race, trigger strict scrutiny.

During the formalist era, the Court held that statutes which literally applied equally to racial groups, such as banning both whites and non-whites from riding together in railroad cars in 1897 in Plessy v. Ferguson, or entering into an interracial marriage, did not involve racial discrimination. Under this “separate, but equal” doctrine, state statutes requiring segregation of the races therefore triggered only rational basis review. This analysis was overruled at the beginning of the instrumentalist era in 1954 in Brown v. Board of Education. Adopting a functional approach, the Court held in Brown that the practical effect of “separate, but equal” was to discriminate against minority groups, and such statutes constituted race discrimination. Modern-day formalists, such as Justices Scalia and Thomas, have agreed that any use of race in a statute literally involves race discrimination, also rejecting the Plessy “separate, but equal” doctrine. (§26.2.1.1)

Racial classifications intended to favor minorities have been allowed in cases on admission to educational institutions, on obtaining government contracts, and in providing opportunities for electing minority candidates. While instrumentalist Justices have argued that such “benign” use of race for affirmative action purposes should only trigger the lower level of intermediate review, a majority of the Court has said that since such cases also involve race discrimination, strict scrutiny should be used. In such cases, for the affirmative action program to be constitutional, the government must show that its use of race is the least burdensome way to advance a compelling government interest, such as the government remedying its own past history of race discrimination,
or ensuring a diverse student body in educational institutions. 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 2003, dissenting in *Grutter v. Bollinger*, 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 less burdensome, more permissible kinds of factor analysis. (§ 26.2.1.4)

Classifications by the states regarding legal aliens are given strict scrutiny, unless they relate to “political functions,” such as police officers, probation officers, or public school teachers, where minimum rational review is applied. Alienage classifications in federal law trigger only minimum rational review because of the great power that Congress has over matters of immigration and aliens. Classifications regarding children of illegal aliens, similar to classifications regarding illegitimate children (§ 26.3.2), are given intermediate scrutiny. The state of Texas could not meet that test where the state sought to deny free public education to children of illegal immigrants. (§ 26.2.2)

Classifications that discriminate on the basis of religion are also given strict scrutiny. As noted at § 32.2.2.5, these cases also trigger strict scrutiny under the Free Exercise Clause. (§ 26.2.3)

**CLASSIFICATIONS TRIGGERING INTERMEDIATE REVIEW**

Prior to 1971, the Court applied minimum rational review to cases of gender discrimination. In 1971, in *Reed v. Reed*, the Court found that preferring males as estate administrators did not pass rational basis scrutiny. The Court appeared not to defer to legislative judgment in the case, and thus perhaps was actually applying a second-order rational review test. In 1973, in *Frontiero v. Richardson*, Justice Brennan, writing for himself and Justices Douglas, White, and Marshall, said that gender classifications should be given strict scrutiny, because gender, like race, is an immutable characteristic and both share a history of invidious discrimination. Majority support for that view did not develop, and in 1976, in *Craig v. Boren*, Justice Brennan wrote for a majority that gender classifications should be valid only if shown to be substantially related to a substantial government interest, an intermediate standard of review. Since 1976, that standard has remained in place. In practice, most gender discrimination has been ruled unconstitutional under that approach. (§ 26.3.1)

Prior to 1977, classifications discriminating against illegitimate children triggered only minimum rational review. In 1977, *Trimble v. Gordon*, the Court changed the standard of review in these cases to intermediate review. The justification for this was that whether or not a child is illegitimate is not the product of the child’s choice, and that “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.” (§ 26.3.2)

**CLASSIFICATIONS TRIGGERING RATIONAL BASIS REVIEW**

Rational basis review is applied to standard social and economic legislation, classifications that disadvantage non-resident corporations, and classifications involving children, the elderly, physical or mental disabilities, or sexual orientation. As to sexual orientation, the Court found no legitimate
purpose, and only animus, in laws supporting broad-based discrimination against homosexuals or laws criminalizing sodomy merely because of disapproval of the homosexual lifestyle. (§ 26.4)

CLASSIFICATIONS THAT ABRIDGE FUNDAMENTAL RIGHTS

Although no specific text in the Constitution deals with these issues, the Court has stated that as a matter of foundational principles lying behind the representative democracy of the United States, individuals have a fundamental right to travel within the United States, a right of access to courts, and a right to vote and access to the ballot. For substantial burdens on these unenumerated, non-textually specific rights, the Court applies strict scrutiny. For less than substantial burdens on these rights, the Court applies second-order rational review, upholding “reasonable” regulations of these rights. The Court has held there is no fundamental right to equal funding for public school education, although many state courts have found such a right under their state constitutions. (§ 26.5)

CHAPTER 27: THE DUE PROCESS CLAUSES OF THE 5th AND 14th AMENDMENTS

INTRODUCTION

The Due Process Clause of § 1 of the 14th Amendment provides, “No State shall deprive any person of life, liberty, or property, without due process of law.” This language mirrors the Due Process Clause in the Fifth Amendment, which provides “nor shall any person . . . be deprived 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, as well as at the time of ratification of the 14th Amendment in 1868, that "due process" referred to the settled usages and modes of proceeding existing in the common law and statute law of England, not shown unsuited to conditions in this country. Due process, thus, usually referred to proper procedures. Only occasionally was due process thought to have a substantive component. This aspect of Due Process Clause analysis is called “procedural due process.”

Despite this fact, subsequent to ratification of the 14th Amendment, the Court has provided individuals with a number of substantive protections against state or federal infringement through use of the Due Process Clause. This doctrine of “substantive due process” has two parts: “enumerated” rights and “unenumerated” rights. “Enumerated” rights include those rights that are “fundamental” based on the text, context, and history of “life, liberty, and property” in the Due Process Clause. In addition, “enumerated rights” include those aspects of the Bill of Rights that are sufficiently “fundamental” to be incorporated into the Due Process Clause of the 14th Amendment, and thus made applicable against the states. The second part of substantive due process doctrine involves “unenumerated” fundamental rights that form part of substantive due process analysis. These rights, which the Court has held are “implicit in the concept of ordered liberty,” are not textually specific in the Constitution. (§ 27.1.1)

Rights based on the text, context, and history of “life, liberty, and property” that are not viewed as “fundamental” trigger only versions of rational review: minimum rational review for standard social or economic legislation, and second-order rational review for excessive punitive damage awards.
The definition of fundamental rights has two separate branches. 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*, the rights “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 particularly true for formalist judges, who, as noted in Chapter 9, tend to supplement their analysis of literal text with specific historical practices. It is also true, however, for Holmesian judges, whose predisposition to defer to the dominant forces in society, noted in Chapter 10, suggests that fundamental rights should emerge from legislative and executive traditions, or perhaps popular referenda, not court action.

Instrumentalist and natural law judges, as normativists, 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. For instrumentalist judges, this may involve consideration of contemporary social policy, as noted in Chapter 11. For natural law judges, as noted in Chapter 12, this will more likely involve a “reasoned elaboration” of what is fundamental to “our concept of constitutionally ordered liberty” in light of prior Supreme Court precedents. (§ 27.1.1)
INCORPORATING THE BILL OF RIGHTS INTO THE 14th AMENDMENT

These same predispositions have guided the Court in deciding which of the expressed protections of the Bill of Rights should be considered “incorporated” into the liberty protected by the 14th Amendment’s Due Process Clause as “fundamental” and thus made applicable against the states. During the formalist and Holmesian eras, the definition of such rights was whether "a fair and enlightened system of justice is impossible without them" so that "neither liberty nor justice would exist if they were sacrificed." Under this approach, the Takings Clause of the Fifth Amendment, the First Amendment protections for freedom of speech and religion, and the Sixth Amendment right of an accused to counsel, at least as applied to a capital murder case, were viewed as fundamental. Other aspects of the Bill of Rights, particularly other aspects of a criminal defendant’s rights, such as the privilege against self-incrimination or protection against double jeopardy, were not viewed as fundamental to an “enlightened system of justice,” in part because those rights were not uniformly granted as a matter of specific historical practices in England or Continental Europe. During the instrumentalist era, the test for what rights are fundamental was changed to be what is fundamental to the “American system of justice.” Not surprisingly, under this test, most of the Bill of Rights were viewed as fundamental. Indeed, by the end of the instrumentalist era, the only provisions of the Bill of Rights 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.

If a case ever arose raising the issue, probably the Second Amendment, Third Amendment, and Eighth Amendment ban on excessive fines would be viewed as fundamental and made applicable against the states. 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, not just by grand jury indictment. Despite the Seventh Amendment, states can follow a practice of trying some factual issues to a court, rather than a jury, in those rare cases where that might apply. This would not be true for the same issue if the case were heard in federal court under diversity jurisdiction. (§ 27.2)

RECOGNITION OF UNENUMERATED RIGHTS AS FUNDAMENTAL

During the formalist era, the Court stated in 1923 in *Meyer v. Nebraska* that “liberty” 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.”

The part of this listing focused on the “right of the individual to contract, to engage in any of the common occupations of life” was summarized in *Lochner v. New York* as a “liberty of contract.” Under that doctrine, which reflected the conservative, pro-business formalism of the formalist era, this “liberty of contract” could be interfered with only by laws that reasonably relate to the health and safety, morals, or general welfare of the public. For conservative, pro-business formalists,
“general welfare of the public” meant a business “affected with the public interest,” which typically meant 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.” In such cases, there is no competitive free market to discipline business behavior, and thus government regulation is justified. On the other hand, pure economic regulation of the free market was viewed as an illegitimate government interest, based, in part, on a view that the Due Process Clause reflected a belief in economic Social Darwinism, and reliance on the “unseen hand” of the free market to deal with business regulation.

This part of the “substantive due process” doctrine was rejected by the Court in 1937, against the backdrop of the Great Depression. Following a Holmesian deference-to-government approach, after 1937 the Court has subjected all standard economic regulations to minimum rational review, substantially deferring to the legislative and executive branches to determine what economic regulations advance the “general welfare of the public.” (§ 27.3.2.1)

The remainder of the list in 
Meyer concerning fundamental rights “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” is still followed today as precedent. From a formalist perspective focusing on specific historical practices, 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.” Of course, viewed as a matter of specific historical practices traditional at the time the Constitution was ratified, this constellation of rights would only include the right of one man and one woman to marry (not polygamy 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).

Since 1937, the list of fundamental personal liberty rights has grown to include not only the right to marry, establish a home, and raise children, as in 
Meyer, but also a right to procreate, a right not to procreate through access to contraception and abortion, and other personal liberty rights identified by the Court. These rights have been elaborated in two kinds of ways.

One kind of analysis involves reasoning from enumerated fundamental rights in the Bill of Rights to other kinds of unenumerated rights viewed as related to those rights by being within the “penumbras” or “emanations” of those rights. For example, the Court’s conclusion in 
Meyer that there exists a right “to acquire useful knowledge” can be understood as a corollary to the First Amendment right to “freedom of speech.” Similarly, the right “to worship God” mentioned in 
Meyer was likely closely related in the Court’s mind, and perhaps even identical, to the First Amendment provision regarding the “free exercise” of religion. Justice Douglas’ 1965 opinion in 
Griswold v. Connecticut provides another example. In 
Griswold, Justice Douglas said that a case involving access to contraception by a married couple for use in their home concerned an unenumerated right of privacy related to several fundamental constitutional guarantees dealing with privacy. He referred to the right of association contained in the “penumbra” of the First Amendment, the Third Amendment's ban on the quartering of soldiers in one’s home, the Fourth

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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 had held in *Meyer* that there exists fundamental rights to marry, establish a home, and raise children. A right flowing naturally from these rights would be a right of a married person to procreate a child that the individual has a right to raise. Thus, the Court held in *Skinner v. Oklahoma* that both “marriage and procreation” are fundamental rights. So stated, these rights deal with the right of an individual to make decisions regarding marriage, procreation, and raising children. The Court has indicated that these cases involve what is called “decisional privacy,” that is, an “interest in independence in making certain kinds of important decisions.” Following the principle of “reasoned elaboration” of the law, this means the individual should have a right to make a decision either to procreate or not procreate, or marry or not marry.

The Court has elaborated the unenumerated fundamental rights analysis in this way. Thus, a second justification for the decision in *Griswold*, noted above, is that if a married couple has a right to procreate, they also have a right not to procreate, and thus a right of access to contraception. Similarly, based on “analogical” reasoning, an individual has a right not to marry, in addition to a right to marry. Thus, in *Eisenstadt v. Baird*, the Court held that an individual does not have to be married to have equal rights to procreate or not to procreate. The Court said, “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.” Through such “penumbral” and “analogical” reasoning, fundamental rights can be identified that were not part of societies’ original customs and traditions. Given the role of specific historical practices in their analysis of fundamental rights, formalist Justices naturally reject such “reasoned elaboration” of the law. (§ 27.3.3)

The Court’s decision in *Roe v. Wade* reflects an instrumentalist approach toward such “reasoned elaboration” of the law. In *Roe*, decided in 1973, 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, practice, precedent, and prudential considerations. As an historical matter, Justice Blackmun noted that in many ancient civilizations, such as Greece and Rome, abortions were legal, and that at the common law in England and most American colonies, abortions performed before “quickening” – “the first recognizable movement of the fetus *in utero*, appearing usually from the 16th to the 18th week or pregnancy – was not an indictable offense.” This history supported recognizing a right to have an abortion early in the pregnancy. Regarding precedent, Blackmun noted, “[T]he Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. . . . [These decisions] make it clear that the right has some extension to activities relating to marriage, procreation, contraception, family relationships, and child rearing and education. This right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.” Justice Blackmun also discussed prudential arguments of social policy. He noted, “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.” All of these arguments supported the Court’s decision in *Roe*.

Regarding practice, Blackmun observed that subsequent to the 14th Amendment, states regulated abortion more strictly, with many states banning abortion from conception on. He noted, “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. . . . 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.” Justice Blackmun also considered arguments of social practice, noting that while the American Medical Association had historically been anti-abortion, a new AMA resolution in 1970 “emphasized 'the best interests of the patient,' 'sound clinical judgment,' and 'informed patient consent.'” Justice Blackmun also cited the position of the American Public Health Association, which advocated, “Rapid and simple abortion referral must be readily available through state and local public health departments, medical societies, or other non-profit organizations.”

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 Justice White’s and Justice Rehnquist’s Holmesian dissents in *Roe*, given the Holmesian great deference to legislative and executive practice. Justice Rehnquist noted in his dissent, “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.’” In addition, despite Justice Blackmun’s use of general historical evidence regarding abortions, specific historical practices at the time the 14th Amendment was ratified in 1868 do not support a constitutional right to have an abortion. Thus, formalist Justices, like Justices Scalia and Thomas, have also routinely dissented from the Court’s decision in *Roe.* (§ 27.3.3.3)

When the right was recognized as fundamental in *Roe*, the rule was that strict scrutiny was triggered for any burden on a fundamental right. However, in 1992, in *Planned Parenthood v. Casey*, Justices O’Connor, Kennedy, and Souter, who were the controlling votes in the case, adopted the doctrine which had been applied in other cases, noted at § 21.2.3, that less than substantial or undue burdens on unenumerated fundamental rights typically trigger only second-order rational review, not strict scrutiny. Applied in *Casey*, the question thus became whether a regulation has “the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a non-viable fetus.” The opinion then applied that test, striking down a requirement of spousal notification, but upholding, under rational review, requirements of written informed consent, providing certain information to the patient, a 24-hour waiting period, required record keeping, and a parental consent provision for women under 18, with a judicial bypass. The basic holding of *Roe* that a fundamental right exists was upheld on the ground 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.”
In general, 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, strict scrutiny analysis was restricted in *Casey* to protecting the core principle of personal liberty from undue burdens. This is consistent with a modern natural law approach, which will want to ensure that basic principles of liberty and equality are protected, but recognize that once that protection is assured, there are a number of collateral decisions that any society must make in order to assure persons can live together in peace and harmony with equal concern and respect given to all that are best made in most circumstances by democratically elected officials, rather than courts. Such an approach rejects the instrumentalist willingness to have the courts take a greater lead in policy decisionmaking over non-substantial burdens on unenumerated fundamental rights. As part of the natural law approach to “reasoned elaboration of the law,” this distinction between undue or substantial burdens triggering strict scrutiny versus lesser burdens triggering second-order rational review, noted at § 21.2.3, will likely be extended to each aspect of unenumerated fundamental rights analysis. (§ 27.3.4.1)

The Court has not made a definitive decision on whether the “heart of liberty” right to “to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life” means that laws discriminating against homosexuals, such as barring same-sex marriage, is a deprivation of a fundamental right. The Court dodged the question in *Lawrence v. Texas* where a law criminalizing sodomy was struck down. Justice Kennedy wrote that the fact that a governing majority has regarded a particular practice as immoral is not a legitimate reason for upholding a law prohibiting the practice, and he found that the Texas law was based on nothing more than animus. Thus, the law failed even minimum rational review. However, he made clear that the case did not involve minors, non-consenting persons, declarations of status, or same-sex marriage. (§ 27.3.4.2)

The Court has also had to apply the “heart of liberty” language in the context of medical decisions regarding life and death. While there probably is a fundamental right of a competent person to refuse medical treatment, even if that would hasten death, the Court held in *Cruzan v. Director, Missouri Department of Health* that a state may permissibly advance its interest in preserving human life by applying a clear and convincing standard of proof to determine the patient’s wishes where the person is unconscious or otherwise unable to express an intention. The Court held in *Washington v. Glucksberg* that states can ban terminally ill people from killing themselves with the help of a doctor because there is no fundamental right to assistance in committing suicide. (§ 27.3.4.3)

Courts have also dealt with privacy cases involving disclosure of private medical records (§ 27.3.3.4), and decisional privacy regarding juvenile curfew statutes (§ 27.3.4.4). A number of privacy-related questions remain open, such as what are the limits on a woman’s right to choose to have a partial-birth abortion; can certain sexual acts traditionally regulated by the criminal law, like fornication or adultery, continue to be made illegal, given the Court’s decision in *Lawrence v. Texas*, and do persons have a right to medical treatment that will relieve pain even though it may accelerate death.
PROCEDURAL DUE PROCESS

The Due Process Clauses of the Fifth and 14th Amendments indicate 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. The second question is who counts as a “person” and what “life,” “liberty,” or “property” rights are protected under “due process.” The third question is what “due process of law” requires before the deprivation can be constitutional.

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” that is intentional, or the product of deliberate indifference, but not merely negligent. 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. 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. (§ 27.4.1)

The Court concluded in Roe v. Wade that the term “person” in the 14th Amendment refers only to postnatal individuals, that is, only after birth. The Court noted that the word “person” appears many places in the Constitution, 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.” Thus, “life” interests under the Due Process Clause do not begin until birth, although the Court has held that states have a legitimate interest in protecting prenatal life from the moment of conception (§ 27.4.2.1). Under this 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.” (§ 27.4.2.2)

Constitutionally protected liberty interests are created by the Constitution and by state and federal law. They include not only the fundamental liberty rights under substantive due process analysis, but also a liberty interest in one’s reputation not being stigmatized by the government. In terms of liberty interests enjoyed by prisoners, inmates have a liberty interest in being 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, and a liberty interest in not having imposed on them atypical and significant hardships in relation to the ordinary incidents of prison life. (§ 27.4.2.3)

Property interests are not created by the Constitution or individual expectations but, rather, by rules or understandings stemming from state or federal law. Thus, such interests can arise from federal or state statutory or constitutional provisions, or as a matter of state common-law property rights. In Goldberg v. Kelly, decided in 1970, 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 continuing to receive payments (an “entitlement” in popular usage) and a hearing would help
prevent unfair or mistaken deprivations of the property interest that welfare recipients had in continuing to receive payments. In 1971, the Court decided in *Bell v. Burson* 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 a distinction between "rights" and "privileges." During the formalist and Holmesian eras, the Court had allowed states and the federal government to deprive persons of occupational licenses upon conditions imposed by the government, if the interests were classified as a “privilege” rather than a “right.” (§ 27.4.2.4)

The first requirement of procedural due process is that the governing law must give persons of ordinary intelligence a reasonable opportunity to know what is prohibited. The formalist-era Court struck down some economic regulations as unconstitutionally vague, and the instrumentalist-era Court struck down a few criminal statutes as unconstitutionally vague. The Holmesian-era and modern natural law-era Courts have been relatively tolerant of the difficulties of legislative drafting, and only rarely have held a statute unconstitutionally vague, outside the First Amendment context, discussed at § 29.6.1.4. (§ 27.4.3.1)

The general test applied today in procedural due process cases was announced by the Court in *Mathews v. Eldridge* in 1976. It calls for balancing “the private interest that will be affected; the risk of an erroneous deprivation through present procedures and the probable value, if any, of additional or substitute procedures; and the government’s interest, including the function involved and the fiscal or administrative burdens that the additional or substitute procedures would entail.” In applying this test, the Court has indicated that due process usually requires an opportunity for notice and some kind of hearing before a deprivation. However, the government can act without advance procedures if it is not practicable to provide a pre-deprivation hearing. (§ 27.4.3.2)

Numerous examples are provided in the ET of procedural due process analysis applied to cases on mental hospital commitment, parental rights termination, government entitlements, workplace matters, license or utility termination, creditor/debtor situations, actions by schools, and detained persons. Also considered is the delegation of government functions to private parties and legislative adoption of rules drafted by private parties. (§ 27.4.4)

**CHAPTER 28: CONGRESSIONAL POWER TO ENFORCE CIVIL WAR AMENDMENTS**

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.” 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.

During the instrumentalist era, in cases such as *Katzenbach v. Morgan*, 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. The Court also held in Katzenbach that “appropriate” legislation would be tested only by the minimal “plainly adapted” standard of review of McCulloch v. Maryland.

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 to reinstate the traditional view that congressional power under the Civil War Amendments is remedial only. This is consistent with the view in Marbury v. Madison that it is “emphatically the province and duty of the judicial department to say what the law is.” The Court has also 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 appears to be a version of “third-order” rational review, similar to the “rough proportionality” test of Dolan under the Takings Clause (§ 22.2.5), with the burden on Congress to justify its action, rather than the minimum rational review of McCulloch v. Maryland. The Court has left substantially unexplained the justification for applying this higher standard of review to the term “appropriate” in the Civil War Amendments, although it is consistent with the background natural law principle of proportionality used in the Eighth Amendment “cruel and unusual punishment” analysis, discussed at § 23.2.1.4. Specific examples of Congress’ use of its enforcement power appear in the remainder of Chapter 28 in the context of the 13th Amendment (§ 28.2), the 14th Amendment (§ 28.3), and the 15th Amendment (§ 28.4).

SUB-PART FOUR: THE FIRST AMENDMENT

The First Amendment to the Constitution provides, “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 peacefully to assemble, and to petition the Government for a redress of grievances.” The basic doctrine regarding free speech is discussed in Chapter 29. A number of special categories of speech get their own kind of First Amendment review that is less than standard First Amendment protection. These categories are discussed in Chapter 30. A second protection of the First Amendment involves the right “to assemble” and “petition the Government for a redress of grievances,” which has been held include a “freedom of association.” These cases are discussed in Chapter 31. The third protection of the First Amendment involves two clauses dealing with religion: the Establishment Clause and the Free Exercise Clause. These two clauses are discussed in Chapter 32. As discussed at § 27.2, the Court has held that the liberty protected by the 14th Amendment includes the freedoms protected by the First Amendment, so these provisions apply equally to federal or state governmental regulations.

CHAPTER 29: FREEDOM OF SPEECH AND OF THE PRESS

EVOLUTION IN THE PROTECTION OF SPEECH

In the original natural law era there were no major Supreme Court decisions granting protection to the freedom of speech. The issue regarding freedom of speech was raised, however, with the passage in 1798 of the Alien and Sedition Acts. Among other things, the Sedition Act criminalized certain forms of politically partisan speech, which the Act termed “sedition.” During the campaign of 1800, a number of Jefferson partisans were arrested under the Act, and Jefferson and his allies
used the passage and enforcement of the Act to brand President Adams and his administration as hostile to the rights of free speech. After Jefferson’s election in 1800, the Alien and Sedition Acts were repealed, in part because of the understanding of Jefferson and his supporters that the Sedition Act constituted an infringement on the rights of free speech, even though truth was a defense under the Act. As the Supreme Court noted many years later in *New York Times Co. v. Sullivan*, “Although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history. Fines levied in its prosecution were repaid by Act of Congress on the ground that it was unconstitutional. . . . Calhoun, reporting to the Senate on February 4, 1836, assumed that its invalidity was a matter ‘which no one now doubts.’ . . . Jefferson, as President, pardoned those who had been convicted and sentenced under the Act. . . . The invalidity of the Act has also been assumed by Justices of this Court. . . . These views reflect a broad consensus that the Act, because of the restraint it imposed upon criticism of government and public officials, was inconsistent with the First Amendment.” (§ 29.1.1)

Despite this general understanding of the First Amendment during the original natural law era, the first “freedom of speech” cases of the formalist era downplayed this legislative and executive practice surrounding the Alien and Sedition Acts. Instead, following the formalist predisposition toward literal interpretation, the cases concluded that the First Amendment was directed primarily at the literal meaning of “free” speech, that is, the right to speak freely and not be limited by prior restraints. For example, in 1907, in *Patterson v. Colorado*, the Court focused on literal text, as well as 18th-century historical sources specifically addressing the freedom of speech, such as Blackstone, to conclude that protection against prior restraints was the full extent of the Free Speech Clause of the First Amendment. (§ 29.1.2)

The later views of Justice Holmes reflected a more functional approach toward free speech doctrine. Writing in *Schneck v. United States*, Holmes stated, “The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.” Turning to considering the purpose behind the free speech clause, Holmes observed in *Abrams v. United States*, “When men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas – that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.” The impact on the Court of Justice Holmes’ views was apparent in cases like *Bridges v. California*, decided in 1941, where the Court stated, “What finally emerges from the ‘clear and present’ danger cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished.” Reflecting the Holmesian deference-to-government approach, however, in 1951, in *Dennis v. United States*, the Court upheld an application of the Smith Act which made it unlawful knowingly or wilfully to advocate destroying any government in the United States by force or violence. (§ 29.1.3)

The liberal instrumentalist-era Court provided greater protection for speech than the clear and present danger test. For example, in 1972, the Court stated in *Police Department of Chicago v. Mosley*, “[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.” Regarding advocacy of illegal conduct, the Court held in 1969 in *Brandenburg v. Ohio* that speech is protected unless the
speech is “directed to inciting or producing imminent lawless action and is likely to incite or produce such action.” (§ 29.1.4)

CONTEMPORARY LEVELS OF REVIEW FOR FULLY PROTECTED SPEECH

Reflecting the modern natural law predisposition to follow precedent, very few instrumentalist-era precedents regarding the First Amendment have been overturned or limited. The doctrine of the modern natural law era reflects the relatively robust protection of the instrumentalist era, embracing a number of reasons mentioned in prior cases in favor of robust protection of free speech. These include: Holmes’ views on free speech and the marketplace of ideas; free speech supports a robust democratic process; radical action may best be restrained by granting free speech, subject to criminal punishment for criminal acts; free speech advances the human spirit that demands self-expression and self-realization; free speech promotes the ideal of libertarian dignity protected through law; and freedom of speech promotes tolerance of others.

Reflecting the analytic predisposition of the natural law approach, modern free speech doctrine has become more systemic in terms of levels of review. Under modern free speech doctrine, the Court applies a different level of scrutiny depending upon whether the speech being regulated: (1) occurs in (a) a public forum or (b) a non-public forum; and (2) whether the regulation is (a) a content-based regulation of speech, focusing on (i) the viewpoint of the speech or (ii) the subject-matter or topic of the speech, or (b) a content-neutral regulation of speech based upon the (i) the secondary effects of the speech or (ii) a concern with only the time, place, or manner of the speech. In a public forum, content-based regulations of speech trigger strict scrutiny, while content-neutral regulations trigger intermediate review. In a non-public forum, viewpoint regulations of speech trigger strict scrutiny, while content-based regulations of subject-matter and content-neutral regulations typically trigger rational review. In tabular format, the levels of review that apply to fully protected speech are:

<table>
<thead>
<tr>
<th>Content-Based Regulation of Speech</th>
<th>Public Forum or Private Property</th>
<th>Non-Public Forum Owned by the Government</th>
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<tr>
<td>Viewpoint Discrimination</td>
<td>Strict Scrutiny</td>
<td>Strict Scrutiny</td>
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<td>Subject-Matter Discrimination</td>
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<tr>
<td>Content-Neutral Regulation of Speech</td>
<td>Intermediate Review</td>
<td>Basic Rational Review</td>
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To trigger First Amendment protection, the government must be regulating speech, and not conduct. Regulations of conduct merely trigger other clauses of the Constitution, like Equal Protection or Due
Process. Further, government action involving funding of speech, rather than regulating speech, raise its own kind of First Amendment analysis. (§ 29.2)

REGULATING SPEECH VERSUS CONDUCT

By its terms, the First Amendment proscribes only governmental regulations “abridging the freedom of speech,” not conduct. Governmental regulations of conduct, therefore, are outside of the ambit of the First Amendment. In determining whether the regulation is one of speech or conduct, the Court has noted that “symbolic speech” is protected by the First Amendment. “Symbolic speech” exists where conduct is not “pure speech,” such as talking, writing, or wearing informative clothing, but is nevertheless intended to be expressive and conveys a message reasonably likely to be understood. Classic case examples of symbolic conduct include burning a cross on someone’s lawn, burning a flag, or performers dancing in the nude at an adult entertainment establishment.

Sometimes, whether the regulation is one of speech or conduct may not be so clear. For example, the Court held in *Dallas v. Stanglin* that “recreational dancing” by patrons of a dance hall was not expressive activity. In contrast, in *Barnes v. Glen Theatre, Inc*, the Court held that a statute barring public nudity when applied to nude dancing by “performers” at an adult entertainment establishment involved expressive activity because part of the purpose of the performance was erotic expression. From a formalist perspective, focused more on literal meaning than purpose, Justice Scalia said that the First Amendment did not apply in *Barnes*, since the nude dancing by performers literally was not symbolic speech, but mere conduct. (§ 29.3.1)

GOVERNMENT SPENDING ON SPEECH

The federal and state governments fund a wide variety of activities. For the federal government, this fits comfortably within the General Welfare Clause as supplemented by the Necessary and Proper Clause. As the Court held in *Helvering v. Davis*, “When money is spent to promote the general welfare, the concept of welfare or the opposite is shaped by Congress, not the states. So the concept be not arbitrary, the locality must yield.” When the government has subsidized a particular activity, the Court has typically not reviewed its effects from a heightened level of scrutiny.

The situation is somewhat different if the government subsidizes some speech, but not other speech. There is always the possibility that it is engaged in viewpoint discrimination. The major cases have all been dealt with during the modern natural law era. These decisions generally permit the government to subsidize a viewpoint if it is the government that is speaking. The government may also call for speech-related considerations to be included when making a many-factored judgment in a competitive funding process. However, due to Justice Kennedy’s critical fifth vote in a number of cases, the government cannot engage in viewpoint discrimination within a program designed to encourage a diversity of views from private speakers. And it cannot restrict lawyers in a government-funded legal services program from questioning the legality of existing law. (§ 29.3.2)
CONTENT-BASED VERSUS CONTENT-NEUTRAL REGULATIONS OF SPEECH

The distinction between content-based and content-neutral regulations of speech is well illustrated by the famous and leading case of United States v. O’Brien. In this 1968 case, the Court upheld the conviction of a protester who had violated federal law by burning his draft card on the steps of a courthouse as part of a demonstration against the Vietnam war. The crime defined by statute was destroying a draft certificate. Chief Justice Warren stated, “[A] regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.” The government interest in O’Brien that was unrelated to the suppression of free expression was the harm that burning the draft card would have to the effective functioning of the Selective Service System. The Court concluded in O’Brien that the secondary effect of burning the draft card was what concerned the government, not the protest activity itself.

The O’Brien principle, although framed in the context of a regulation of symbolic speech that had a problematic secondary effect, was extended in Members of the City Council of Los Angeles v. Taxpayers for Vincent to all time, place, or manner regulations applied in a public forum. This was done with little detailed consideration, but was based on the common-sense observation that a time, place, or manner regulation also involves a case where the government is not concerned about the content of the speech, but only the time, place, or manner of the speech’s delivery. Thus, under current doctrine, either a regulation is content-based or it is content-neutral, with no distinction made between whether the regulation is content-neutral because it is based upon secondary effects or is a time, place, or manner regulation.

Another example of the distinction between content-based and content-neutral regulations appeared in Texas v. Johnson. In this case, the majority held that a state flag desecration statute was invalid as applied to defendant, who had burned a flag as part of a political protest. The majority noted that the state’s interest in banning flag burning to prevent breaches of the peace was a content-neutral reason for the regulation. It thus triggered intermediate review. That justification failed intermediate review, however, because the statute was not substantially related to advancing the interest in preventing a breach of the peace, since no one at the demonstration was injured or threatened with injury and only several witnesses testified that they had been seriously offended by the flag-burning.

The state’s second interest was an interest in preserving the flag as a symbol of nationhood and national unity. The majority said that this interest was related to the suppression of expression and, thus, was content-based. Therefore, strict scrutiny was applied to the consideration of that interest, rather than the intermediate review standard of O’Brien. This reason failed the strict scrutiny approach, the Court said, because it is a bedrock general principle that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable. The Court said that the government may pursue its legitimate interest in preserving the symbolic value of flag by making suggestions concerning the proper treatment of the flag. It might attempt to persuade those who feel differently about the flag that they are wrong. But it cannot justify a criminal conviction for engaging in political expression by use of the flag. (§ 29.4.1)
The Court distinguishes between two kinds of content-based regulations: (1) those that discriminate on grounds of viewpoint; and (2) those that discriminate on grounds of subject-matter. Viewpoint discrimination occurs where the government regulation takes sides in a dispute, and only regulates the disfavored side. In subject-matter regulation, the government prevents an entire topic from being discussed. Most of the time this distinction is clear, but occasionally categorizing a regulation can be problematic. (§ 29.4.2)

**EFFECT OF FORUM BEING PUBLIC OR NON-PUBLIC**

The Court applies a different standard of scrutiny to government regulations of speech in non-public forums owned by the government, rather than regulations of speech in a public forum or on private property. With regard to non-public forum property owned by the government, the state can impose content-neutral laws, or regulate the subject-matter of the speech to ensure the forum is being used for its intended purposes, as long as the regulation is reasonable and not an effort to suppress expression merely because public officials oppose the speaker’s view, that is, viewpoint discrimination. Viewpoint discrimination continues to trigger strict scrutiny review even in a non-public forum. All other regulations in a non-public forum trigger only minimum rational review.

Public streets and public parks are naturally regarded as examples of public forums. Jails and military bases are classic examples of non-public forums. In determining whether a forum is public or non-public, formalist Justices tend to focus more on the government’s intent, and whether the government has expressly, or literally, opened the forum for public use. Holmesian Justices also tend to focus on governmental intent, deferring to the government’s contention in litigation that the forum is a non-public forum unless the opposite conclusion is clear. In contrast, instrumentalist and natural law Justices focus more on whether the objective nature of the forum is compatible with free speech uses. Based on their predisposition to protect free speech rights, particularly of the poor and dissenters, liberal instrumentalist Justices tend to resolve close questions more in the direction of finding that the forum is a public forum than do natural law Justices.

A third kind of forum is a designated public forum, opened by the state as a place for expressive activity for some purposes. Although the state is not required indefinitely to retain the open character of the facility, as long as it does so it is bound by the same standards that apply in a traditional public forum when that forum is used for designated purposes. (§ 29.5)

A good example of the different standards that apply depending on the nature and location of the activity being regulated concerns public schools. Where the regulation involves an aspect of school life viewed as occurring in a non-public forum, such as government control over material presented in school classrooms or school auditoriums, as in *Bethel School District No. 403 v. Fraser*, then basic rational review is applied. Where the regulation involves an aspect of school life on playgrounds or in a school lunchroom, which are viewed more as places designated for free speech, and thus public forums, content-neutral regulations have been subjected to intermediate scrutiny, as in *Tinker v. Des Moines Independent Community School District*, and content-based regulations have triggered strict scrutiny. (§ 29.6.2.2)
SPECIALIZED FIRST AMENDMENT TOPICS

There are some specialized First Amendment topics that are best considered on their own. Some relate to procedural aspects of the restrictions: prior restraints, content-neutral injunctions on speech, government fees for permits to speak, vagueness challenges, and substantial overbreadth. Others relate to circumstances in which the restraint applies: coerced speech, the government as educator, invasion of privacy, free speech versus fair trial rights, and taxation of the press.

PRIOR RESTRAINTS

A prior restraint is a legal sanction that has the effect of suppressing future speech before there is a judicial finding, after appropriate proceedings, that such speech is not constitutionally protected from restraint. The Court has often emphasized that any prior restraint has a "‘heavy’ presumption against its constitutional validity.” This is particularly true because of the collateral bar rule. While a person accused of violating a law can defend on the grounds that the law is unconstitutional, in the case of a prior restraint “a court order must be obeyed until it is set aside” and “persons subject to the order who disobey it may not defend against the ensuing charge of criminal contempt on the ground that the order was erroneous or even unconstitutional.”

Reflecting the rigor of the strict scrutiny “least restrictive alternative” test, the Court indicated in Freedman v. Maryland that for even a temporary prior restraint to be valid the restraint must: (1) put the burden on the government to go to court and bear the burden of proving the speech unprotected; (2) merely preserve the status quo for the shortest fixed period compatible with sound judicial resolution; and (3) provide for a prompt, final judicial disposition of the case. However, a trial court judge may impose a “gag order” on parties not to reveal certain information about the on-going proceedings if such an order can satisfy strict scrutiny by being necessary to advance the compelling government interest of ensuring a fair trial. (§ 29.6.1.1)

CONTENT-NEUTRAL INJUNCTIONS ON SPEECH

A refinement in the standard of review for content-neutral injunctions on speech, rather than content-neutral regulations of speech, was announced by the Supreme Court in Madsen v. Women's Health Center. There the Court dealt with a challenge to an injunction regarding what actions could be taken by protesters at an abortion clinic. Chief Justice Rehnquist stated that the differences between an injunction and a generally applicable ordinance required somewhat more stringent application of First Amendment principles regarding content-neutral injunctions than the usual time, place, or manner rule, which requires that the law must be "narrowly tailored to serve a significant public interest." The reason closer attention should be paid flows from the general rule that injunctive relief should be no more burdensome than necessary. Thus, the Court said the relevant inquiry is whether a challenged provision "burdens no more speech than necessary to serve a significant government interest," which was substituted for the “not burdening substantially more speech than necessary” prong of intermediate scrutiny. The majority made clear that the “no more speech than necessary” was not the strict scrutiny “least restrictive alternative” analysis. Thus, Madsen represented a third kind of narrow tailoring analysis between intermediate review and strict scrutiny.
This additional level of narrow tailoring analysis adds confusion to the law. From the perspective of the “base, plus six” model of levels of review (Chapter 7), the majority could have achieved the same result in Madsen by adopting the intermediate review with bite standard applicable to commercial speech, discussed at § 30.3.2. As the majority’s analysis reveals, where the injunction at issue in Madsen was constitutional, it was because it was “directly related” to the perceived harms and was a close enough fit to satisfy the intermediate “not substantially more burdensome than necessary” test. Where the injunction was unconstitutional, it was because it was not directly related to perceived harms, or not a close enough fit, and thus substantially overbroad. (§ 29.6.1.2)

**FEES FOR SPEECH ON GOVERNMENT PROPERTY**

Where the government has a content-neutral justification for imposing a fee prior to permitting speech, such as ensuring that two groups are not trying to speak at the same time in the same place, or ensuring that the costs are covered of cleaning up any littering that might occur following an event, the court applies an intermediate standard of review. As typically phrased, such laws are only allowed if the government has: (1) an important, content-neutral reason for the regulation (the prong one requirement of an intermediate standard of review requiring an important or substantial interest); (2) there are clear criteria leaving no overly broad discretion to the licensing authority (the prong two requirement of ensuring that the regulation is substantially related to advancing the important content-neutral interest and is not a cover for content-based discrimination); and (3) procedural safeguards, such as requiring prompt determinations as to license requests and judicial review of license standards (the prong three requirement of the regulation not being substantially more burdensome than necessary and not imposing substantial burdens on free speech). Where the fee provision is drafted in a way that involves content-based discrimination, the Court applies a strict scrutiny approach. (§ 29.6.1.3)

**VAGUENESS DOCTRINE**

A law is unconstitutionally vague under the Due Process Clauses of the Fifth and 14th Amendments if the law does not define with “sufficient definiteness” what conduct is permitted and what conduct is prohibited (§ 27.4.3.1). While any law can be unconstitutionally vague, the Court has expressed the greatest concern regarding vagueness in the context of criminal statutes and in the context of the First Amendment. Courts are particularly troubled about vague laws restricting speech out of concern that they will chill constitutionally protected speech. In NAACP v. Button, the Court noted that the freedom of speech is “delicate and vulnerable, as well as supremely precious in our society [and] the threat of sanctions may deter their exercise almost as potently as the actual application of sanctions.”

Based on concerns such as these, the Court has declared unconstitutional a state statute preventing any “subversive person” from being employed by the state and requiring persons to swear they are not members of a “subversive organization.” The Court concluded that the term “subversive” was “unduly vague” and “uncertain.” The Court has also struck down on vagueness grounds a statute that prohibited treating the flag of the United States “contemptuously.” The Court also ruled unconstitutional a statute making it unlawful to “interrupt” police officers in the performance of their duties. The Court noted that the law was not clearly limited to “disorderly conduct or fighting words” and the law effectively grants police “the discretion to make arrests selectively on the basis
of the content of the speech.” The Court has noted that the concern with vagueness is less in cases involving government funding of speech than in government regulation of speech. (§ 29.6.1.4)

THE SUBSTANTIAL OVERBREADTH DOCTRINE

Another process-based rule is an exception to the normal rule that parties cannot bring cases to vindicate the rights of third parties. In free speech cases the plaintiff can call for application of the substantial overbreadth doctrine. Thus, even if the plaintiff is engaged in unprotected speech, the plaintiff can secure a determination of invalidity if the law is substantially overbroad and as a result affects the rights of third persons. As explained by the Court in Members of the City Council of Los Angeles v. Taxpayers for Vincent, “[T]he transcendent value to all society of constitutionally protected expression is deemed to justify allowing 'attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.' This is deemed necessary because persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression.” The Court also noted in Vincent, “‘The requirement of substantial overbreadth is directly derived from the purpose and nature of the doctrine. While a sweeping statute, or one incapable of limitation, has the potential to repeatedly chill the exercise of expressive activity by many individuals, the extent of deterrence of protected speech can be expected to decrease with the declining reach of the regulation.’ In short, there must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds.” (§ 29.6.1.5)

COERCED SPEECH

The foundation for modern cases on coerced speech is West Virginia Board of Education v. Barnette. There the Court held invalid a public school program requiring teachers and pupils to participate in a salute to the flag of the United States. In an oft-quoted paragraph, Justice Jackson, said, “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.” Applying that concept, the Court has held that a state cannot require passenger vehicles to carry a license plate that contains an ideological message. Similarly, a person cannot be required to contribute money to a union or a professional organization if the money will not be spent for collective-bargaining activity or to improve the profession, and will be spent on speech not approved by the contributor. However, the Court has allowed the government to mandate assessments on producers as part of a scheme of economic regulation, even though part of the money would be used to finance generic advertising. The Court noted that citizens have no First Amendment right not to fund government speech through general taxes or targeted assessments. (§ 29.6.2.1)
THE GOVERNMENT AS EDUCATOR

When the government acts as educator, and the regulation involves an aspect of school life regarded as occurring in a non-public forum, such as a classroom or auditorium, minimum rational review has been applied. When the regulation involves non-curricular aspects of school life on playgrounds or in a school lunchroom, places viewed more as designated for free speech and, thus, public forums, content-neutral regulations have been subjected to intermediate scrutiny, and content-based regulations have triggered strict scrutiny. Thus, a school could discipline a high school student for inappropriate speech at a high school assembly, but could not punish students for wearing black arm bands where the Court found no material disruption of classwork or invasion of the rights of others, and the school authorities could not reasonably forecast such consequences. However, the principal could censor a student newspaper developed within the school curriculum so long as his judgment was reasonably related to legitimate pedagogical concerns. (§ 29.6.2.2)

SPEECH AND PRIVACY RIGHTS

The government has power to protect persons from speech which creates an intolerable invasion of privacy. Conservative formalist and Holmesian Justices tend to be more deferential to privacy rights, while liberal instrumentalist Justices tend to be more deferential to rights of free speech. Natural law Justices tend to strike a middle ground, balancing privacy concerns of the audience against the free speech rights of demonstrators or the press. For example, a majority of the Court, with Justices Brennan and Marshall dissenting, upheld an ordinance interpreted to bar focused picketing aimed at a particular house. An injunction against protestors in front of an abortion clinic was upheld with respect to noise, but not as to images that could be observed within the clinic, as to which the curtains could be pulled. (§ 29.6.2.3)

FREE SPEECH AND FAIR TRIALS

Cases involving complete bans on persons, including the media, from criminal courtrooms have been struck down by the application of strict scrutiny. That approach extends to excluding the public or the press from voir dire proceedings. On the other hand, court do have a compelling interest in insuring a fair trial, and thus limitations on the press are permissible if necessary to advance that interest. For example, in Sheppard v. Maxwell, prejudicial publicity about the defendant had saturated the community in which he was tried. The Court said that the press must have a free hand if there is no threat to the integrity of a trial. However, where the accused might be prejudiced, the court can and should take appropriate steps. The court can limit the presence of the press at judicial proceedings. The judge can also continue the case until publicity subsides, transfer it to another county, or sequester the jury. Failure to protect the defendant from inherently prejudicial publicity will result in reversal of the conviction.

Protective orders that would enhance the litigation process have also been approved. For example, in Seattle Times Co. v. Rhinehart, the Court allowed a protective order restraining the parties to civil litigation from publishing material obtained through the discovery process. The Court said this furthered a substantial interest unrelated to the suppression of expression, that is, a purpose to assist in the preparation of trial or settlement. By using this language, the Court adopted an intermediate standard of review for a protective order justified by a content-neutral reason. (§ 29.6.2.4)
TAXATION OF THE PRESS

Taxation of the press can be used to threatened its freedom of speech. The Court has held that the government can subject newspapers to generally applicable economic regulations without creating a constitutional problem, but the government may not single out the press for special treatment without satisfying strict scrutiny. In the modern natural law era, the protection from being singled out has been extended by requiring strict scrutiny whenever the incidence of a tax is content-based. (§ 29.6.2.5)

CHAPTER 30: EXCEPTIONS TO STANDARD FREE SPEECH DOCTRINE

INTRODUCTION

A number of special categories of speech are reviewed at less than the standard First Amendment protection of strict scrutiny. In some of these cases, such as certain advocacy of illegal conduct, fighting words, obscenity, or indecency involving children, the speech receives no First Amendment protection, except for the prescription against viewpoint discrimination that triggers strict scrutiny. For other kinds of speech, like defamatory speech or government regulation of the speech of government employees on matters of public concern, a version of heightened rational review is applied. For regulations of broadcast television or radio, or regulations of commercial speech, a version of intermediate scrutiny is applied. In campaign finance cases or speech regulating the choice and election of candidates, a version of strict scrutiny typically is applied.

ADVOCACY OF ILLEGAL CONDUCT OR HATE SPEECH

Four kinds of cases fall generally under the category of speech involving the advocacy of illegal conduct. The classic case involves advocacy by a speaker to a group at a demonstration, or the distribution of leaflets or other literature, advocating lawless action. The Court’s doctrine from Schenck, through Abrams, Bridges, and Dennis, to Brandenburg is discussed at § 29.1. Under Brandenburg v. Ohio, the test for whether the speech is unprotected as advocacy of illegal conduct is whether the speech is “directed to inciting or producing imminent lawless action and is likely to incite or produce such action.” If the speech meets this test, the speech is “unprotected” and there is no further First Amendment review, unless viewpoint discrimination is involved, which always triggers strict scrutiny. (§ 30.1.1.1)

A second kind of case involves advocacy where the speaker indicates a possible intent for the speaker to commit violence. The Court has defined these cases as involving whether the speaker’s statement indicates a “true threat” to commit an act of unlawful violence to a particular individual or group of individuals. Burning a cross on a person’s yard has been regarded as a true threat. True threats are distinguished from the classic cases of advocacy of illegal conduct in that to constitute a true threat the speaker must threaten that the speaker will cause the harm, or that it will be caused by someone the speaker controls, directs, or is involved with in a conspiracy. (§ 30.1.1.2)

A third kind of case involves speech concerning violence done in the context of on-going illegal actions. These cases involve application of special “hate crimes” statutes that make the related
speech a crime independent of the on-going illegal action. The Court has never upheld any “hate crimes” statute as constitutional unless it was narrowly defined to reach only other categories of “unprotected speech,” such as advocacy of illegal conduct, true threats, or fighting words. The best chance for such a statute would probably be to relate the “hate speech” to certain “secondary effects” to trigger intermediate review under standard First Amendment doctrine, rather than being a clear content-based regulation of speech triggering strict scrutiny. Despite this doctrine, hostile work environment cases based on speech have been allowed, the courts viewing the hostile work environment as produced by discriminatory conduct, not speech. (§ 30.1.1.3)

Finally, sometimes statutes or government regulations have attempted to regulate or ban certain kinds of “hate speech” where no other illegal or violent conduct was taking place. Again, the best chance for such a statute would probably be to relate the “hate speech” to certain “secondary effects” to trigger intermediate review. A number of these cases have involved attempt to regulate “hate speech” on university campuses, but in these cases, courts have typically viewed such “hate speech” statutes as unconstitutionally vague. For example, in Doe v. University of Michigan, a district court concluded that words in a university policy requiring that the language must "stigmatize" or "victimize" are “general and elude precise definition.” Further, the "secondary effects" clause of the law required that the language in order to be sanctionable had to "involve an express or implied threat” affecting “an individual’s academic efforts, employment, participation in University sponsored extra-curricular activities or personal safety.” The court noted, “It is not clear what kind of conduct would constitute a ‘threat’ to an individual’s academic efforts.” (§ 30.1.1.4)

FIGHTING WORDS

During the Holmesian deference-to-government era, the Court sustained a conviction in Chaplinsky v. New Hampshire for calling a police officer a "damned Fascist," where a statute banning annoying words was construed to ban only such words as ordinary men know are likely to cause a fight – a breach of the peace. Since Chaplinsky, the Court has not sustained a conviction on the basis of fighting words alone. For example, in 1987, in City of Houston v. Hill, the Court noted that an ordinance that made it unlawful to "oppose, molest, abuse or interrupt any policeman in the execution of his duty" was not limited to fighting words or obscene language, and held that the law was substantially overbroad.

Despite this limited use of Chaplinsky, a few lower federal courts and state courts have upheld convictions, or otherwise failed to protect speech by denying actions for wrongful arrest for speech or imposing civil fines, based upon a “fighting words” rationale, particularly for derogatory comments addressed to police officers, with many of those reported cases involving comments by racial minorities. Even when the defendant prevailed, time, money, and energy had to be expended on the defense. For these reasons, some commentators have argued that Chaplinsky continues to represent a threat to free speech values and should be overruled. (§ 30.1.2)
OBSCENITY

Another area lacking First Amendment protection is obscenity. During the formalist and Holmesian eras, the Court did not define "obscenity" precisely. For example, in 1942 in Chaplinsky, the Court merely stated that the "lewd and obscene" are among "certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem." During the instrumentalist era, in 1973, a majority of the Court agreed in Miller v. California on a test for constitutionally obscene speech. The Miller definition of obscenity requires the trier of fact to decide: (a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to prurient interest, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. Under Miller, the "contemporary community standards" need not be national; a jury can be instructed to apply standards of their state – but the impact of the materials will be judged by their effect on an average person, rather than one particularly susceptible or sensitive.

The Court in the modern natural law era has clarified Miller by holding that the community standard applies only to the first branch of the test, which relates to prurient interest. Whether the work is "patently offensive" under the second branch is determined by a jury under a reasonable person standard, and not by community standards. Whether the work "lacks serious value" is determined by the court as a matter of law, also under a reasonable person test. As a practical matter, whether through VHS, DVD, or Internet access, the adult pornography industry is a multi-billion dollar industry, and even “hard-core” pornography, although officially banned, is available to most who wish to acquire it, in the same manner as many illegal drugs as a practical matter are available to those who wish to purchase them. Despite an occasional prosecution for obscenity involving the sale of adult pornography to a consenting adult, the focus of constitutional law in this area has turned principally to the issue of child pornography and keeping obscene, indecent, or patently offensive images away from children. (§ 30.1.3)

INDECENCY AND CHILDREN

If children are used in the production of pornographic material, the First Amendment does not apply. Given that the purpose of the ban on distribution of materials depicting sexual acts or displays of children is to protect the sexual exploitation of children, the Court held in 1982 in New York v. Ferber that the Miller test is modified so as not to require that the sexual depiction appeal to the prurient interest, or that the conduct be portrayed in a patently offensive manner, or that the material need be considered as a whole. Thus, isolated depictions of children engaging in sexual acts or displays can constitute child pornography under Ferber. Further, while under Miller material that “does no more than arouse, ‘good, old fashioned, healthy’ interest in sex” cannot be obscene, the Court has never indicated that any form of child pornography could meet that test. The state may bar the advertising or sale of child pornography or the possession and viewing of child pornography even in the home.

Indecent or patently offensive material that is considered harmful for children to hear or view is analyzed under standard First Amendment doctrine with the understanding that the state has a
compelling interest in preventing such material from being viewed by children. With respect to libraries and the Internet, the Court has been concerned that attempts to keep non-obscene pornography from children not also bar adults, if there are alternatives that can achieve that result. (§ 30.1.4)

DEFAMATION AND RELATED TORTS

Cases of defamation and related torts involve laws that regulate on the basis of the content of the individual’s speech. Nonetheless, these cases do not involve application of the strict scrutiny approach normally applicable to content-based regulations of speech. Instead, in cases involving defamation and related torts, the Court developed during the instrumentalist and modern natural law eras a number of tests that balance the state’s interest in an effective tort law against the individual’s constitutional interest in the freedom of speech. Although the Court does not make reference to this fact, the balancing done in these cases tracks in rigor a second-order rational review approach, so that where the defamatory act concerns speech about a public official and the constitutional interest in freedom of speech is at its highest, there is a very difficult “actual malice” test to meet, as in New York Times Co. v. Sullivan. Where the plaintiff is a private person and the substance of a defamatory statement makes substantial danger to reputation apparent, the Court held in Gertz v. Robert Welch that the state need not require more than proof of fault, that is, negligence, to find liability, even though the case involves a matter of public concern. However, in recognition of danger from excessive damage awards, a state could permit recovery of presumed or punitive damages only on proof of actual malice. Where the governmental interest in protecting individuals is even stronger and the constitutional interest in free speech is less strong, as in cases that do not involve public officials or matters of public concern, the Court held in Dun & Bradstreet that states can impose liability if fault is shown, and there can be recovery of presumed or punitive damages without showing actual malice. It remains uncertain what rule should be applied in the rare care where the plaintiff is a public official or public figure, but the defamation does not relate to a matter of public concern. (§ 30.2.1.1.A)

In an action to redress an invasion of privacy based on allegedly false reports regarding matters of public interest involving a public official or figure, the Court held in Time, Inc. v. Hill that truth is a complete defense and the plaintiff must prove actual malice, following New York Times Co. v. Sullivan. The Court has not addressed the appropriate standard where the plaintiff is not a public figure or official, but lower courts have split on whether the Sullivan or Gertz test should apply in these “false light” cases. (§ 30.2.1.1.B)

Regarding the tort of invasion of privacy, the Court held in Cox Broadcasting Corp. v. Cohn that civil liability for invasion of privacy by a true publication may not be imposed on a broadcaster for accurately publishing information released to the public in official court records. If private information is illegally intercepted and then delivered to a broadcaster who publishes it, the Court held in Bartnicki v. Vopper that the privacy interests protected by the federal statute were not sufficient to justify its application to a broadcaster of an illegally intercepted communication containing information of public concern where the broadcaster did not illegally intercept the private communication or arrange for its interception. (§ 30.2.1.1.C)
As to other torts, the Court allowed a defendant to be liable for videotaping 15 seconds of the plaintiff’s human cannonball act and playing it on the nightly news. The Court said this was an appropriation of plaintiff’s property. Decisions have also allowed liability for speech under the doctrine of promissory estoppel, as where a newspaper breached a promise of confidentiality to a source who relied on the promise in providing information to the paper. (§ 30.2.1.1.D)

SPEECH RIGHTS OF PRISONERS

Regarding the speech rights of prisoners, standard First Amendment doctrine would suggest that regulations of speech in the non-public forum of a jail should trigger minimum rational review, unless they involve viewpoint discrimination. However, in Beard v. Banks, the Court used second-order rational review, rather than minimum rational review, using a means/end test balancing: (1) the government’s legitimate interest in prison management, (2) the manner in which a regulation achieves benefits, considering less burdensome alternatives, and (3) the burdens imposed on the prisoner, including alternative means of exercising First Amendment rights. For content-neutral regulations affecting prisoners’ out-going mail, the Court adopted in Procunier v. Martinez an intermediate standard of review, which is appropriate, since those regulations affect mail being sent to a public forum or private property. (§ 30.2.1.2)

SPEECH OR POLITICAL ACTIVITY OF GOVERNMENT EMPLOYEES

As developed in Pickering v. Board of Education of Will County, Illinois, and cases following Pickering, a public employee must show that he or she suffered an adverse employment action that was causally connected to participation in a protected activity, such as speaking out on an issue of public concern, in order to establish a claim of unlawful First Amendment retaliation. Once the employee satisfies this initial burden, the burden shifts to the government employer to show a legitimate nondiscriminatory reason for the action, e.g., that the interest of the government in the efficient delivery of its services outweighs the interest of the employee in speaking out, or that the adverse action would have been taken even without the employee’s speech having been made. If the government meets this burden, the burden shifts back to the employee to show that the employer’s actions were in fact a pretext for illegal retaliation.

Because the government has the primary burden under Pickering of defending its decision once the plaintiff has established a prima facie case, this kind of balance reflects what the “base plus six” model of levels of review (Chapter 7) describes as third-order rational review. If the speech is not on a matter of public concern, the government has wide latitude in managing its offices without intrusive oversight. Whether the speech addresses a matter of public concern is determined by its content, form, and context. There have been many cases in which these general principles were applied to particular fact situations. (§ 30.2.2.1)

Prior to the 1960s, the government was given wide latitude to regulate the political activities of government employees under minimum rational review. However, in 1976, in Elrod v. Burns, the Court held that public employees may not be discharged or threatened with discharge solely because of their partisan political affiliation or nonaffiliation. That principle has been extended to hirings, promotions, and transfers of government employees, subject to exceptions where political affiliation is appropriate for the job’s functions, such as being a confidential advisor. (§ 30.2.2.2)
REGULATION OF RADIO AND TELEVISION

In the beginning of broadcast regulation, the Court distinguished between the freedom guaranteed to newspapers and the need for government regulation of the airwaves, based on the rationales of scarcity of broadcast stations and public ownership of the airwaves. Given the greater justification for government regulation, content-based regulations of broadcast radio and television trigger only intermediate scrutiny, not strict scrutiny, as in Red Lion Broadcasting Company v. FCC and FCC v. League of Women Voters. As time has gone by, scarcity has become a less significant issue, and thus the rationale for this different treatment has diminished. The existing precedents, however, have not been overruled. (§ 30.3.1)

Regulation of cable or satellite radio or television stations do not follow the Red Lion approach. Arguments regarding scarcity or public ownership of the airwaves are much less relevant in those contexts. However, the Court has not clarified what should be the standard of review for content-based regulations of cable or satellite broadcasting: intermediate scrutiny with bite, loose strict scrutiny, or regular strict scrutiny. (§ 30.3.1) A loose version of strict scrutiny, calling only for regulations not to be substantially more burdensome than necessary, rather than being the least restrictive alternative, has been used in racial redistricting cases and may become applicable to regulations of cable/satellite broadcasting. (§ 30.4.1)

COMMERCIAL SPEECH

Commercial speech relates to economic transactions, including promotional ads as well as offers. It is not converted into noncommercial speech by occurring in educational, political, or religious contexts, such as an ad for a church, but truly educational, political, or religious speech is analyzed under standard First Amendment doctrine. Until 1975, commercial speech received no First Amendment protection, and under the Equal Protection and Due Process Clauses was given only minimum rational review as an economic regulation. In 1975 in Bigelow v. Virginia, and in 1976 in Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, the Court held that if information is not in itself harmful, the best means for persons to perceive their own best interests is to open the channels of communication. The Court decided, however, that less than strict scrutiny review should be applied to content-based regulations of commercial speech, because truth may be more easily verified by the disseminator and there is little likelihood of chilling free speech because ads lead to commercial profits.

The current approach to commercial speech doctrine was summarized in 1980 in Central Hudson Gas & Electric Corp. v. Public Service Comm’n. In that case, the Court wrote, “For commercial speech to come within the [protection of the First Amendment], it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.” Under this approach, minimum rational review is given to regulations of unlawful, false, or misleading ads, since, without any special First Amendment protection, they would be viewed as standard economic regulations subject to minimum rational review under the Equal Protection and Due Process Clauses. This remainder of the Central Hudson Gas & Electric Corp. v. Public Service Comm’n...
test is more stringent than regular intermediate scrutiny, since the test requires that the regulation
directly advance the government’s interest, rather than merely substantially advance the
government’s interest. This increase in review is what makes the Central Hudson test an example
of intermediate review with bite as described in the “base plus six” model of review (Chapter 7).
The Central Hudson test applies only to content-based regulations of commercial speech. Content-
neutral time, place, or manner restrictions of commercial speech, like content-neutral regulations
of fully protected speech, are tested under basic intermediate scrutiny. Because commercial speech
is “hardy,” the substantive overbreadth doctrine does not apply so that a statute whose overbreadth
consists of unlawful restriction of commercial speech will not be invalidated on that ground. Several
Justices have insisted that commercial speech deserves the same protection as non-commercial
speech, and the Court has been increasingly vigilant in applying the Central Hudson test. (§ 30.3.2)

SPEECH RELATING TO CAMPAIGN FINANCING AND ELECTIONS

In the realm of speech regarding elections, the Court has focused on three situations: regulations of
contributions and expenditures, disclosure requirements, and regulating the process of nominating
and electing candidates. Where strict scrutiny applies, more liberal Justices have been more willing
to find that regulations are narrowly tailored to advance compelling interests, such as preventing
fraud and corruption. Further, more liberal Justices have been more willing to apply intermediate
review to certain regulations in this area. More conservative Justices have typically ruled in favor
of free speech interests held by the people, candidates, political parties, and other political groups.
Usually they have identified less speech-infringing ways for dealing with the concerns that have led
to the government restrictions. (§ 30.4.2)

Regarding regulation of contributions and expenditures, a version of strict scrutiny has been applied
for limitations on campaign expenditures, while a lower level of scrutiny has been used for
limitations on campaign contributions, since the 1976 foundational case of Buckley v. Valeo.
Because statutory limits on contributions had not been shown to prevent candidates and political
committees from amassing the resources needed for effective advocacy, limitations on contributions
could be regarded as a less severe restriction on freedom of expression than limits on expenditures.
While the exact nature of this lower level was unclear for many years, a 5-Justice majority, including
Justice O’Connor, held in 2003 in McConnell v. Federal Election Commission that a version of
intermediate scrutiny should be used for limitations on contributions. It is unclear whether this
doctrine will survive Justice O’Connor’s retirement from the Court in 2006, or whether Justice
Kennedy’s view that campaign contribution regulations should receive higher than intermediate
review will become the majority approach. (§ 30.4.2.1)

Cases on disclosure requirements have been dealt with under the strict scrutiny, direct relationship,
least restrictive alternative test. Even under this standard, however, disclosure requirements have
usually been upheld as directly related to advancing a compelling interest in preventing corruption
of the political process by secret campaign financing or other kinds of secret behavior. (§ 30.4.2.2)

For speech regarding elections to the legislative and executive branches, the Court applies strict
scrutiny to substantial burdens, and second-order rational review to less than substantial burdens.
Most cases involving the choice and election of candidates have involved some aspect of primary
elections. (§ 30.4.2.3) Speech made during the course of election campaigns by judges raise special
First Amendment problems because, unlike their counterparts in the political branches, judges are expected to refrain from catering to particular constituencies or committing themselves on controversial issues in advance of adversarial presentation. Nevertheless, in Republican Party of Minnesota v. White, a 5-Judge conservative majority applied the same strict scrutiny standard to regulations of elections to the judiciary as is applied to regulations of the legislative and executive branches. (§ 30.4.2.4)

CHAPTER 31: FREEDOM OF ASSEMBLY AND ASSOCIATION

The First Amendment provides, in part, “Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” From this text, the Court has inferred a related First Amendment right of freedom of association. As stated in NAACP v. Alabama ex rel. Patterson, “Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association.” (§ 31.1) Severe or substantial burdens on associational rights trigger strict scrutiny. However, not being specifically mentioned in the First Amendment, the freedom of association has been regarded as an unenumerated fundamental right related to the textually specific freedom of assembly, so that less severe burdens on associational rights trigger only second-order rational review. (§ 31.2.1)

Cases involving government limitations on individuals’ freedom of association can arise in a number of different contexts. In several cases governments have implemented anti-discrimination policies by imposing membership requirements on private groups. Thus, for example, requiring membership of women in local rotary clubs was held not to interfere with “intimate association” rights because of the organization’s size, purpose, limited selectivity in choosing members, and the fact that many of their activities, including service activities, took place in the presence of strangers. However, the Boy Scouts were allowed to revoke the membership of an avowed homosexual and gay activist on the ground that the presence of that person would affect in a significant way the group’s ability to advocate its negative viewpoint with respect to homosexuality. (§ 31.2.2)

The government has been allowed to sanction knowing membership in groups alleged to pose a threat of imminent violent action under the advocacy of illegal conduct exception to the First Amendment, discussed at § 30.1.1.1. When a threat of lawless activity is not imminent, the First Amendment applies. Recently, lower federal courts have upheld federal statutes making it a crime to provide material support or resources to a foreign terrorist organization. The theory has been that these statutes do not directly ban expressive association, but rather the conduct of providing material support. Thus, they are analyzed as content-neutral regulations of the harmful secondary effects of such conduct under O’Brien’s intermediate scrutiny approach, discussed at § 29.4.1. Under such intermediate scrutiny, the statutes have been upheld as substantially related to curbing the spread of international terrorism, and not substantially more onerous than necessary. (§ 31.2.3)

Cases involving burdens on associational rights also take place in the context of regulations of political parties and elections. Where the burden is substantial, strict scrutiny applies, as was true where a referendum converted the state’s primary election from a closed primary to a blanket primary in which voters could vote for any candidate regardless of the voter’s or the candidate’s party affiliation. Lesser burdens on associational rights trigger less exacting review, as where the
Court upheld Hawaii’s absolute ban on write-in voting. The Court said it imposed only a limited burden on voters’ rights to make free choices and to associate politically through the vote. (§ 31.2.4)

CHAPTER 32: THE RELIGION CLAUSES OF THE FIRST AMENDMENT

The religion clauses of the First Amendment – the Establishment and Free Exercise Clauses – provide that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” Although these clauses literally apply only to Congress, just as the First Amendment freedom of speech became incorporated into the 14th Amendment Due Process Clause during the 1920s, the First Amendment freedom of religion also became applicable to the states during that time.

THE ESTABLISHMENT CLAUSE

Under the Establishment Clause, four different tests have been used to find an “establishment of religion.” They are: (1) whether the government action has a sole purpose to advance religion, or a principal or primary effect to advance religion, or creates an excessive entanglement between church and state, the so-called Lemon test; (2) whether an objective observer would think the government action was an endorsement of religion; (3) whether the government action is coercing or proselytizing religion; and (4) whether the government action is an unreasonable accommodation of religion given our Nation’s history and traditions. While not a perfect match for the Justices’ views, in general the Lemon test reflects a liberal instrumentalist approach, the “endorsement” test reflects a natural law approach, the “coercion or proselytizing” test reflects a Holmesian approach, and the “history and traditions” test reflects a formalist approach. Thus, the Lemon test is still supported by the liberal instrumentalist Justices currently on the Court, Justices Stevens, Ginsburg, and Breyer, as the precedents decided under Lemon predominantly reflect the liberal policy of a strong separation of church and state. Justice O’Connor advocated replacing the Lemon test with an “endorsement” test, which Justice Souter is willing to follow. Justice Kennedy has focused more on the “coercion” or “proselytizing” of religion. Chief Justice Rehnquist, and Justices Scalia and Thomas, have wanted the analysis to focus more on specific historical examples of accommodation between church and state at the time the Constitution was ratified, as well as specific legislative and executive traditions since ratification. That will likely be the approach of Chief Justice Roberts and Justice Alito. (§ 32.1)
CASES ON AID TO RELIGIOUS SCHOOLS

During the Holmesian deference-to-government era, in 1947, a 5-4 Court upheld in *Everson v. Board of Education* an ordinance that reimbursed parents for the cost of transportation to school, including parochial schools. The majority discussed the history of how law had related to religion in Europe and the American colonies, and noted that the Establishment Clause means that neither the federal government nor a state could set up a church, aid one religion or all, or prefer one over another, influence or punish a person with respect to attending church or professing belief or disbelief in any religion, levy a tax to support religious activities or institutions, or participate in the affairs of religious organizations or groups and vice versa. On the other hand, the majority noted that the Establishment Clause only requires neutrality, not hostility, toward religion. A state may extend its general state law benefits, including fire and police protection, to all its citizens and to all its businesses and charitable organizations, including churches, without regard to religious faith. The majority then classified aid for getting children to school as a general state law benefit. Dissenters spoke of the need for a stronger wall of separation between church and state.

During the instrumentalist era, the Court adopted a more vigorous approach to separation of church and state issues generally. For example, in 1962, in *Engel v. Vitale*, the Court struck down a policy of having teachers, at the beginning of each school day, say a non-denominational prayer. In 1963, in *School District of Abington Township v. Schempp*, the Court struck down a Pennsylvania law that required that at least 10 verses from the Holy Bible shall be read, without comment, at the opening of public school on each school day, with children to be excused upon the written request of their parents or guardian. Regarding aid to religious schools, a number of instrumentalist-era cases struck down statutes that had the effect of providing some benefit to schools run by religious organizations, such as loans of instructional materials or money for field trips, since that aid could be used for religious as well as secular education. The Court permitted statutes that provided secular books to religious schools, since those books could not be used to teach religious material. (§ 32.1.3.1.A)

Since 1986, in the modern natural law era, there has been a decline in the percentage of cases where government action regarding aid to religious schools has been struck down under the Establishment Clause. In a representative, and important, school aid case, Justice O’Connor’s opinion for the Court in 1997 in *Agostini v. Felton* upheld a federal program that channeled money to local agencies to provide remedial education, guidance, and job counseling to students who reside in low income areas and who were failing or at risk of failing, regardless of whether the children attended public or private schools, including religious schools. The teachers were public employees. They were instructed not to introduce any religious matter into their teaching or become involved in the religious activities of the schools. Justice O’Connor observed that certain disqualifying fact characterizations, such as that teachers in this kind of program will inevitably teach religion, have been rendered obsolete by experience, and she overruled earlier cases, such as *School District of Grand Rapids v. Ball*, that had held such a program violated the Establishment Clause. She said that this kind of program does not provide incentives for persons to attend parochial schools where the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and where it is made available to religious and secular beneficiaries on a nondiscriminatory basis. (§ 32.1.3.1.B.1)
RELIGIOUS INFLUENCE IN PUBLIC SCHOOLS

Another kind of Establishment Clause case involves religious influence within the public schools. In 1962, in *Engel v. Vitale*, the Court struck down a policy of having teachers, at the beginning of each school day, say a non-denominational prayer. Students were not compelled to join in the prayer over their parents’ objection. Carrying forward that holding was the decision in *Lee v. Weisman* in 1992 that prayers could not be offered at a high school graduation. Even further, in 2000 in *Santa Fe Independent School District v. Doe*, the Court did not allow a high school to select a student speaker before a football game who was invited and encouraged to give a religious message. The Court said this was impermissible endorsement of religion under the “endorsement” test and also coercive under the “coercion or proselytizing” test. A current controversy is whether teaching “Intelligent Design” in public schools is banned by the First Amendment under these tests.

During the instrumentalist era, concern about possible violation of the Establishment Clause was used by some public schools as a justification for refusing to allow groups with a religious perspective to use school facilities. However, since 1986, that justification has not been successfully invoked where the Court has concluded that denial of equal access to school facilities violated the free speech rights of such groups. For example, in 1993, in *Lamb’s Chapel v. Center Moriches Union Free School District*, the Court held that a school district violated the First Amendment freedom of speech when it excluded a bible club from presenting films in a public forum opened by the school. In 1995, in *Rosenberger v. Rector and Visitors of the University of Virginia*, the Court held that a state university would not violate the Establishment Clause if it funded the publication of a wide variety of student newspapers, including one that expressed religious viewpoints. Justice Kennedy wrote that such a program would be neutral with respect to religion. (§ 32.1.3.1.B.2)

DISPLAY CASES

Not surprisingly, during the instrumentalist era, the pattern of results in the display cases mirrored those in the school aid cases. Liberal instrumentalist Justices found most displays unconstitutional if they contained a religious element. Justice O’Connor focused on whether the displays constituted a government “endorsement” of religion. The formalist perspective focused on whether the displays were consistent with our Nation’s history and traditions.

Reflecting these perspectives, in 1980, in *Stone v. Graham*, a 5-4 Court held that the display of a copy of the Ten Commandments on the walls of public classrooms violated the Establishment Clause as its sole purpose was to advance religion. The decision was *per curiam*, and summarily reached without full briefing and argument. Chief Justice Burger, and Justices Stewart and Blackmun, indicated they would grant certiorari and give the case full consideration. Justice Rehnquist filed a full dissenting opinion, stating that the statute did have a secular purpose of acknowledging the role that our religious heritage, and in particular the Ten Commandments, has played in the social, cultural, and historical development of our Nation. In 1984, in *Lynch v. Donnelly*, a 5-4 Court allowed a creche to be included in a large Christmas display sponsored by a city and held in a private park. Reciting numerous historical examples of “official acknowledgment by all three branches of government of the role of religion in American life,” Chief Justice Burger spoke of the display as giving benefit to religion only in a way that was “indirect, remote, and incidental.” Justice O’Connor did not find an endorsement in *Lynch* because a creche is a traditional
symbol of Christmas, and was accompanied here by many secular elements, such as a banner proclaiming “Season’s Greetings” and, as the dissent acknowledged, a miniature village, including a “Santa Claus' house, a talking wishing well, and cut-out clowns and bears.” (§ 32.1.3.2.A)

Since 1986, the endorsement theory of Justice O’Connor has gained adherents and has been the key factor in several display cases. For example, in 1995 in Capitol Square Review and Advisory Board v. Pinette, the Court allowed a private party (the Ku Klux Klan) to display an unattended religious symbol (a cross) in a traditional public forum (Capital Square, next to the statehouse). Reflecting the controlling votes in the case, Justice O’Connor, concurring, joined by Justices Souter and Breyer, noted that under her endorsement test the presence of a sign disclaiming government sponsorship or endorsement of the Klan cross helped make clear to the community the state’s role. In 2005, in McCreary County, Kentucky v. American Civil Liberties Union of Kentucky, a 5-4 majority composed of Justices Stevens, O’Connor, Souter, Ginsburg, and Breyer held that posting a version of the Ten Commandments in a courthouse was unconstitutional as its “primary purpose” was to advance religion. Again, reflecting the controlling vote in the case, Justice O’Connor, concurring, noted that the “primary purpose” behind the county's display was relevant because, under her endorsement test, it conveyed “an unmistakable message of endorsement to the reasonable observer.” Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, would have upheld the display of the Ten Commandments based on a “history and traditions” formalist approach. Justice Kennedy concluded that the posting did not amount to “coercion or proselytizing” of religion. Departing from his usual natural law approach to constitutional interpretation, Justice Kennedy has routinely rejected the “endorsement” test in favor of adopting the Holmesian view of asking whether any display amounts to “coercion or proselytizing” of religion.

In Van Orden v. Perry, decided the same day as McCreary, the Court allowed a plaque of the Ten Commandments to be included among 16 other plaques on the grounds in front of the Texas Capitol building. Although Justice O’Connor concluded the plaque constituted endorsement of religion, Justice Breyer switched his vote from McCreary on the ground that the circumstances surrounding the display’s placement on the capitol grounds and its physical setting suggested that the state was conveying a message about the historic relation between the standards of the Ten Commandments and the law. It seems likely that a similar result would follow because of the nation’s history in relation to use on coinage and currency of “In God We Trust,” and perhaps the phrase “Under God” in the Pledge of Allegiance. With Justice O’Connor’s retirement from the Court, and given the predicted voting pattern as a Holmesian for Chief Justice Roberts and formalist for Justice Alito, the controlling votes on the Court in Establishment Clause cases may now be, at least for a while, Justice Kennedy’s “coercion or proselytizing” test, rather than Justice O’Connor’s “endorsement” test. (§ 32.1.3.2.B)

FREE EXERCISE CLAUSE

WHAT IS RELIGION

The Court has stated many times that the Free Exercise Clause of the First Amendment applies to protect individuals’ “sincerely held religious beliefs” from regulation by the government. In deciding cases, the Court has been quite willing to assume for purposes of the litigation that the person’s statement that something is a religious belief is “sincerely held.” Indeed, the belief can be
“sincere” even if it is not held by most believers of that person’s religious faith, as long the individual before the court sincerely holds the view. Further, the relevant question is whether the individual “sincerely holds” the belief, not whether a jury, or anyone else, would conclude that belief is true or false. As the Court stated in United States v. Ballard, “Heresy trials are foreign to our Constitution. Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken of mortals does not mean that they can be made suspect before the law.”

In terms of what counts as a “religious belief,” a formalist-era Court stated in 1890 in Davis v. Beason that "the term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will." This definition suggested a monotheistic view of religion. During the instrumentalist era, the Court defined the term more broadly to include a range of monotheistic and non-monotheistic beliefs. For example, in 1965, in United States v. Seeger, the Court interpreted the term “religious belief” in the Universal Military Training and Service Act to include any “given belief that is sincere and meaningful [and] occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God.” Inferences from Justice Scalia’s dissent in 2005 in McCreary, joined by Chief Justice Rehnquist and Justice Thomas, suggests disagreement with these instrumentalist-era views, and would grant Free Exercise Clause protection only to those who believe in monotheistic religions, treating agnostics, atheists, non-monotheistic believers, or believers in “unconcerned deities [e.g., Deists]” as outside the protection of the Free Exercise Clause.

Any attempt to limit the free exercise of religion to only monotheistic views is reminiscent of the free speech views of John Milton in the 17th century, who was prepared to grant free speech to individuals, but not for speech he disagreed with – in his case, “popery, open superstition, impiety, or evil.” Similarly, in John Locke’s A Letter on Toleration in 1689, he justified “placing restrictions on Catholics because of their mixed allegiance, and justified not extending tolerance to atheists because atheists do not have the moral scruples to be trusted in civil society where rights are viewed as having derived from God, and because the atheist has no fear of a future state of punishment.” In any event, any limited view on what beliefs are protected by the Free Exercise Clause would likely be relatively futile in practice. Many Free Exercise Clause claims can be reformulated as “equal treatment” or “equal access” claims under the First Amendment freedom of speech or the Equal Protection Clause. For example, the access of religious groups to public school facilities and support in Lamb’s Chapel, Rosenberger, and other such cases, noted at § 32.1.3.1.B.2, technically involved the First Amendment freedom of speech, not the Free Exercise Clause. Furthermore, as a matter of Court precedents, as phrased by Justice Stevens in Wallace v. Jaffree, “[T]he Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all.” (§ 32.2.1)
STRICT SCRUTINY OR RATIONAL BASIS REVIEW

During the formalist and Holmesian eras, the protection given free exercise of religion mirrored a minimum rational review level of scrutiny. In 1963, in *Sherbert v. Verner*, the instrumentalist-era Court increased the level of protection to strict scrutiny. In *Sherbert*, a state had refused unemployment compensation to an individual, a member of the Seventh-Day Adventist Church, on the ground that she had failed, without good cause, to accept available suitable work when offered, that is, she would not work on Saturday, the sabbath day of her faith. Justice Brennan said that the effect of the law was to put pressure on appellant to forgo the practice of her religion.

Despite this application of strict scrutiny, during the instrumentalist era courts upheld a number of cases of government actions burdening religious beliefs as satisfying a compelling government interest, least restrictive alternative analysis. For example, in *United States v. Lee*, the Court held that Congress could require all employers, including Amish employers, to pay social security taxes, even if such payments would violate the Amish’s religious beliefs. Congress had granted self-employed Amish an exception from participation in the Social Security program, but the choice not to extend that exception to Amish employers was for Congress to make. Similarly, the Supreme Court, and lower federal courts, upheld against free exercise challenges other aspects of economic regulations, such as application of the Fair Labor Standards Act requirements on minimum wages and record keeping requirements to religious organizations conducting “ordinary commercial activities,” or application of other aspects of the tax code.

During the modern natural law era, in 1990, in *Employment Division v. Smith*, the Court reverted to minimum rational review for a law of general applicability that only incidentally burdened the free exercise of religion. The Court concluded strict scrutiny should be used only for: (1) unemployment compensation cases involving denial for refusing to work for religious reasons, such as working on one’s sabbath, as in *Sherbert v. Verner*, based on that precedent being “settled law”; (2) cases involving “hybrid” claims, that is, claims based on a conjunction of free exercise claims combined with other constitutional protections, such as freedom of speech, or, as in *Wisconsin v. Yoder*, the right of parents to direct the education of their children, where the related right would trigger strict scrutiny on its own; or (3) cases involving direct discrimination against religion.

Reacting to the *Smith* case, Congress passed the Religious Freedom Restoration Act of 1993. It called for courts to use strict scrutiny whenever any government substantially burdens a person’s exercise of religion, even if the burden results from a law of general applicability. In *City of Boerne v. Flores*, the Court declared the law invalid as applied to state laws. Congress had sought justify the law as an exercise of power under § 5 of the 14th Amendment (Chapter 28). The Court said that for Congress to exercise its § 5 enforcement power there must be congruence and proportionality between the injury to be prevented and the means adopted to that end. Here, there was no sufficient record of modern instances of laws passed because of religious bigotry. Justice O’Connor said that *Smith* was wrong and should be re-examined, as did Justices Breyer and Souter. (§ 32.2.2.5)

Congress did not surrender. Within three years, Congress passed the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA). That Act requires strict scrutiny of all laws regarding any land use regulation or prison regulation that imposes a substantial burden on religion if: (1) that burden affects, or removal of that burden would itself affect, interstate commerce; or (2)
the burden is imposed in a program or activity receiving federal financial aid; or (3) the burden is imposed in implementation of any regulation that permits individual assessments of the proposed property use. The Act also requires strict scrutiny in any case involving a substantial burden on the religious exercise of a person residing in or confined to an institution that received federal financial assistance or affects commerce with foreign Nations, among the several states, or with the Indian tribes. The new statute does not purport to be an exercise of § 5 power.

The validity of this legislation from the perspective of the Establishment Clause was considered in the context of a prison regulation in Cutter v. Wilkinson. In Cutter, the Court ruled unanimously that the statute was merely an attempt to respect the free exercise rights of prisoners, and did not create an Establishment Clause problem as long as the statute did not “elevate accommodation of religious observances over the institution’s need to maintain order and safety.” Although the Court did not address the issue in Cutter, it seems likely the other aspects of the statute, in addition to the provisions regarding prison regulations, are valid under Congress’ Commerce Clause and Spending Clause powers. The Act as applied to prisons receiving federal financial assistance is almost certainly valid under a Spending Clause analysis (§ 18.3), as is activity affecting interstate commerce under the Commerce Clause (§ 18.2.5). The Commerce Clause also probably makes valid the Act as applied to real estate interests that form part of the housing market. (§ 32.2.2.5)

The Court has been clear that while the government can sometimes grant a religious exemption, or provide for a compelling government interest analysis in statutes otherwise constitutional, the government is under no necessary obligation to do so. For example, as held in Locke v. Davey, the government may deny a public scholarship to an otherwise eligible applicant solely because the applicant planned to use the monies to study for the ministry at a church-related school. (§ 32.2.2.5)

PART II: HOW TO USE THE ET AND ITS CONTENTS

USE OF THE ET

INTRODUCTION

The entire E-Treatise is on a single PDF file that will appear in the middle or on the right hand side of the screen. The Adobe Acrobat program, in which the PDF file is recorded, allows movement in the text through movement icons and links. Also, you may use the search function to look through the book for any page, topic, name, section, or Chapter.

When you open the ET you will be on the title page. The title page identifies various portions of the book to which you can move by putting your cursor under the page number of the relevant topic and making a left click. The operational section looks like this:
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After you have reached a page of text that you wish to examine, you may move up or down on that page by using the arrows at the top or bottom of the right hand column or by dragging the box that appears between the arrows. You may move to any Section or Chapter referred to in the text by making a left click when the cursor points upward to that reference. You may return to the home page by clicking on the vertical bar on the left hand side of the tool bar which appears at the top of the page. You may move to a previous page by clicking on the left-arrow circle that appears in the tool bar at the top of the page.

HELP IN USING THE MANY FEATURES OF THE ET

[The Help materials in the Companion Book to The Path of Constitutional Law appear in the ET under the file heading “Help,” which can be accessed by clicking on this link: Help]

CONTENTS OF THE ET

The ET contains the usual aids to users, including a preface, help materials for using the ET on Adobe Reader, and summary of themes. The ET then contains the full text of the book, along with a New Justices Addendum on Justices who joined the Court after the 2005 Term – Chief Justice Roberts, and Justices Alito, Sotomayor, Kagan & Gorsuch. The ET also contains a Table of Justices listing all 113 Justices who have served on the United States Supreme Court from 1789-2018.

The ET also contains a detailed Table of Contents, Table of Cases, Name Index, Subject Matter Index, Annotated Constitution, Dedication, Author Information, Acknowledgments, Note on Citation, and an Executive Summary, which is the text of the Companion Book to the E-Treatise. All of these sources may be accessed from the Title Page, Page 1 by clicking on links on that page.

PART III: ANNOTATED CONSTITUTION

[The Annotated Constitution materials in the Companion Book to The Path of Constitutional Law appear in the ET under the file heading, “Annotated Constitution,” which can be accessed by clicking on this link: Annotated Constitution]
This 2018 Supplement updates *The Path of Constitutional Law: An E-Treatise* by discussing significant constitutional cases decided by the United States Supreme Court, and other developments in constitutional law, since the cut-off date of the E-Treatise – October, 2006. This involves cases during the 2006-2017 Terms of the Court (from October 2006 - June 2018), along with noteworthy cases decided by lower federal courts or state courts, government action, or academic commentary through June 2018. The Supplement is organized by reference to the section number, page number, and footnote cites in the E-Treatise where earlier cases/articles on the same topic are discussed. A Table of Cases & Name Index for the Supplement appear at the Supplement’s end, along with Current Events on some specially noted political developments or judicial opinions (additions noted in Supplement by numbered links A1, A2, etc.).

Reference is made throughout the Supplement to aspects of the predispositions of the four judicial decisionmaking styles: formalism, Holmesian, natural law, and instrumentalism. Those predispositions are discussed throughout the E-Treatise, with particular focus in Chapter 9 (formalism); Chapter 10 (Holmesian); Chapter 11 (instrumentalism); and Chapter 12 (natural law). A good summary of these predispositions appears at § 6.4.4, including Tables 6.4.1 & 6.4.2.

**Lower Courts’ Obligation to Follow Supreme Court Precedent**

§ 4.3.4, page 94, n.100: In *Bosse v. Oklahoma*, 137 S. Ct. 1 (2016) (*per curiam*), the Supreme Court affirmed the *Rodriguez* principle that a lower court should follow existing Supreme Court precedent, even if it appears to conflict with later decisions, since it is “this Court’s prerogative alone to overrule one of its precedents.”

**Application of the Rule of Lenity for Criminal Statutes**

§ 5.2.2.1.C, page 108, end of section: In *Shaw v. United States*, 137 S. Ct. 462 (2016), the Supreme Court held a defendant can still be guilty of bank fraud even if the defendant’s intent was only the cheat the bank’s customer, not the bank itself, since the bank has a property interest in the customer’s deposits. The statute was clear that “knowingly . . . to defraud” was all that was required, not “purpose” to defraud the bank; hence, there was not sufficient ambiguity in the statute to trigger the “rule of lenity” in interpreting criminal statutes.

**Deference to an Agency’s Interpretation of Regulations**

§ 6.2.3.1, page 154, text following n.84: In *Federal Express Corp. v. Holowecki*, 128 S. Ct. 1147 (2008), an employee had filed an information questionnaire and an attached affidavit asking the Equal Employment Opportunity Commission (EEOC) to “please force Federal Express to end their age discrimination.” Giving deference to the practices of the agency, Justice Kennedy held for a 7-2 Court that what plaintiff filed was properly construed as a request for the agency “to take remedial action to protect the employee’s rights or otherwise settle [the] dispute.” *Id.* at 1157-61. Adopting a formalist focus on literal text, and a concern with clear, bright-line rules, discussed in the E-Treatise at § 9.2.1.1 nn.4-6, Justice Thomas concluded that plaintiff had not filed a “charge” since “the filing at issue in this case did not state that it was a charge and did not include a charge form; to the contrary, it included a form that expressly stated it was for the purpose of ‘pre-charge’ counseling.” *Id.* at 1161 (Thomas, J., joined by Scalia, J. dissenting). Thomas expressed concern that no one can tell precisely whether a filing is a charge. *Id.* at 1168. Justice Alito joined the majority opinion, which reflected more Holmesian deference to legislative/executive practice, for which he has a slight affinity, as discussed in “New Justices Addendum,” page 1627, nn.31-33.

In *Christopher v. SmithKline Beecham Corp. d/b/a Glaxo-SmithKline*, 132 S. Ct. 2156, 2165-69 (2012), a 5-4 Court held that pharmaceutical sales representatives qualify as outside salespersons to which the Fair Labor Standards Act (FLSA) provisions on overtime compensation do not apply, despite a contrary Department of Labor (DOL) regulation. The DOL’s view was not entitled to *Auer* deference because of inconsistencies with the language of the FLSA, lack of public participation in development of the regulation, and unfair surprise to pharmaceutical companies given traditional practice. Without regard to *Auer* deference, the 4-Justice dissent concluded the language of the FLSA treats these salespersons as covered. *Id.* at 2174-79 (Breyer, J.,
joined by Ginsburg, Sotomayor & Kagan, JJ., dissenting). See also Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117 (2016) (while agencies are free to change policies, longstanding policies may have “engendered serious reliance interests,” and “[u]nexplained inconsistency” in a policy change is a “reason for holding an interpretation to be an arbitrary and capricious change” which receives no Chevron deference); Decker v. Northwest Environmental Defense Center, 133 S. Ct. 1326 (2013) (Auer deference applied to the EPA’s interpretation of its own Clean Water Act rules); City of Arlington v. FCC, 133 S. Ct. 1863 (2013) (Chevron deference applies to an agency’s interpretation of its own jurisdiction); id. at 1877 (Roberts, C.J., joined by Kennedy & Alito, JJ., dissenting) (no deference until court decides agency has jurisdiction). The majority’s view mirrors arbitration law, where deference applies to an arbitrator’s decision the arbitrator has jurisdiction. See Rent-A-Center West, Inc. v. Jackson, 130 S. Ct. 2772, 2777 (2010). Perhaps because Chevron and Auer favor interpretations of the current Administration, conservative Justices increasingly raised concerns about the doctrines from 2008-2016. See United Student Aid Funds, Inc. v. Bible, 136 S. Ct. 1607 (2016) (Thomas, J., dissenting from denial of certiorari) (citing his, Roberts, C.J., and Scalia, J., concerns); Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149-58 (10th Cir. 2016) (Gorsuch, J., concurring); United States Telecom Ass’n v. FCC, 855 F.3d 381, 417-26 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc).

For more cases on agency authority to regulate, see EPA v. Homer City Generation, 134 S. Ct. 1584 (2014) (Chevron deference given to EPA interpretation regulating pollution emitted in one state causing harm in other states) (Scalia, J., joined by Thomas, J., dissenting) (Alito, J., took no part in the consideration or decision of the case); Utility Air Regulatory Group v. EPA, 134 S. Ct. 2427 (2014) (Chevron deference given to EPA regulations of greenhouse gases for sources already regulated for conventional pollutants, which covers over 95% of regulated sources, but unreasonable to assert statutory authority to apply regulations to new sources solely on basis of greenhouse gas emissions); id. at 2449-50 (Breyer, J., joined by Ginsburg, Sotomayor & Kagan, J., concurring in part and dissenting in part) (Chevron deference should be given to regulations of both sources); id. at 2455 (Alito, J., joined by Thomas, J., concurring in part and dissenting in part) (unreasonable to apply regulations to both sources); Perez v. Mortgage Bankers Ass’n, 135 S. Ct. 1199 (2015) (agencies need not follow notice-and-comment rulemaking for new interpretation of regulations, just as they do not for initial interpretation, abrogating Paralyzed Veterans of America v. D.C. Arena L.P., 117 F.3d 579 (D.C. Cir. 1997)); Michigan v. EPA, 135 S. Ct. 2699 (2015) (unreasonable for EPA not to consider “costs” before deciding “whether” regulation is “appropriate and necessary” under the Clean Air Act); id. at 2714-15 (Kagan, J., joined by Ginsburg, Breyer & Sotomayor, JJ., dissenting) (taking “costs” into account in deciding “how much to regulate” adequate); Texas v. United States, 809 F.3d 134 (5th Cir.2015) (preliminary injunction granted preventing implementation of policy directive providing legal presence for illegal immigrants who are parents of citizens or lawfully permanent residents which was adopted without notice-and-comment rulemaking), aff’d by equally divided court, 136 S. Ct. 2271 (2016); Clean Air Council v. Pruitt, 862 F.3d 1 (D.C. Cir. 2017) (2-1 panel decision) (EPA’s decision to stay implementation of portions of a final rule concerning methane and other greenhouse gas emissions without notice-and-comment rulemaking invalid as “arbitrary, capricious, [and] in excess of . . . statutory . . . authority.”).

Use of Legislative History to Help Interpret a Statute

§ 6.2.3.1, page 155, text following n.87: Consistent with the observations in the E-Treatise, in Samantar v. Yousuf, 130 S. Ct. 2278, 2291-92 (2010), a majority of the Court used legislative history to help confirm the text and purpose of a statute, even where the text and purpose, considered alone, were not ambiguous or vague. The three formalist Justices on the Court – Justices Scalia, Thomas, and Alito – all wrote separate concurrences criticizing the use of legislative history. Id. at 2293 (Alito, J., concurring); id. at 2293 (Thomas, J., concurring in part and concurring in the judgment); id. at 2293 (Scalia, J., concurring in the judgment).

Natural Law Interpretation as the “True Originalist” Approach to Constitutional Interpretation

§ 6.3.4, page 166, end of section; § 7.1 n.4, page 175; § 8.4.2.2, page 276, end of section: For further discussion of Madison’s natural law style of interpretation reflecting a “true originalist” form of interpretation, and its difference from Thomas Jefferson’s more formalist approach, see R. Randall Kelso, Contra Scalia, Thomas, and Gorsuch: Originalists Should Adopt A Living Constitution, 72 U. Miami L. Rev. 112 (2017) (available at: http://libguides.stet.edu/kelsomaterials).
Substantially Flawed Reasoning Part of Whether Decision Was Substantially Wrong


Supreme Court’s Teague Doctrine Does Not Limit Collateral Relief in State Courts

§ 7.3.4.1, page 226, text following n.222: In Danforth v. Minnesota, 128 S. Ct. 1029, 1032-33 (2008), a 7-2 Court held that the Teague doctrine is based on the Court’s statutory and prudential authority to regulate remedies provided in federal courts, not constitutional authority over state courts. Thus, state courts are free to adopt their own standards for retroactive application of Court decisions, consistent with a conservative predisposition for states’ rights and instrumentalist support for new rights to be applied retroactively to existing cases. The dissent viewed the Teague doctrine as a matter of substantive federal law, thus binding on states under the Supremacy Clause. Id. at 1047-48 (Roberts, C.J., joined by Kennedy, J., dissenting).

Demographics of Supreme Court Justices

§ 7.4.2, page 231, text preceding n.233: Given confirmation in 2009 of Justice Sonia Sotomayor, who is Catholic, and in 2010 of Justice Elena Kagan, who is Jewish, from 2010-16 there were 6 Catholics and 3 Jews on the Court, meaning for the first time there were no Protestants. With Justice Scalia’s death on February 13, 2016, and his replacement by Justice Neil Gorsuch on April 10, 2017, the Court had 5 Catholics, 3 Jews, and 1 Episcopalian. This is still true, as Justice Kennedy’s replacement, Justice Brett Kavanaugh, sworn in October 6, 2018, is also Catholic. Overall, 4 women and 110 men have served on the Court. For discussion of all of the post-2006 additions to the Supreme Court, see “New Justices Addendum” at pages 1627-1628.

Appointment of Federal Court Judges

§ 7.4.2, page 234, end of section: Given increased use of filibusters to block judicial and executive appointments, the Senate Democratic majority voted 52-48 on November 21, 2013 to change filibuster rules to prevent filibusters on all nominations of lower federal court judges and executive branch officials. Filibusters were preserved for nominations to the Supreme Court. To overcome a Democratic filibuster, the Republican-controlled Senate voted on April 6, 2017 to prevent filibusters on Supreme Court nominations as well, paving the way for Justice Neil Gorsuch to be confirmed on a 54-45 vote. While the privilege of a Senator from a state to block a vote on a nomination of a judge from their state to a district court or Court of Appeals position was preserved, in 2018 Republicans removed that privilege in some Court of Appeals nominations, while preserving it for district court judges, whose jurisdiction would be all within that Senator’s state. The President’s power to make “recess” appointments was limited, to an extent, in NLRB v. Noel Canning, 134 S. Ct. 2550 (2014), discussed in this Supplement at § 19.4.3.1, n.112.

Discretionary Appeal by Certiorari and Direct Appeal to the Supreme Court

“Caustic” Language Used in Supreme Court Opinions


Deciding Cases in the Lower Federal Courts

§ 7.4.3, page 238, n.251: On randomness of judicial assignment, see Adam S. Chilton & Marin K. Levy, Challenging the Randomness of Panel Assignment in the Federal Courts of Appeals, 101 CORNELL L. REV. 1 (2015); Tod C. Peppers, Katherine Vigilante & Christopher Zorn, Random Chance or Loaded Dice: The Politics of Judicial Designation, 10 U. N.H. L. Rev. 69 (2012) (analyzing cases from 1925-1988). Unlike Supreme Court practice, where a Justice must be alive when the opinion is announced for the vote to count, for lower federal courts the judge’s vote may count if the judge has completed work on a case, even if the judge dies before the opinion is announced and the judge’s vote is critical for a 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).

Given the increased workload of federal courts, but few judicial positions added, the practice has increased of asking “senior” judges – judges who have retired from full-time service – to aid deciding cases, particularly sitting on three-judge appellate panels. Although unlikely to be adopted by the Court, given practice and precedent, one article has argued such use is unconstitutional. David R. Stras & Ryan W. Scott, Are Senior Judges Unconstitutional?, 92 CORNELL L. REV. 453 (2007) (problem of “bureaucratic senior judge,” who performs administrative duties, and “itinerant senior judge,” who sits on courts outside home district or circuit). But see Hon. Betty Binns Fletcher, A Response to Stras & Scott’s Are Senior Judges Unconstitutional?, 92 CORNELL L. REV. 523 (2007) (concerns are much ado about nothing). See also Radar v. ING Groep, N.V., 497 F. App’x 171 (3rd Cir. 2012), cited at 82 U.S.L.W. 3465 (Feb. 11, 2104) (designating district court judge residing in 5th Circuit to 3rd Circuit panel did not violate Constitution or 28 U.S.C. §§ 44, 46, 292). Consistent with practice, retired Justices O’Connor and Souter have continued to sit on Court of Appeals panels (more than 175 cases for O’Connor and more than 400 for Souter).

Judicial Recusal

§ 7.4.4, page 240, text following n.258: In Caperton v. A.T. Massey Coal Co., Inc., 129 S. Ct. 2252 (2009), a 5-4 Supreme Court held that Justice Benjamin of the West Virginia Supreme Court violated the Due Process Clause when he denied a motion to recuse himself where he was the key vote to reverse a trial court judgment of $50 million against a company whose president had contributed $3 million to his campaign for election. Justice Kennedy noted the importance of objective standards that do not require proof of actual bias, and there was a serious risk of bias because a person with a personal stake in a case had a significant influence in the judge’s election by contributing a large proportion of campaign funds. Id. at 2259-67. Reflecting Holmesian and formalist preference for certainty and predictability, the dissent refused to extend Due Process beyond two “well established” rules: a judge may not preside over a case in which he or she has a direct, personal, substantial pecuniary interest, and a judge may not preside over a criminal contempt case that resulted from the defendant’s hostility toward the judge. Id. at 2267-72 (Roberts, C.J., joined by Scalia, Thomas & Alito, J.J., dissenting). See also Williams v. Pennsylvania, 136 S. Ct. 1899 (2016) (recusal required when judge had significant, personal involvement as a prosecutor in defendant’s case) (Roberts, C.J., and Thomas & Alito, J., dissenting); Rippo v. Baker, 137 S. Ct. 905 (2017) (per curiam) (proper question to ask is whether “the probability of actual bias on the part of the judge is too high,” not whether the judge is actually biased); In re Chinniah, 670 Fed. App’x 59 (3rd Cir. 2016) (party’s dissatisfaction with prior ruling no basis for recusal); L.G. v. S. L., 88 N.E.3d 1069 (Ind. 2018) (one party’s attorney providing recommendation letter for judge for appointment to state Supreme Court not grounds for recusal).

Formalist/Holmesian Views on International Sources Use in Constitutional Interpretation

§ 9.2.2.1, page 288, n.45 & § 10.2.2.1, page 312, text following n.37: See also 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 involves “the language, structure, drafting and ratification of the U.S. Constitution . . . .”).

“Originalism” of Justices Scalia and Thomas


Instrumentalist Views on Using International Sources in Constitutional Interpretation


Natural Law Views on Using International Sources in Constitutional Interpretation


Political Considerations Post-2006

§ 14.4, page 462, end of section: The unpopularity of President Bush’s economic and military policies permitted the Democrats to seize majorities in Congress in the 2006 mid-term elections, and for those majorities to increase in the 2008 election, along with the election of Democratic candidate Barack Obama for President. In the short term, the prediction in the E-Treatise of equal competitive balance between Republicans and Democrats is likely to remain, as shown by Republicans taking a majority in the House of Representatives in 2010, a majority in the Senate in 2014, and the close Presidential election in 2016. See A1. In the long term, a society committed to modern natural law values, combined with current demographic trends, is likely to favor more current Democratic policy initiatives, rather than current Republican party traditionalism, as suggested by the discussion in the E-Treatise at § 15.4 & §§ 16.1, 16.2 & 16.3.

Notes on the 2011 “Arab Spring”

§ 15.4.2, page 491, n.87: Consistent with the analysis in the E-Treatise, during the Spring of 2011, a number of countries in the Islamic World had “democratic revolutions,” trying to move their countries either from Stage 2 monarchies into Stage 3 fledgling democracies, or State 4 crony-capitalist states into State 5 pluralistic democracies with general respect for human rights. The success of such efforts, at least through 2018, has been decidedly mixed.

Same-Sex Marriage Around the World

§ 16.1, page 509, end of second full paragraph: Consistent with the analysis in the E-Treatise, 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 across Mexico. By 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. Australia, Finland, Germany, and Malta approved same-sex marriage in 2017. A number of other countries recognize some form of civil union or registered partnerships, including Andorra, Austria, Chile, Croatia, Czech Republic, Cyprus, Czech Republic, Ecuador, Estonia, Greece, Hungary, Italy, Japan, Ireland, Israel, Liechtenstein, Northern Ireland, Slovenia, Switzerland, and Taiwan. See generally Same-Sex Marriage Around the World, Encyclopedia Britannica (www.britannica.com). Same-sex marriage became lawful in the entire United States by Obergefell v. Hodges, 135 S. Ct. 2584 (2015), discussed in this Supplement at § 27.3.3.1.A n.181.
Origins of Judicial Review


Alternatives to Judicial Review

§ 17.1.4, page 571, n.67: 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).

International Standards of Judicial Review

§ 17.1.4, page 572, n.68: Rights review in Constitutional Courts around the world use one basic approach: proportionality. See Alec Stone Sweet & Jud Mathews, Proportionality Balancing and Global Constitutionalism, 47 COLUM. J. TRANSNATIONAL LAW 72, 75 (2008). 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. Id. at 75-76. 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. Id. at 75. This inquiry into “legitimacy” is best understood as part of the “suitability” inquiry into whether the government is rationally advancing a “legitimate” government interest.

Despite surface differences between American judicial review, summarized in the E-Treatise at § 7.2.1, versus international proportionality review, each approach uses the same building blocks in developing the relevant standard of review. Each is based on a means/end analysis, focusing on the ends the government is seeking to advance and the means by which those ends are advanced. Each focuses on whether 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 American constitutional review, there are three answers to these questions. Under minimum rationality review, the government action only has to be rationally related to advancing a legitimate government end, and the challenger bears the burden of proving it is not. 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 suitability – the first stage of proportionality review – tracks a rational review approach by asking whether “the means chosen and the ends pursued is rational and appropriate, given a stated policy purpose.” Id. at 75.

As with means/end reasoning, there are three different approaches in American constitutional law to the second building block issue of whether the government action is narrowly tailored to not burden individual rights more than is 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 only must be not substantially more burdensome than necessary, not the least burdensome alternative. Under minimum rationality review, the government must only not impose an irrational burden. 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 stated goals.
Jud Mathews & Alec Stone Sweet, *All Things in Proportion? American Rights Review and the Problem of Balancing*, 60 EMORY L.J. 797, 803 (2011). 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.” *Id.* 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.” *Id.* at 803. 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 more from the perspective of ensuring that “no factor of significance to either side has been overlooked” *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 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).

Nature of Judicial Review

§ 17.1.4, page 573, end of section: The Supreme Court has often noted, “[W]e are a court of review, not of first view.” *Nautilus, Inc. v. Biosig Instruments, Inc.*, 134 S. Ct. 2120, 2131 (2014), citing *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005). Thus, when adopting or clarifying some aspect of the law, the Court’s usual practice is to remand to give lower courts first chance to apply that standard to the facts. *Id.*

Remedial Issues

§ 17.2.2.1.B, page 584, text preceding n.108: In addition to § 1988, a number of federal statutes grant attorneys’ fees in appropriate cases. See, e.g., *Hardt v. Reliance Standard Life Insur. Co.*, 130 S. Ct. 2149, 2152 (2010), quoting *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 694 (1983) (statutory language that “the court in its discretion may allow a reasonable attorney’s fee and costs of action to either party” permits court to award attorney’s fees as long as the party had achieved “some degree of success on the merits” even if the party could not claim to be a “prevailing party”); *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749 (2014) (determining what cases are “exceptional” for award of attorneys’ fees under Patent Act must be done on a “case-by-case” basis); CRST Van Expedited, Inc. v. EEOC, 136 S. Ct. 1642 (2016) (in a case involving employment discrimination under Title VII of the Civil Rights Act of 1964, defendant may be entitled to attorney’s fees based on plaintiff’s “frivolous, unreasonable, or groundless” litigation, even where the case was dismissed on procedural grounds, rather than the court concluding the litigation was “frivolous” on the merits).

*See also Astrue v. Ratliff*, 130 S. Ct. 2521, 2524 (2010) (absent clear statutory language, fees are payable to the litigant, not the attorney, and thus are subject to an administrative offset by the government under 31 U.S.C. §§ 3711(a), 3716(a) to satisfy a pre-existing debt owed the government); *Lefemine v. Wideman*, 133 S. Ct. 9 (2012) (plaintiff who obtained injunction was a “prevailing party” entitled to attorneys’ fees, even if no monetary damages were obtained); *Goodyear Tire & Rubber Co. v. Haeger*, 137 S. Ct. 1178 (2017) (under court’s inherent authority sanctions to pay other sides’ legal fees for bad-faith conduct limited to legal fees the innocent party inured solely because of the misconduct); *Deutsch v. Henry*, 2016 WL 7165993 (W.D. Tex. 2016) ($175,673 sanction against lawyer for “myriad [over 100] court filings” that falsely accused opposing attorney of “racism, cowardice, and anti-Semitism”; lawyer also fabricated an e-mail purportedly sent by opposing attorney in order to gain advantage in a discovery dispute).
Original Jurisdiction in Lower Federal Courts: Bivens Rule and Statutes of Limitations

§ 17.2.2.1, page 587, n.120: The recent trend of the Court limiting Bivens actions continued in Wilkie v. Robbins, 127 S. Ct. 2588, 2600-05 (2007) (because plaintiff had an administrative process, and ultimately a judicial process, for vindicating complaints, no Bivens action was necessary). Reflecting formalist reluctance to imply private rights of action, discussed at § 17.2.2.1 nn.119-20, formalist Justices Scalia and Thomas indicated that they would restrict Bivens to its precise facts and not consider any new Bivens actions. Id. at 2608 (Thomas, J., joined by Scalia, J., concurring). Reflecting the instrumentalist greater embrace of implying private rights of action to help ensure effective redress of grievances, discussed at § 17.2.2.1 n.118, Justices Stevens and Ginsburg concluded that Robbins’ alternative remedies were not adequate, and would have granted him a Bivens action. Id. at 2613-17 (Ginsburg, J., joined by Stevens, J., concurring in part and dissenting in part). See also Mirmehdi v. United States, 662 F.3d 1073 (9th Cir. 2011) (no Bivens action for aliens not lawfully in the United States to sue for damages for wrongful detention pending deportation).

In Ziglar v. Abbasi, 137 S. Ct. 1843, 1857-58 (2017) (Sotomayor, Kagan & Gorsuch, JJ, not participating), citing cases from 1983-2012 where no Bivens action was implied, the Court reemphasized again a reluctance to imply new Bivens actions, particularly if “special factors counseling hesitation” exist, such as whether “the Judiciary is well suited, absent congressional action or instruction, to consider and weight the costs and benefits of allowing a damage action to proceed.” The Court refused to grant a Bivens action for detainees suspected of terrorism to challenge detention policy, and remanded to consider whether a Bivens action should exist on prisoner abuse claims; officials were granted qualified immunity. Id. at 1873 (Breyer, J., joined by Ginsburg, J., dissenting) (Bivens actions should exist on both claims; qualified immunity should be decided on remand). See also Hernandez v. Mesa, 137 S. Ct. 2003 (2017) (case remanded for lower court to apply “special factors” test to determine if Bivens action should exist for cross-border shooting of Mexican national).

For courts to have jurisdiction, the case must be brought within any applicable statute of limitations. Traditionally, courts have permitted tort plaintiffs to avoid statutes of limitations if they did not know, nor with the exercise of reasonable diligence could have known, that they had a claim against the defendant – the so-called “discovery rule.” See, e.g., Horn v. A.O. Smith Corp., 50 F.3d 1365 (7th Cir. 1995). Some courts have extended this rule to permit government agencies to bring civil enforcement actions if the government agency could not have “discovered” the violation earlier. See James R. MacAyeal, The Discovery Rule and the Continuing Violation Doctrine as Exceptions to the Statute of Limitations for Civil Environmental Penalty Claims, 15 VA. ENVTL. L.J. 589, 601-10 (1996). This exception has been scaled back by Gabelli v. SEC, 133 S. Ct. 1216 (2013), which held that while use of the discovery rule may be justified when a victim seeks damages, it is not justified when penalties are sought by a government agency, unless the statute clearly provides for such jurisdiction. See also CTS Corp. v. Waldburger, 134 S. Ct. 2175 (2014) (discovery rule in CERCLA (Comprehensive Environmental Response, Compensation, and Liability Act) only preempts state statute of limitations, not statutes of repose) (Ginsburg, J., joined by Breyer, J., dissenting).

Discretionary Appeal by Certiorari and Direct Appeal to the Supreme Court

§ 17.2.2.2, page 587 n.122: See Supplement at page 2043 (§ 7.4.3, page 235, text following n.241).

Bivens Actions versus Habeas Corpus Review

§ 17.2.2.2, page 588, n.128: For state and federal prisoners, whether an action can be brought as a civil rights action, as in Wilkinson, or only under a deferential habeas corpus standard, discussed at § 23.2.2.3, as in Preiser, can make a difference. Relying on Skinner v. Switzer, 131 S. Ct. 1289 (2010) (prisoner may seek DNA testing of crime-scene evidence in § 1983 action, since testing might not reduce prisoner’s sentence), a court held in Davis v. U.S. Sentencing Commission, 716 F.3d 660 (D.C. Cir. 2013), that a federal prisoner could challenge disparities in prison sentences for crack versus powder cocaine in a civil rights Bivens action, since victory would not necessarily reduce prisoner’s sentence, as sentencing discretion would remain).
Limited Review of State Court Decisions

§ 17.2.2.3, page 589, n.133: In *Hawaii v. Office of Hawaiian Affairs*, 129 S. Ct. 1436 (2009), the Court held, applying *Michigan v. Long*, 463 U.S. 1032 (1983), that federal jurisdiction exists over state court decisions where there is an interweaving with federal law and the adequacy and independence of any state law ground is not clear from the opinion. The Supreme Court of Hawaii had enjoined the sale of certain Hawaiian trust lands, based in part on its reading of a 1993 Apology Resolution, passed by Congress, in which “Congress has clearly recognized that the native Hawaiian people have unrelinquished claims over the ceded lands.” 129 S. Ct. at 1442-43. *See also Walker v. Martin*, 131 S. Ct. 1120 (2011) (in a habeas corpus case a federal court will not review a claim rejected by a state court if its decision rests on independent state law grounds).

Limitations on the Jurisdiction-Stripping Power of Congress

§ 17.2.3.1, page 595, text following n.158: *See also McKenzie v. U.S. Citizenship and Immigration Serv., District Director*, 761 F.3d 1149 (10th Cir. 2014) (Immigration Act of 1990 transfers authority over naturalization from judiciary to Attorney General; thus incorrect birth date on naturalization certificate cannot be corrected by federal courts). For limitations imposed on Congress’ jurisdiction-stripping power by the 5th Amendment Due Process Clause and Article I, § 9, cl. 2 Habeas Corpus Clause for enemy combatants, *see Boumediene v. Bush*, 128 S. Ct. 2229 (2008), discussed in this Supplement at § 27.4.4.8 text preceding n.418; Janet Cooper Alexander, *Jurisdiction-Stripping in a Time of Terror*, 95 Cal. L. Rev. 1193 (2007). For additional cases on jurisdiction-stripping issues, *see* Supplement § 20.1.4.3, page 849, text following n.96.

Jurisdiction of the Bankruptcy Courts

§ 17.2.3.1, page 596, n.162: *See also Stern v. Marshall*, 131 S. Ct. 2594, 2600-01, 2620 (2011) (not being Article III judges, bankruptcy judges lack constitutional power to decide state common law claims arising in bankruptcy); *id.* at 2621-22 (Breyer, J., joined by Ginsburg, Sotomayor & Kagan, JJ., dissenting). *Cf.* *Executive Benefits Ins. Agency v. Arkison*, 134 S. Ct. 2165 (2014) (fraudulent conveyance claims cannot be decided by non-Article III judges under *Stern*, but bankruptcy judge may issue findings of fact and conclusions of law to be adopted by an Article III district court).

Appeal from Article I Courts to Supreme Court

§ 17.2.3.1, page 597, end of section: *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).

Personal Jurisdiction and the Due Process Clause

§ 17.2.3.2, page 598, n.169: Since 2010, the Court has limited “general jurisdiction” by recasting the (a) “fair play and substantial justice” and (b) “continuous and systematic” and “substantial” language from *International Shoe*, 326 U.S. 310, 316-18 (1945), 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); *Daimler AG v. Bauman*, 134 S. Ct. 746, 761 (2014) (no general jurisdiction over Daimler-Chrysler AG, despite Mercedes-Benz USA having substantial contacts in California and being Daimler’s agent for distributing Daimler-manufactured vehicles); *Williams v. Yamaha Motor Co. Ltd.*, 851 F.3d 1015 (9th Cir. 2017) (no general jurisdiction over Yamaha Motor Co. Ltd. over premature corrosion in outboard motors, despite activities of Yamaha Motor Corp., USA importing motors and marketing them in California); *Livnut v. Palestinian Authority*, 851 F.3d 45 (D.C. Cir. 2017) (no general jurisdiction in U.S. courts for Jewish
worshipers shot by Palestinian Authority guards while praying at Joseph’s Tomb in the West Bank since Authority’s home – headquarters, officials and primary activities – are in the West Bank). 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 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.

See generally Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco County, 137 S. Ct. 1773 (2017) (no general jurisdiction in California since Bristol-Myers Squibb (BMS) is incorporated in Delaware and is headquartered in New York (with more than 50% of its workforce in New York or New Jersey), despite 5 research labs in California employing 160 people, 250 sales representatives in California, and state-government advocacy office in Sacramento; no specific jurisdiction for 592 residents from other states, who joined with 86 California residents suing in products liability, negligent misrepresentation, and misleading advertising relating to BMS’s drug Plavix, since their claims did not “arise from” activities in California, but from advertising and use in their own states); id. at 1786 (Sotomayor, J., dissenting) (since the non-residents’ claims resulted from same conduct in their states that occurred in California, their lawsuit did “relate to” those activities, and under International Shoe and its progeny, the claim only needs to “arise out of, or relate to” forum activities for specific jurisdiction; it does not have to be caused by forum activities).

For recent cases on “specific jurisdiction,” see J. McIntyre Machinery, Ltd. v. Nicastro, 131 S. Ct. 2780 (2011) (single sale to New Jersey customer by an American distributor of a British corporation’s products, unaccompanied by regular course of sales, or advertising or marketing in the state, insufficient for specific jurisdiction); id. at 2791 (Breyer, J., joined by Alito, J., concurring in the judgment); id. at 2794 (Ginsburg, J., joined by Sotomayor & Kagan, JJ., dissenting); Walden v. Fiore, 134 S. Ct. 1115 (2014) (specific jurisdiction does not exist in Nevada against federal Drug Enforcement Agency when they seized funds while plaintiffs were at the Atlanta airport on a stopover to Nevada, because due process does not permit a court to exercise personal jurisdiction over the defendant (DEA) whose sole contact with the forum is knowledge that plaintiff has connections to that state); Williams v. Romarm, S.A., 756 F.3d 777 (D.C. Cir. 2014) (shooting victim in D.C. cannot pursue claims in U.S. courts against Romanian manufacturer of gun sold in U.S. through U.S. distributor which made its way into D.C.); ITL International Inc. v. Constelna SA, 669 F.3d 493 (5th Cir. 2012) (use of Gulfport, Mississippi seaport to ship candy to Costa Rica insufficient to grant specific jurisdiction in Mississippi in contract dispute between manufacturer and distributor); Fulbright & Jaworski LLP v. Eighth Judicial District Court, 342 P.3d 997 (Nev. 2015) (out-of-state firm cannot be sued in Nevada merely by representing Nevada client in out-of-state real estate transaction, where no solicitation of client took place in Nevada). But see MacDermid, Inc. v. Deiter, 702 F.3d 725 (2nd Cir. 2012) (Toronto-based employee’s e-mail to her personal e-mail account in Canada triggered minimum contacts supporting specific jurisdiction in Connecticut when e-mail routed through employer’s computer server in Connecticut); Metzger v. Temple of Ancient Dragon, Inc., 2016 WL 7242102 (S.D. Cal. 2016) (Michigan based company that displayed images of California-based competitor’s custom designs on its website created minimum contacts for specific jurisdiction, despite less than 1% of its sales occurred in California). Cf. Lightfoot v. Cendant Mortgage Corp., 137 S. Ct. 553 (2017) (corporate charter of Fannie Mae which authorizes Fannie Mae “to sue and be sued, and to complain and to defend, in any court of competent jurisdiction, State or Federal” does not grant federal courts subject-matter jurisdiction over all cases involving Fannie Mae, but merely allows suit in any court, state or federal, that already possesses subject-matter jurisdiction, i.e., a “court of competent jurisdiction”); TC Heartland LLC v. Kraft Foods Group Brands LLC, 137 S. Ct. 1514 (2017) (domestic corporation resides only in state of incorporation under patent venue statute).

Forum Non Conveniens Doctrine

§ 17.2.3.2, page 599, n.172: See also 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; *Atlantic Marine Constr. Co. v. United States Dist. Court for Western Dist. of Texas*, 134 S. Ct. 568 (2014) (appropriate way to enforce forum-selection clause in contract is through forum non conveniens, and valid forum-selection clause should be given controlling weight in all but the most exceptional circumstances unrelated to parties’ convenience (since they have waived those arguments in entering into the clause), such as when public-interest factors are involved, such as administrative difficulties from court congestion, local interest in having localized controversies decided at home, or having trial of a diversity case in a forum at home with the law).

**Eleventh Amendment Immunity Waiver Cases**

**§ 17.2.4.2, page 602, n.191:** 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).

**Eleventh Amendment State University & Local Entity Immunity Cases**

**§ 17.2.4.2, page 604, n.204:** See also *Ali v. Carnegie Institute of Washington*, 2017 WL 1349280 (Fed. Cir. 2017) (plaintiff suit to be added to patent regarding controlling flow of genetic information dismissed, as one of two existing patent holders a professor at public University of Massachusetts, and thus an indispensable party in the case who has state 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 doctrine); *United States v. University of Massachusetts, Worcester*, 812 F.3d 35 (1st Cir. 2016) (student loan association is an arm of the state); *Kriepke v. Wayne State Univ.*, 807 F.3d 768 (6th Cir. 2015) (same); *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.”).

**Eleventh Amendment Ex Parte Young & Related Immunity Cases**

**§ 17.2.4.2, page 605, text following n.208:** 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. *Id.* at 1650-51 (Roberts, C.J., joined by Alito, J., dissenting) (“This is a matter for the State to sort out, not a federal judge.”). See also *Nichols v. Alabama State Bar*, 815 F.3d 726 (11th Cir. 2016) (Alabama State Bar is an arm of the state and thus entitled to immunity; since plaintiff did not sue any state official, no need to address Ex Parte Young exception); *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 immunity when sued by disappointed Bar test-taker); *Clark v. Virginia Dep’t of State Police*, 793 S.E.2d 1 (Va. 2016) (state police department immune from suit alleging discrimination against veterans under Uniformed Services Employment and Reemployment Rights Act).

**Limitations on Younger Abstention Doctrine**

**§ 17.2.4.4, page 617, text following n.262:** In *Sprint Communications, Inc. v. Jacobs*, 134 S. Ct. 584 (2014), an unanimous Court held that Younger abstention is limited to: (1) parallel, pending state criminal proceedings; (2) state civil proceedings that are akin to criminal proceedings; and (3) cases that implicate a state’s interest in enforcing the orders and judgments of its courts. Younger does not apply merely if there is a parallel state-court civil proceeding on same subject matter. *Cf. ReadyLink Healthcare, Ic. v. State Comp. Ins. Fund*, 754 F.3d 754 (9th Cir. 2014) (applying Sprint).
§ 17.4.4, page 618, n.271: See also Bell v. City of Boise, 709 F.3d 890 (9th Cir. 2013) (Rooker-Feldman does not bar federal court damage action not challenging legality of state court judgments).

Standing: The Injury-in-Fact Requirement

§ 17.3.1.1, page 621, n.280 & § 17.3.1.3.A, page 646, n.396: In Summers v. Earth Island Institute, 129 S. Ct. 1142 (2009), a 5-4 Court held that certain environmental organizations lacked standing to challenge the United States Forest Service concerning its decision to conduct a salvage sale of timber without providing notice, comment, and appeal. Justice Scalia said plaintiffs had not identified any application of the challenged regulation that threatened imminent and concrete harm. Id. at 1149-51. In dissent, Justice Breyer said that the test should be whether there is a realistic likelihood that the challenged future conduct will, in fact, recur and harm the plaintiff. Id. at 1155-56 (Breyer, J., joined by Stevens, Souter & Ginsburg, JJ., dissenting). Consistent with his concurrence in Lujan, discussed in the E-Treatise at § 17.3.1.3.D n.432, Justice Kennedy said the case would be different if Congress had sought to provide redress for a concrete injury, rather than merely a procedural right to sue not related to a concrete injury. Id. at 1153 (Kennedy, J., concurring).

In Town of Chester v. Laroe Estates, Inc., 137 S. Ct. 1645 (2017), the Court clarified that intervenors who wishes to pursue relief not requested by a plaintiff must have their own injury-in-fact. On other recent injury-in-fact cases, see Clapper v. Amnesty International USA, 133 S. Ct. 1138 (2013) (plaintiff failed to show sufficiently “concrete” injury, based on alleged likelihood that their communications with foreign individuals, whom they believe to be likely targets of FISA wiretapping, will be wiretapped); id. at 1155 (Breyer, J., joined by Ginsburg, Sotomayor & Kagan, J.J., dissenting) (likelihood of government surveillance “sufficiently certain”); Drake v. Obama, 664 F.3d 774 (9th Cir. 2012) (“birthers” – voters, taxpayers, state representatives, and active military personnel – all lack “concrete” injury to sue President Obama); Hedges v. Obama, 724 F.3d 170 (2nd Cir. 2013) (foreign activists do not face “sufficient threat” of indefinite detention to have standing to challenge provision of National Defense Authorization Act purporting to authorize indefinite detention of al-Qaeda, Taliban, or associated enemy combatants); Wagner v. Cruz, 179 F. Supp. 3d 743 (D. Utah 2016), aff’d, 662 Fed. App’x 554 (10th Cir. 2016) (no standing for “birther” complaint against Ted Cruz; plaintiff has only “generalized grievance” and harm is “hypothetical”); American Freedom Law Center v. Obama, 821 F.3d 44 (D.C. Cir. 2016) (complaint by holders of compliant plans under Affordable Care Act that program for persons holding non-compliant plans would cause increases in their insurance “speculative”); West Virginia ex rel. Morrissey v. United States Dep’t of Health and Human Services, 827 F.3d 81 (D.C. Cir. 2016) (State lacks concrete injury to challenge decision to leave enforceability of the Affordable Care Act’s minimum coverage requirement to States during a three-year transitional period). But see Susan B. Anthony List v. Driehaus, 134 S. Ct. 2334 (2014) (organizations alleged sufficient threat of future enforcement of Ohio statute criminalizing false statements about candidates); Oklevueha Native American Church of Hawaii, Inc. v. Holder, 676 F.3d 829 (9th Cir. 2012) (Church has standing alleging right to religious use of marijuana infringed by federal drug laws); Libertarian Party of Los Angeles County v. Bowen, 709 F.3d 867 (9th Cir. 2013) (lack of past prosecution not dispositive when Secretary of State issued specific warning on enforcement); Safari Club Int’l v. Jewell, 842 F.3d 1280 (D.C. Cir. 2016) (Safari club can sue on behalf of its members to challenge Department of Interior decision, without notice-and-hearing rulemaking, prohibiting importation of elephant trophies, despite not seeking a permit; applying for a permit would have been futile); Real v. City of Long Beach, 852 F.3d 929 (9th Cir. 2017) (standing despite not applying for tattoo permit).

In Hollingsworth v. Perry, 133 S. Ct. 2652 (2013), a 5-4 Court held that proponents of California referendum Proposition 8 lacked standing to appeal a district court’s order declaring Proposition 8 unconstitutional, as they had only a “generalized grievance” shared by other citizens, based on Allen v. Wright, 468 U.S. 737, 754 (1984); Lujan v. Defenders of Wildlife, 504 U.S. 555, 573-74 (1992); and Arizonans for Official English v. Arizona, 520 U.S. 43, 65 (1997). 133 S. Ct. at 2662-63. If the supporters had been appointed “agents” of the state they might have standing to represent the state’s interest, but none of the traditional indicia of agency existed. Id. at 2666-67. The dissent admitted that standing in federal court is a matter of federal law, and thus it was not binding on federal courts that the California Supreme Court had concluded under California law these supporters would have standing in state courts. Nevertheless, the dissent concluded that because the
supporters would have had a “state-defined status,” that should be sufficient to give them a concrete injury under federal law. 133 S. Ct. at 2668 (Kennedy, J., joined by Thomas, Alito & Sotomayor, JJ., dissenting). Under the majority’s decision, state citizens cannot ensure a referendum will be enforced if a district court finds it unconstitutional and the requisite state official, Governor or Attorney General, refuses to appeal. Id. Cf. Arizona State Legislature v. Arizona Indep. Redistr. Comm’n, 135 S. Ct. 2652 (2015) (legislature has standing to sue referendum-imposed redistricting commission) (Scalia, J., joined by Thomas, J., dissenting).

In Spokeo, Inc. v. Robins, 136 S. Ct. 1540 (2016), the Court muddied the waters a bit in defining “injury-in-fact.” In Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992), cited in the E-Treatise at § 17.3.1.1 n.280, the Court noted an “injury-in-fact” is “(a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical.” In Spokeo, the Court said an “injury-in-fact” must be (a) “particularized”—that is, not “undifferentiated” or a “generalized grievance”; and (b) “concrete,” with “concrete” defined as “real” and “not abstract” – which seemingly means not “conjectural or hypothetical.” If so, then the shift in terminology from Lujan does not change standing doctrine; it merely moves “concrete” to define part (b) of Lujan analysis. On the other hand, if in Spokeo the Court means there are now three requirements for standing: (a)(1) “concrete,” as defined in Spokeo; (a)(2) “particularized,” as defined in Spokeo; and (b) “actual or imminent, not conjectural or hypothetical,” it is unclear how (a)(1) differs from (b).

Standing: Injury-in-Fact Requirement in Redistricting Cases

§ 17.3.1.3.A, page 647, n.400: In Gill v. Whitford, 138 S. Ct. 1916 (2018), the Court reaffirmed United States v. Hays’ holding that plaintiffs in one district do not have standing to remedy problems in other districts.

Congressional Authority to Create Standing

§ 17.3.1.3.D, page 657, n.439: The breadth of Congress’ ability to create standing, as suggested by Justices Kennedy and Souter’s concurrence in Lujan v. Defenders of Wildlife, discussed in the E-Treatise at § 17.3.1.3.D n.432, was confirmed in Massachusetts v. EPA, 127 S. Ct. 1438 (2007). The case involved a challenge to the failure of the EPA to consider whether it should regulate greenhouse gas emissions from new motor vehicles. Justice Stevens’ opinion held that (1) where Congress had “authorized this type of challenge to EPA action,” citing Justice Kennedy and Souter’s concurrence in Lujan, and (2) the plaintiff is a state seeking to protect sovereign interests, and thus on federalism grounds is entitled to “special solicitude” in standing analysis, the state had standing to protect its coast line that might be harmed by rising sea levels caused by global warming. Id. at 1453-55. The decision reflected natural law respect for precedent, citing Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907) (Georgia has standing to protect its citizens from air pollution originating in Tennessee). 127 S. Ct. at 1454. Four Justices concluded the claimed injury was too speculative (which, as a matter of formalist logic, without “special solicitude” for the state, may be true), and global warming was best addressed by the legislature and executive, not litigation (Holmesian focus on deference to government). Id. at 1463-64 (Roberts, C.J., joined by Scalia, Thomas & Alito, JJ., dissenting).

Qui Tam Actions and Standing

§ 17.3.1.3.E, page 659, end of section: See also Brooks v. Dunlop Manufacturing Inc., 702 F.3d 624 (Fed. Cir. 2012) (Congress’ elimination of qui tam filings of false patent marketing complaints, and retroactive application to cases in progress, does not violate due process).

The “Zone of Interests” Test for Standing: The Flast Case

§ 17.3.1.4.B, page 661, n.450: The trend of limiting Flast to its precise facts continued in Hein v. Freedom From Religion Foundation, Inc., 127 S. Ct. 2553 (2007). In Hein taxpayers lacked standing to challenge executive action possibly violating the Establishment Clause, since it was not a congressional appropriation under the Spending Clause. Id. at 2559 (Alito, J., joined by Roberts, C.J., and Kennedy, J., announced judgment of the Court) (Flast not overruled). Formalist Justices Scalia and Thomas would have overruled Flast, as Flast’s reasoning is inconsistent with modern standing doctrine, as discussed at § 17.3.1.4.A n.447. Id. at 2573-74 (Scalia, J., joined by Thomas, J., concurring in the judgment). Consistent with an
instrumentalist view supporting *Flast*, as noted at § 17.3.1.2.D nn.364-68, four Justices dissented, including Justice Souter, who often followed the reasoning of instrumentalist-era precedents, as discussed at § 12.3.2, pages 377-38. *Id.* at 2584 (Souter, J., joined by Stevens, Ginsburg & Breyer, J., dissenting). See also *Arizona Christian School Tuition Organization v. Winn*, 131 S. Ct. 1436 (2011) (tax credits to religious organizations are not appropriations under the Spending Clause; *Flast* does not apply); *Id.* at 1450 (Kagan, J., joined by Ginsburg, Breyer & Sotomayor, J., 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 11-foot tall Latin cross because money was part of “lump-sum appropriation,” not specific legislative appropriation).

The “Zone of Interests” Test for Standing in Statutory Interpretation Cases

§ 17.3.1.4.B, page 665, end of section: The suggestion in the E-Treatise of limited applicability of the statutory “zone of interest” test was confirmed in *Lexmark International, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014) (clarifying that the “zone of interest” test is statutory, and not a prudential principle of equitable discretion; injuries easily fell within “zone of interests” protected by false advertising provision of Lanham Act). See also *Bank of America Corp. v. Miami*, 137 S. Ct. 1296, 1301 (2017) (Miami is an “aggrieved person” under Fair Housing Act (FHA) because city’s economic injuries from banks’ alleged discriminatory lending practices within “zone of interests” of FHA); *Id.* at 1307 (Thomas, J., joined by Kennedy & Alito, J.J., concurring in part and dissenting in part) (Miami not within FHA “zone of interests”).

Equitable Discretion and the Newdow Case


Result of a Case Becoming Moot

§ 17.3.3.1, page 677, n.523: Normally when a case becomes moot, the Court vacates any judgment rendered below. However, the Court noted in *Alvarez v. Smith*, 130 S. Ct. 576, 581 (2009), quoting *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 25 (1994), 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.’”

Application of Mootness Exceptions

§ 17.3.3.1, page 678, text following n.531: Regarding “capable of repetition, yet evading review” exception, see *Azar v. Garza*, 138 S. Ct. 1790 (2018) (while standard abortion rights challenges, such as *Roe v. Wade*, 410 U.S. 113, 125 (1973), implicates this exception, unusual case of pregnant minor who entered the country illegally and challenged policy of Office of Refugee Resettlement not to facilitate abortion rendered moot when, after prevailing in a lower federal court, she got early morning abortion before government could seek stay and appeal). Regarding “voluntary cessation” exception, see *Brown v. Buhman*, 822 F.3d 1151 (10th Cir. 2016) (case challenging Utah’s bigamy law mooted when prosecution announced policy of only prosecuting for bigamy based on allegations of misrepresentation, fraud, or abuse). Regarding collateral consequences exception, while most courts will hold that right to “nominal damages” will save any otherwise moot case, the 11th Circuit Court of Appeals recently held differently. See *Flanigan’s Enterprises, Inc. of Ga. v. City of Sandy Springs*, 868 F.3d 1248 (11th Cir. 2018) (7-5 en banc) (given repeal of statute regulating sale of sex toys, case mooted despite claim for nominal damages), and cases from other Circuits cited therein.
The Political Questions Doctrine

§ 17.3.4.5, page 688, n.574: In *Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421 (2012) (Breyer, J., dissenting), 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 existed because the State Department had declined to follow the law, citing its long-standing policy of not taking a position on the political status of Jerusalem. On remand, the law was held unconstitutional, as discussed in this Supplement at § 19.3.2, text following n.42. See also *Committee on Oversight and Government Reform v. Holder*, 979 F. Supp. 2d 1 (D.D.C. 2013), citing, inter alia, *Committee on the Judiciary v. Miers*, 558 F. Supp. 2d 53 (D.D.C. 2008) (political questions doctrine does not preclude court from enforcing subpoena by congressional committee against Attorney General, and committee, backed by the House, has standing under *Raines v. Byrd*, 521 U.S. 811 (1997), discussed in the E-Treatise at § 17.3.1.4.D, page 668, nn.482-84).

Severability Analysis


Remedial Powers of Courts

§ 17.4.4, page 699, n.613: 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 implement a systemwide cap reducing California prison population by 37,000 to address overcrowding which denied prisoners with medical disorders and mental conditions right to be free from cruel and unusual punishment. Formalist and Holmesian Justices concluded order exceeded court’s institutional capacity. *Id.* at 1951 (Scalia, J., joined by Thomas, J., dissenting); *id.* at 1959 (Alito, J., joined by Roberts, C.J., dissenting). Application for a stay was denied in *Brown v. Plata*, 134 S. Ct. 1 (2013) (Alito, J., grant stay) (Scalia, J., joined by Thomas, J.) (grant stay; dissolve injunction). See also *Braggs v. Dunn*, 2017 WL 27773833 (M.D. Ala. 2017) (court order regarding Alabama prison system).

While the Supreme Court has not taken up the issue, in a recent concurring opinion Justice Thomas indicated his belief district courts lack power to impose “nationwide injunctions” when they find existing government action unconstitutional. *Trump v. Hawaii*, 138 S. Ct. 2392, 2425-29 (2018) (Thomas, J., concurring).

Breadth of the Necessary and Proper Clause

§ 18.1.2, page 711, text following n.44: Consistent with the observations made in the E-Treatise text regarding “appropriate” legislation under the Necessary and Proper Clause being equivalent to the “rationally related to legitimate government interest” review under the Equal Protection Clause, the Court adopted such a flexible approach in *United States v. Comstock*, 130 S. Ct. 1949 (2010), where 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. The Court also indicated that whether Congress could think some activity has a substantial effect on interstate commerce under the Commerce Clause is governed by the same minimum rationality review. *Id.* at 1956-57. Justices Kennedy and Alito indicated their belief the Necessary and Proper Clause analysis, and the Commerce Clause analysis, may well require more justification than a mere Equal Protection rational relationship test. *Id.* at 1966-68 (Kennedy, J., concurring in the judgment); *id.* at 1968-69 (Alito, J., concurring in the judgment). Justice Thomas, joined by Justice Scalia, was more forceful in rejecting the majority’s Necessary and Proper Clause analysis. *Id.* at 1975-77 (Thomas, joined by Scalia, J., in all but Part III-A-1-b, dissenting). However, the 5-Justice majority of four liberal instrumentalists (Justices Stevens, Ginsburg, Breyer, and Sotomayor), and deference-to-government Holmesian (Chief Justice Roberts), adopted this view. See also *United States v. Kebodeaux*, 133 S. Ct. 2496 (2013) (Necessary and Proper Clause authorizes Congress to enact Sex Offender Registration and Notification Act (SORNA)); *id.* at 2510 (Thomas, J., joined by Scalia, J., as to Parts I, II & III-B, dissenting) (SORNA usurps police power of states).
§ 18.2.5, page 735, end of section: In National Federation of Independent Business v. Sebelius, 132 S. Ct. 2566 (2012), the same 5-Judge majority that decided Comstock, discussed in this Supplement at § 18.1.2 text following n.44, upheld the individual mandate provision of the Patient Protection and Affordable Care Act of 2010, so-called Obamacare. The four liberal instrumentalists would have upheld the mandate provision, which required individuals to purchase health insurance by 2014 or pay a penalty, under the Commerce Clause. In their view, the mandate was regulating commerce, since at some point every individual will need health care, and thus individuals by being alive should be viewed as participating in the health care market. 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). In contrast, Chief Justice Roberts, in a viewed shared by the other four Justices, concluded the mandate was not a “regulation” of commerce, but rather “mandating” commerce. Since the Commerce Clause only gives Congress the power “to Regulate Commerce,” these five Justices concluded the mandate could not be authorized by the Commerce Clause. Id. at 2586-93 (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). Reflecting his Holmesian deference-to-government predisposition, however, Chief Justice Roberts noted a judicial restraint maxim cited in Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1936), discussed in the E-Treatise at § 17.1.3.2, 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, Roberts concluded the mandate could be viewed as a tax, and constitutional under Congress’ power to tax. 132 S. Ct. at 2593-96. This aspect of the case is discussed in this Supplement at § 18.3.1 end of section. The Court’s striking down the Act’s attempt to deny states all Medicaid funding if states did not choose Medicaid expansion, is discussed in this Supplement at § 18.3.2.2 text following n.166. Statutory interpretation considerations are discussed in this Supplement at § 32.2.2.5, text following n.263, including A4. On this case, see generally R. Randall Kelso, A Review of UNPRECEDENTED: THE CONSTITUTIONAL CHALLENGE TO OBAMACARE BY JOSH BLACKMAN (2015) (available at: http://libraryguides.stcl.edu/kelsomaterials).

It is not clear how important the distinction between “regulating” versus “mandating” commerce will be in later cases. Earlier congressional acts mandating individual action, such as requirements to file a tax return, to register for selective service, or to report for jury duty, see 132 S. Ct. at 2627 n.10 (Ginsburg, J., opinion), did not involve the Commerce Clause, but other clauses in Article I, § 8, where congressional power is phrased more broadly (power to tax, raise armies, and right to a jury trial). The real future risk is that some states or cities might impose commercial mandates on citizens, and the federal Commerce Clause is no barrier to that. The better argument, applicable to federal, state, and local regulation, involves asking if a mandate violates due process. Requiring every person to “buy and consume broccoli at regular intervals,” see Florida ex rel. Bondi v. United States Dept. of Health and Human Serv., 780 F. Supp. 2d 1256, 1289 (N.D. Fla. 2011), might violate due process, as not being rationally related to any legitimate government interest. So, too, might be a ban on soda drinks larger than 16 ounces at New York City eateries, street carts, and stadiums. Cf. New York Statewide Coalition of Hispanic Chambers of Commerce v. New York City Dep’t of Health and Mental Hygiene, 16 N.E.3d 538 (N.Y. Court of Appeals 2014) (Board of Health exceeded its bounds of its lawfully delegated authority when it promulgated such a rule). However, requiring everyone to buy health insurance to avoid a problem of free-riders is more clearly rational. See Florida ex rel. Atty. Gen. v. United States Dept. of Health and Human Serv., 648 F.3d 1235, 1363 (11th Cir. 2011) (Marcus, J., concurring in part and dissenting in part) (“Congress rationally found that the individual mandate would address the powerful economic problems associated with cost shifting from the uninsured to the insured and to health care providers . . . .”). While some individuals might never need emergency care, and thus are not part of the cost-shifting problem, there is no way in advance to tell who those individuals would be, and thus it is rational to regulate the entire class. See, e.g., New York City Transit Authority v. Beazer, 440 U.S. 568, 590-94 (1979) (since no way to tell who would be heroin drug recidivists, rational to ban everyone in methadone treatment program from Transit Authority jobs), discussed in the E-Treatise at § 26.1.1.1 nn.30-31.

For additional recent commerce clause cases, see Taylor v. United States, 136 S. Ct. 2074 (2016) (because Congress has authority to regulate the national market for marijuana, as in Gonzales v. Raich, 545 U.S. 1
(2005), Hobbs Act’s commerce element, 18 U.S.C. § 1951, is satisfied when defendant robs or attempts to rob a drug dealer’s drugs or drug proceeds, even if the drugs were homegrown (Thomas, J., dissenting) (government should have to prove robbery itself significantly affected interstate commerce). On other marijuana cases, see Wilson v. Lynch, 2016 WL 4537376 (9th Cir. 2016) (federal law banning any person who is “an unlawful user of or addicted to any controlled substance” from owning a gun validly applied to Nevada citizen who had medical marijuana card under Nevada law, as possession unlawful under federal law; law does not violate Second Amendment as being reasonably related to significant government interest, a hybrid form of intermediate review); Vasquez v. Lewis, 2016 WL 4436144 (10th Cir. 2016) (Kansas patrol officers did not have reasonable suspicion to detain and search out-of-state motorist just because he resided in Colorado, a state permitting medical marijuana use).

Power of the Federal Government Over Foreign Commerce

§ 18.2.6.1, page 736, text following n.135: A Circuit split over whether the power over “foreign commerce” is broader than “domestic commerce,” or whether 3 Commerce Clause categories in United States v. Lopez applies to “foreign commerce,” continued in United States v. Bollinger, 798 F.3d 201, 215-16 (4th Cir. 2015) (United States can convict U.S. citizen who molested young girls while living in Haiti as acts “demonstrably effect” the foreign commercial sex industry, without regard to whether effect was “substantial” as required by Lopez; broader viewed adopted by Fourth and Ninth Circuits; Lopez seems to apply in the Third, Sixth, and D.C. Circuits). See also United States v. Baston, 818 F.3d 651 (11th Cir. 2016) (under either approach international sex trafficker living in U.S. can be ordered to pay restitution for victim’s prostitution in Australia), cert. denied, 137 S. Ct. 850 (2017) (Thomas, J. dissenting) (Court should consider the issue).

Power of the Federal Government Over Indian Tribes


Tribes generally have power to try in tribal courts non-tribal members who commit torts on tribal property. See Dolgencorp, Inc. v. Miss. Band of Choctaw Indians, 746 F.3d 167 (5th Cir. 2015), affirmed by equally divided court sub nom. Dollar Gen. Corp. v. Miss. Band of Choctaw Indians, 136 S. Ct. 2159 (2016). See also United States v. Bryant, 136 S. Ct. 1954 (2016) (since Sixth Amendment right to counsel provision does not apply to tribal court proceedings, and the Indian Civil Rights Act of 1968 only requires appointed counsel when a sentence of more than one year’s imprisonment is imposed, defendant’s prior domestic violence convictions without appointed counsel are valid, and can count toward finding “two prior final convictions for domestic violence,” making the third such act of domestic violence “within . . . Indian country” a federal crime under the Violence Against Women and Department of Justice Reauthorization Act of 2005).

The Taxing Power and the Affordable Care Act (Obamacare)

§ 18.3.1, page 741, end of section: In National Federation of Independent Business v. Sebelius, 132 S. Ct. 2566 (2012), Chief Justice Roberts, joined by Justices Ginsburg, Breyer, Sotomayor and Kagan, concluded that the individual mandate requirement on individuals to purchase insurance or pay a penalty in the Patient Protection and Affordable Care Act of 2010 (Obamacare) could be viewed as a tax on individuals who do not have health insurance. Chief Justice Roberts pointed out that “functionally” the provision operates as a tax, is collected by the Internal Revenue Service, and the amount of the payment varies depending on a
person’s income, just like a tax. Id. at 2593-96. The Court has always held that Congress has the power to tax generally, and is not limited to taxing to advance other congressional powers in Article I, § 8. See United States v. Butler, 297 U.S. 1, 65-67 (1936). A four-Justice dissent rejected 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. 132 S. Ct. at 2651-52 (joint opinion of Scalia, Kennedy, Thomas & Alito, JJ., dissenting). For Justices who are more analytically minded, as are formalist (Scalia, Thomas & Alito) and natural law (Kennedy) Justices, such analytic considerations are more important, as discussed in the E-Treatise at § 2.4, pages 30-34. For functionalists, like Holmesian (Roberts) and instrumentalist (Ginsburg, Breyer, Sotomayor, and Kagan) Justices, the functional aspect of a law are more critical, as discussed in the E-Treatise at § 2.4, pages 30-34. Chief Justice Roberts also noted the Court is not bound by what Congress calls a piece of legislation, but rather by its actual effect. 132 S. Ct. at 2594-95 (Roberts, C.J., opinion). Justice Scalia had acknowledged that principle in Clinton v. City of New York, 524 U.S. 417, 464-69 (1998) (Scalia, J., joined by O’Connor, J., and joined in part by Breyer, J., concurring in part and dissenting in part), discussed in the E-Treatise at § 19.4.2.2 n.93, noting the Line-Item Veto Act was not a line-item veto, but an impoundment, because it operated as an impoundment, despite the Congress’ terminology.

Conditions on Spending and Severability in the Affordable Care Act (Obamacare)

§ 18.3.2.2, page 744, text following n.166: An additional aspect of National Federation of Independent Business v. Sebelius, 132 S. Ct. 2566 (2012) (Affordable Care Act of 2010, so-called Obamacare), involved whether the federal government could deny all Medicaid funding if a state chose not to join in Medicaid expansion. Although no spending condition had been held coercive in the post-1937, New Deal era, seven Justices held the threat to remove all Medicaid funding, which might involve 10-40% of a state’s budget, was coercive. Id. at 2575, 2607 (Roberts, C.J., joined by Breyer & Kagan, JJ., as to Part IV); id. at 2662-66 (joint opinion of Scalia, Kennedy, Thomas & Alito, JJ., dissenting). Justices Ginsburg and Sotomayor disagreed with this conclusion. Id. at 2641-42 (Ginsburg, J., joined by Sotomayor, J., as to Part V).

A different 5-Justice majority concluded that the threat to remove all funding could be severed from the Act. Id. at 2607-08 (Roberts, C.J., joined by Breyer & Kagan, J., as to Part IV); id. at 2642 (Ginsburg, J., joined by Sotomayor, J., as to Part V). The 4-Justice joint dissent would have held this threat rendered the entire Medicaid expansion unconstitutional. Id. at 2668-71 (joint opinion of Scalia, Kennedy, Thomas & Alito, JJ., dissenting). Combined with the view that the individual mandate was also unconstitutional, the joint dissent would have ruled the entire Act unconstitutional. Id. at 2671-77. Once the mandate provision is constitutional under the Taxing power, discussed in this Supplement at § 18.3.1 end of section, the majority’s analysis is consistent with the Court’s usual practice to sever out provisions if possible. 132 S. Ct. at 2607-08 (Roberts, C.J., joined by Breyer & Kagan, J., as to Part IV); id. at 2642 (Ginsburg, J., joined by Sotomayor, J., as to Part V). See generally E-Treatise § 17.4.2, page 695, nn.600-602; INS v. Chadha, 462 U.S. 919, 931-34 (1983) (unconstitutional legislative veto in Chadha, and by analogy 200-plus other statutes, severable), discussed at § 17.4.2, page 694 & § 19.4.2.1, page 796. Under the Act, the federal government will pick up all costs of expanding Medicaid until 2016, 95% in 2017, 94% in 2018, 93% in 2019, and 90% thereafter. While the threat to remove all funding is gone, there is still pressure on states to expand since their citizens must pay federal taxes to support expansion in states which do participate. The decision will also likely increase the number of cases where spending conditions will be challenged. As discussed in the E-Treatise § 18.3.2, page 744, n.166, no court ever held the threat in the No Child Left Behind Act to remove federal support for education unless states adopted national testing standards was unconstitutional. The federal government routinely waived requirements under the Act to ensure states would not be denied funding.

Validity of Treaties versus Statutes

§ 18.3.9, page 750, n.189: 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.
Self-Executing versus Non-Self-Executing Treaties

§ 18.3.9, page 752, n.198: In Medellin v. Texas, 128 S. Ct. 1346 (2008), the Court held 6-3 that a treaty is not domestic law enforceable by the domestic courts unless Congress has either (1) enacted implementing statutes or (2) the treaty itself conveys an intention that it is “self-executing” and is ratified on those terms. Here, the International Court of Justice (ICJ) had held that Texas had violated international law by not informing a criminal defendant of his right to have his consulate notified of his detention in a case tried in Texas state courts. Chief Justice Roberts noted that none of the sources of international law created binding federal law in the absence of implementing legislation. Since 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.” Id. at 1363-64. Consistent with Holmesian and natural law resort to legislative and executive practice, the Chief Justice stressed that the executive branch had adhered to its view that the relevant treaties did not create domestically enforceable law. Id. at 1361. Justice Stevens did not join the majority opinion because he viewed the opinion as potentially creating a presumption of treaties being non-self-executing, a view he did not share. Id. at 1372-73 (Stevens, J., concurring in the judgment). A three-Justice dissent noted the Court had many times found treaty provisions self-executing although they contained no text on point. Applying a factor balancing test – the instrumentalist predisposition for such tests discussed in the E-Treatise at § 4.2.2 text following n.48 – Justice Breyer found seven reasons which, taken together, gave the ICJ judgment domestic effect. These included: the objective of the ICJ Protocol was to provide a forum for compulsory settlement; this case concerns matter 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. Id. at 1383-89 (Breyer, J., joined by Souter & Ginsburg, JJ., dissenting).

Ability to Increase Congressional Regulatory Power by the Treaty Power

§ 18.3.9, page 752, n.199: In Bond v. United States, 134 S. Ct. 2077 (2014), the Court dodged the issue of whether a treaty could augment Congress’ power by ruling the Chemical Weapons Convention Implementation Act of 1998 did not reach an attempt by a wife to injure minimally her husband’s lover with a chemical compound. A three-Justice concurrence concluded the statute literally applied, but was unconstitutional as outside Congress’ domestic power, and not justified by treaty power, 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).

Property Clause and Status of Puerto Rico

§ 18.3.10, page 752, text following n.200: See Puerto Rico v. Sanchez, 136 S. Ct. 1863 (2016) (Puerto Rico is not a State, but derives authority from being a United States Territory, and thus is not a separate sovereign for the Double Jeopardy Clause of the Fifth Amendment) (Breyer, J., joined by Sotomayor, J., dissenting). But see Puerto Rico v. Franklin California Tax-Free Trust, 136 S. Ct. 1938 (2016) (Puerto Rico has long been treated by Congress as a State for purposes of the Bankruptcy Code; 1984 Amendment excluding Puerto Rico as a State for the purpose of defining who may be debtor under Chapter 9, thus preventing Puerto Rico from authorizing its municipalities to seek Chapter 9 relief, does not alter treating Puerto Rico as a State for other purposes, including Chapter 9's preemption provision) (Sotomayor, J., joined by Ginsburg, J., dissenting) (Alito, J., took no part in the consideration or decision).

Recent 10th Amendment Cases

§ 18.4.5, page 763, end of section: 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” in violation of the 10th Amendment 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 under the Commerce Clause. 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
costs.” 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 PASPA should have been allowed to stand. Id. at 1489 (Ginsburg, J., joined by Sotomayor, J., and in part by Breyer, J., dissenting). Although not technically a 10th Amendment issue given Garcia, in Bond v. United States, 131 S. Ct. 2355 (2011), a unanimous Court said litigants can enforce what they might consider 10th Amendment limits on the federal government by requiring regulatory authority to be justified under other Clauses of the Constitution. Justice Kennedy noted, “Fidelity to principles of federalism is not for the States alone to vindicate.” Id. at 2364.

“Unitary” versus “Unilateral” Executive Power

§ 19.1, page 773, text following n.12: For an article comparing a “Unitary Executive” model with “Unilateral” executive action, see Thomas J. Cleary, A Wolf in Sheep’s Clothing: The Unilateral Executive and the Separation of Powers, 6 PIECE L. REV. 265 (2007) (while the Constitution vests all executive powers in a President, the “unitary executive” theory, some believe the President is vested with broad power to act “unilaterally”). This issue lies behind criticism by Democrats of unilateral action by President Bush, such as on terrorism, and criticism by Republicans of unilateral action by President Obama, such as aiding the overthrow of Khadafi in Libya without congressional approval, waiving deportation for some aliens illegally in the United States, and waiving the employer mandate in the Affordable Care Act. Presidents can respond to criticism by citing presidential authority as Commander-in-Chief, right to prosecutorial discretion, or delegated authority in statutes to draft certain kinds of executive orders. See 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); Texas v. United States, 787 F.3d 733 (5th Cir. 2015) (2-1 Panel decision) (normal administrative “notice and comment” rulemaking cannot be waived when the President not only “waives” deportation, but makes illegal aliens eligible for “work permits”), affirmed by an equally divided court, United States v. Texas, 136 S. Ct. 2271 (2016).

Presidential Compensation and Emoluments Clause

§ 19.3.1, page 778, text preceding n.28: Under Art. II, § 1, cl. 7, the President receives 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.” The Foreign Emoluments Clause has recently been the subject of litigation given President Trump’s refusal fully to divest himself while President of his extensive property holdings. The President’s motion to dismiss a lawsuit brought by the District of Columbia and State of Maryland, focused on payments to the Trump International Hotel in Washington, D.C., was denied on July 25, 2018 in a comprehensive and well-reasoned opinion on the issue. District of Columbia v. Trump, 315 F Supp. 3d 875 (D. Maryland 2018). Proceedings are continuing in the case.

Presidential Power Over National Policy: International Matters

§ 19.3.2, page 783, text following n.42: An approach similar to Dames & Moore v. Regan was manifested by the Chief Justice’s opinion for the Court in Medellín v. Texas, 128 S. Ct. 1346 (2008). The Court had first ruled that a judgment by the International Court of Justice was not self-executing, discussed in this Supplement at § 18.3.9 n.198. 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. 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, discussed in the E-Treatise at § 19.3.1 n.29, 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. 128 S. Ct. at 1370. Justice Stevens agreed that unilateral Presidential action could not make a non-self-executing treaty binding law in American courts. Id. at 1374 (Stevens, J., concurring in the judgment). Three Justices did not address the issue because they concluded that the treaty was self-executing, discussed in this Supplement at § 18.3.9 n.198. 128 S. Ct. at 1391 (Breyer, J., joined by Souter & Ginsburg, JJ., dissenting). Following
Medellin, Texas applied the death penalty to 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 was executed on August 5, 2008. Another similar Mexican national was executed on July 7, 2011. *Garcia v. Texas*, 131 S. Ct. 2866 (2011) (Breyer, J., joined by Ginsburg, Sotomayor & Kagan, JJ., dissenting).

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. 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, part of President’s power to recognize foreign governments, but not over consular reports used for naturalization, which is Congress’ power over Naturalization). The constitutionality of President Trump’s so-called “Muslim travel ban” is discussed at A2.

**War Powers: Presidential Authority to Authorize Warrantless Wiretapping**

§ 19.3.3, page 789, n.58: On appeal, the Sixth Circuit reversed the lower court on grounds the plaintiffs could not prove they had been the victims of warrantless wiretapping, and thus lacked standing. *ACLU v. National Security Agency*, 493 F.3d 644 (6th Cir. 2007). In *In re National Security Agency Telecommunications Records Litigation*, 700 F. Supp. 2d 1182 (N.D. Cal. 2010), the government had inadvertently disclosed a classified document that indicated the individual had been wiretapped, and thus standing was not a problem. The district court judge held that warrantless wiretapping, unauthorized by Congress, was unlawful, rejecting the argument that the case should have been dismissed under the “state secrets” doctrine to protect the confidential nature of the program. Prior to this decision, on September 23, 2009, Attorney General Holder issued a new Department of Justice guideline that the government will assert the privilege only for information that could cause “significant harm” to national security interests and only if personally approved by the Attorney General. A new Department of Justice State Secrets Review Committee was created.

**War Powers: Congressional Authority to Authorize Warrantless Wiretapping**

§ 19.3.3, page 789, text following n.58: As predicted in the E-Treatise, Congress did authorize in 2007 warrantless wiretapping for national security along the lines of existing executive practice, amending the Foreign Intelligence Surveillance Act (FISA). A further wiretapping law, giving telecommunications companies immunity for following presidential directives before Congress acted, and thus acted possibly unlawfully, was signed into law in 2008. This law was upheld in *In re National Security Agency Telecommunications Records Litigation*, 671 F.3d 881 (9th Cir. 2011). Arguments about Fourth Amendment search and seizure problems with FISA are addressed in an article cited in the E-Treatise at § 23.2.1.1 n.92. *See also Emily Berman, The Paradox of Counterterrorism Sunset Provisions, 81 FORDHAM L. REV. 1777 (2013); Klayman v. Obama*, 957 F. Supp. 2d 1 (D.D.C. 2013) (NSA surveillance program likely violates Fourth Amendment); *Smith v. Obama*, 24 F. Supp. 3d 1005 (D. Idaho 2014) (NSA program likely constitutional). Following revelation by Edward Snowden that the NSA was engaged in the “bulk data” collection of all individuals’ telephone numbers, the Second Circuit ruled on May 7, 2015 that such collection was not authorized by Congress in the Patriot Act of 2001. *ACLU v. Clapper*, 785 F.3d 787 (2d Cir. 2015). In the Freedom Act of 2015, passed on June 2, 2015, Congress terminated authority for such “bulk collection” after an 180-day window (through November 29, 2015). Following this action, a FISA court decision disagreed with the Second Circuit, concluding that Congress had authorized collection prior to the Freedom Act of 2015, and such collection was consistent with the Fourth Amendment. *In re Application of the FBI for an Order Requiring Production of Tangible Things*, Docket No. BR 15-75 (June 9, 2015), *citing Smith*
Line-Item Veto versus Impoundment/Expedited Rescission Acts

§ 19.4.2.2, page 797, n.94: For an article discussing differences among short-term Presidential impoundment, requirements of expedited votes to rescind expenditures, and a Presidential line-item veto power, see Seema Mittal, Note, The Constitutionality of an Expedited Rescission Act: The New Line Item Veto or a New Constitutional Method of Achieving Debt Reduction, 76 GEO. WASH. L. REV. 125 (2007) (proposed legislation, not enacted, involved giving the President power to propose rescissions of spending provisions enacted into law, which then must receive an up-or-down vote).

Separation of Powers: Who are “Officers” Under President’s Appointment Power

§ 19.4.3.1, page 799, text following n.97: In Lucia v. SEC, 138 S. Ct. 2044 (2018), the Court held that the 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, Freytag v. Commissioner of Internal Revenue, 501 U.S. 868 (1991) (Tax Court judges are “Officers” and Bandimere v. SEC, 844 F.3d 1168 (10th Cir. 2016) (SEC’s ALJs are “Officers”). 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 Lucia/Freytag case-by-case approach, Justices Thomas and Gorsuch proposed in Lucia 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 proposed that one component of “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).

Separation of Powers: President’s Recess Appointment Power

§ 19.4.3.1, page 804, n.112: Two recent Court of Appeals challenged the accepted view of the Recess Power. See 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). The Supreme Court considered the issue in NLRB v. Noel Canning, 134 S. Ct. 2550 (2014). The majority 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 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. Four Justices adopted the Court of Appeals’ “literal” interpretation that the President can only use the recess power for positions becoming available during a Senate recess and recess appointments must be made during that recess period. Id. at 2592 (Scalia, J., joined by Roberts, C.J., and Thomas & Alito, JJ., concurring in the judgment). Courts have held that decisions made by the NLRB which involved these “unconstitutional” recess appointees are valid, having been ratified by post-Noel Canning properly constituted NLRB action. See, e.g., Advanced Disposal Services. E., Inc. v. NLRB, 820 F.3d 592 (3rd Cir. 2016).

Separation of Powers: The Vacancies Act

§ 19.4.3.1, page 805, n.115: 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).

**Separation of Powers: Removal of Executive Officials**

§ 19.4.3.2, page 808, n.128: In *Free Enterprise Fund v. Public Accounting Oversight Board*, 130 S. Ct. 3138 (2010), the President could only remove Securities and Exchange Commissioners for good cause, and those Commissioners could only remove members of the Public Accounting Oversight Board for good cause. A 5-4 Court majority held that such “double” good-cause removal protection – a unique arrangement not used in any other federal statute – did “impede” the President’s ability to perform his constitutional duties. The Court struck down the limitation Commissioners’ removal authority, leaving them free to remove the Oversight Board members at will. *Id.* at 3153-55, 3161-62. A four-Justice dissent noted that the “double” good-cause removal did not significantly interfere with the President’s executive power. *Id.* at 3164 (Breyer, J., joined by Stevens, Ginsburg & Sotomayor, JJ., dissenting). As discussed in the E-Treatise at § 6.2.2.4 text preceding n.62, conservative judges tend to be more protective of executive power, as they were here, while liberal judges tend to be more protective of the legislature. *Cf. PHH Corp. v. Consumer Financial Protection Bureau*, 839 F.3d 1 (D.C. Cir. 2016) (rehearing *en banc* granted, panel decision holding for cause removal provision for Director of CFPB intruded too greatly into presidential powers vacated).

**Separation of Powers: Presidential Signing Statements**

§ 19.4.4, page 811, add at bottom of the page: 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 strong executive power, while Congress and the courts have consistently adopted a non-formalist, sharing of powers approach, with greater limits on inherent executive power. These differences are summarized in the E-Treatise at § 19.1, pages 771-73 & § 19.3.2, pages 783-84 & nn.43-44. *See generally* Curtis A. Bradley & Eric A. Posner, *Presidential Signing Statements and Executive Power*, 23 CONST. COM. 307 (2006). On March 9, 2009, President Obama released a memorandum on “Presidential Signing Statements.” 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."

**Separation of Powers: Political Considerations**


**Legislative Immunities under the Speech or Debate Clause**

§ 20.1.4.1, page 839, n.57: *See also United States v. Renzi*, 769 F.3d 731 (9th Cir. 2014) (if a member of Congress offers evidence of his or her own 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) (legislators and their aides are immune from suit for denying a reporter press credentials as the decision to confer media credentials is legislative in nature); *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 as a factual matter that 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.”).
Absolute Immunity

§ 20.1.4.2.B, page 846, n.88: In *Van De Kamp v. Goldstein*, 129 S. Ct. 855, 863-64 (2009), citing *Imbler v. Pachtman*, 424 U.S. 409 (1976), the Court considered whether the *Imbler* principle of prosecutorial immunity for official actions applied to a charge that plaintiff was handicapped at trial by a failure of the prosecutor to carry out his constitutional duty to disclose that a key witness had received reduced sentences for providing prosecutors with favorable testimony in other cases. Plaintiff claimed his rights were violated by the chief supervisory prosecutor’s failure to train adequately those who conducted the trial. A unanimous Court said the administrative obligations noted by the plaintiff were directly connected with the conduct of trials, involved legal knowledge and exercise of discretion, and thus the concerns about protecting the functioning of the prosecutor’s officer supported granting defendant absolute immunity. See also *Rehberg v. Paulk*, 132 S. Ct. 1497 (2012) (witness who testified at grand jury proceedings entitled to absolute immunity from 42 U.S.C. § 1983 claims just as witnesses who testify at trial); *Burton v. Infinity Cap. Mgmt.*, 753 F.3d 954 (9th Cir. 2014) (lawyer who wrote show cause order for judge in violation of statutory automatic stay does not have immunity for contempt under quasi-judicial immunity doctrine).

Qualified Immunity

§ 20.1.4.2.B, page 848, text following n.91: The criticism of *Brosseau v. Haugen*, 543 U.S. 194, 198-99 (2005), was accepted by the Court in *Pearson v. Callahan*, 129 S. Ct. 808 (2009). The Court first adopted the *Brosseau* approach – courts must always consider was a constitutional right violated before addressing whether the law was clearly established at the time – in *Saucier v. Katz*, 533 U.S. 194 (2001). In an unanimous opinion in *Pearson*, the Court overruled *Saucier* and held that district courts should exercise their sound discretion in deciding which of the two inquiries of qualified immunity analysis – was a right violated and was the law clearly established at the time – needed to be addressed to resolve the case. Justice Alito noted the *Saucier* rule had been criticized by scholars and judges as often wasteful of party resources and judicial time, and overruling would not upset anyone’s settled expectations. *Id.* at 818-22. The Court held police officers were entitled to qualified immunity as their warrantless entry did not violate clearly established law because plaintiff had invited a police informant into his home and the officers could be considered invited to enter by a “consent-once removed” theory accepted by several lower courts. *Id.* at 822-23.

Where a lower court considers both issues of immunity, the Supreme Court has the authority to correct errors in either analysis. *Ashcroft v. Al-Kidd*, 131 S. Ct. 2074, 2080, 2083 (2011). The usual rule that a defendant may not appeal an order denying summary judgment once a full trial is held applies to issues of qualified immunity. *Ortiz v. Jordan*, 131 S. Ct. 884 (2011). The usual rule that in summary judgment motions all reasonable inferences are to be drawn in favor of the non-moving party also applies in qualified immunity cases. *Tolan v. Cotton*, 134 S. Ct. 1861 (2014).

For recent qualified immunity cases, see *White v. Pauly*, 137 S. Ct. 548 (2017) (officer who arrived late at an ongoing police action and witnessed shots being fired by one of several individuals in a house entitled to qualified immunity when he shot and killed an armed occupant of the house without first giving a warning); *Wood v. Moss*, 134 S. Ct. 2056 (2014) (Secret Service agents have qualified immunity when moving anti-Bush protestors farther away from President than pro-Bush supporters because no clearly established law requires protestors with different viewpoints to be kept at comparable distances given compelling interest in Presidential safety); *Werner v. Wall*, 836 F.3d 751 (7th Cir. 2016) (state prison officials entitled to qualified immunity for incarcerating sex offender for roughly 100 days beyond mandatory release date where no approved residence was found as required by applicable rules of supervised release); *Occupy Nashville v. Haslam*, 769 F.3d 434 (6th Cir. 2014) (officers entitled to qualified immunity for arresting protestors who attempted to state in park overnight, since no clearly established right to 24-hour access to the public space); *Reichle v. Howards*, 132 S. Ct. 2088 (2012) (Secret Service agent who had probable cause to arrest individual entitled to qualified immunity on retaliatory arrest claim; the Court had held in *Hartman v. Moore*, 547 U.S. 250 (2006), that a retaliatory prosecution claim had to be based on lack of probable cause, but reserved the question whether that doctrine applies to retaliatory arrest); *Plumhoff v. Rickard*, 134 S. Ct. 2012 (2014) (police officer who fired 15 times into car in the course of high-speed pursuit, killing the driver, had qualified immunity against allegation he used excessive force); *Messerschmidt v. Millender*, 132 S. Ct. 1235 (2012)
(police officers entitled to qualified immunity when not reasonably obvious that search warrant issued by a neutral magistrate for any guns and gang-related items was overbroad); Ryburn v. Huff, 132 S. Ct. 987 (2012)

(officials entitled to qualified immunity when entering home without a warrant while investigating rumored gun threats based on concern for their own and others’ safety after the homeowner acted oddly and fled the residence during questioning); Filarsky v. Delia, 132 S. Ct. 1657 (2012) (private individual temporarily retained by the government for work is entitled to seek qualified immunity for that work).

But see Sims v. Labowitz, 885 F.3d 254 (4th Cir. 2018) (no qualified immunity for detective who required 17-year-old boy to masturbate to comply with warrant to obtain picture of his erect penis as evidence he sent sexually explicit photograph to 15-year-old girlfriend); Alfano v. Lynch, 847 F.3d 71 (1st Cir. 2017) (no qualified immunity as clearly established police must have probable cause to believe individual incapacitated, not merely inebriated, to take into protective custody); Davidson v. City of Stafford, Texas, 848 F.3d 384 (5th Cir. 2017) (no qualified immunity for arresting anti-abortion protestor for not giving first and last name, where Texas Penal Code § 38.02 only requires giving such identification after an arrest, not as a reason to arrest); Genusia v. Canova, 748 F.3d 1103 (11th Cir. 2014) (police officers who eavesdropped on conversation in a police station interview room between suspect and his lawyer not entitled to qualified immunity); Russell ex rel. J.N. v. Virg-In, 258 P.3d 795 (Alaska 2011) (no qualified immunity when officer Tasered 11-year-old girl who had been running away from him after being stopped for reckless driving of an ATV (all terrain vehicle), when she was never aggressive or threatening to the officer once he caught her).

Judicial Immunity from Congressional Statutes Intruding on the Judicial Role

§ 20.1.4.3, page 849, text following n.96: 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., 514 U.S. 211, 218-19 (1995), 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, 80 U.S. (13 Wall.) 128 (1872), discussed in the E-Treatise at § 17.2.3.1 n.153. Bank Markazi, 136 S. Ct. 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 Kennedy & Gorsuch, JJ., dissenting) (by focusing on a specific piece of property, impermissible attempt to direct result in a particular case).

Judicial Compensation

§ 20.1.4.3, page 849, n.97: In Beer v. United States, 696 F.3d 1174 (Fed. Cir. 2012) (10-2 en banc decision), cert. denied, 133 S. Ct. 1997 (2013), an en banc panel distinguished United States v. Will, 449 U.S. 200 (1980), and held that because cost of living adjustments in the Ethics Reform Act of 1989 were stated as automatic, not discretionary, they “vested”; thus Congress could not deny them.

Sovereign Immunity of the United States or Foreign States from Suit

§ 20.1.4.4, page 851, n.104: In Ali v. Federal Bureau of Prisons, 128 S. Ct. 831 (2008), the Court interpreted 28 U.S.C. § 2680 (the Federal Tort Claims Act). That Act 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.” A 5-4 Court held the phrase “any other law enforcement officer” was not limited to officers engaged in custom or excise activity; thus, it included a prison officer. Justice Thomas relied in a formalist manner on the breadth of the word “any.” If Congress had intended a limited meaning it could have said “any other law enforcement officer acting in a customs or excise capacity.” Id. at 840. In dissent, Justice Kennedy said that the last phrase (“any other law enforcement officer”), properly read, shares
the characteristics of the preceding phrases (“officer(s) of customs or excise” and “assessment or collection of any tax or customs duty”). He said that there was little concern about possible frivolous claims because there are in place administrative procedures that must be exhausted before a suit is allowed. Kennedy noted, “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.” Id. at 849 (Kennedy, J., joined by Stevens, Souter & Breyer, JJ., dissenting).

Regarding application of the Foreign Sovereign Immunities Act, the Court held in Bolivarian Republic of Venezuela v. Helmerich & Payne Int’l Drilling Co., 137 S. Ct. 1312, 1316 (2017), that to defeat foreign sovereign immunity and confer jurisdiction on a court under the Act’s “expropriation exception”, a party’s “nonfrivolous, but ultimately incorrect, argument that property was taken in violation of international law is insufficient to confer jurisdiction. Rather, [the party must present factual allegations that] make out a legally valid claim that a certain kind of right is at issue (property rights) and that the relevant property was taken in a certain way (in violation of international law). A good argument to that effect is not sufficient.”

Preemption under the Supremacy Clause

§ 20.3.1.1, page 855, n.126: In Haywood v. Drown, 129 S. Ct. 2108, 2117-18 (2009), a 5-4 Court held that the Supremacy Clause was violated by a New York statute that withdrew from state trial courts the power to hear actions for money damages brought against state correctional officers – a withdrawal that included § 1983 actions. That was contrary to Congress’ judgment when enacting § 1983 that all persons who violate federal rights while acting under color of state law shall be held liable for damages. A four-Justice dissent argued that under the Court’s precedents states remain free to alter the structure of their judicial system even if it means that certain federal actions will no longer be heard in state courts, so long as it is done by nondiscriminatory means. Id. at 2137-38 (Thomas, J., joined by Roberts, C.J., and Scalia, J., and Alito, J., as to Part III, dissenting). Justice Stevens responded that since the law was based on the view that damage suits against correctional officers are vexatious, the state law was effectively an immunity statute cloaked in jurisdictional garb. He said the Court’s holding merely confirmed the Supremacy Clause cannot be evaded by formalism. Id. at 2118. Cf. United States v. Klein, 80 U.S. 128, 145-48 (1872) (Congress cannot overturn a Court decision by denying jurisdiction to hear a case if the decision is relied upon in court; the statute’s purpose is critical, not literalism), discussed in the E-Treatise at § 17.2.3.1 n.153.

Recent Express and Implied Preemption Cases

§ 20.3.1.2, page 863, n.153: In Preston v. Ferrer, 128 S. Ct. 978, 986-87 (2008), an 8-1 Court held that the Federal Arbitration Act established a national policy favoring arbitration, and thus when parties agree to arbitrate all disputes arising under their contract, state laws lodging primary jurisdiction in another forum, whether judicial or administrative, are preempted. This support for arbitration is consistent with many Court cases. See Allied-Bruce Terminix Co. v. Dobson, 513 U.S. 265, 280 (1995); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 31 (1991) (“The advantages of arbitration are many . . . .”); Teresa L. Elliott, Responsibility of the Courts in Motions to Compel Arbitration, 32 OHIO N.U.L. REV. 89, 105 n.168 & passim (2006). Justice Thomas continued his states rights’ view that issues of arbitration should be viewed as matters of procedure, not substantive law, and thus FAA does not apply. 128 S. Ct. at 989 (Thomas, J., dissenting).

In Riegel v. Medtrone, Inc., 128 S. Ct. 999, 1006-11 (2008), an 8-1 Court held that the Medical Device Amendments of 1976 preempted state common-law claims of negligence, strict liability, and implied warranty against the manufacturer of a premarket approved device intended for human use. Justice Scalia noted state tort law remedies would disrupt the federal scheme. However, the states could continue to provide remedies for claims premised on a violation of FDA regulations because the state duties in such a case would parallel rather than add to federal requirements. Justice Ginsburg stated in dissent, “Congress, in my view, did not intend to effect a radical curtailment of state common-law suits seeking compensation for injuries caused by defectively designed or labeled medical devices.” Id. at 1013 (Ginsburg, J., dissenting). The clear language of the statute persuaded the rest of the Court, including Justice Stevens, id. at 1011-13 (Stevens, J., concurring in part and concurring in the judgment), that express preemption had taken place. However, Justice Stevens did indicate his agreement with Justice Ginsburg’s analysis of the purpose of the statute. Id. at 1011.
In *Rowe v. New Hampshire Motor Transport Ass’n*, 128 S. Ct. 989, 993-98 (2008), a unanimous Court held that a federal statute which prohibits states from enacting any law “related to” a motor carrier “price, route, or service” preempted two provisions of a Maine law that regulated the delivery of tobacco to customers within the state. The Court rested its decision on the fact that the federal prohibition relating to motor carriers was expressed in language similar to that relating to air carriers in the Airline Deregulation Act of 1978 (ADA). The Court had held in *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992), that language in the ADA preempting state laws having a connection with or reference to “price, route, or service” included consumer-fraud statutes against deceptive airline-fare ads. The analogy was strengthened because both sets of state laws interfered with federal deregulation policy designed to insure that services reflect maximum reliance on competitive market forces. See also *Northwest, Inc. v. Ginsberg*, 134 S. Ct. 1422 (2014) (claim by passenger airline breached Minnesota’s implied covenant of good faith and fair dealing in terminating his membership in preferred flyer program for his alleged abuse of the program preempted by ADA); *Gilstrap v. United Air Lines*, 709 F.3d 995 (9th Cir. 2013) (federal standards of care requiring airlines to provide assistance to disabled travellers preempt state law standards, but state law remedies for breaching those standards are not preempted).

During the 2008 Term, a 5-4 Court held in *Altria Group, Inc. v. Good*, 129 S. Ct. 538 (2008), that the federal Labeling Act neither expressly nor impliedly preempted a state statutory claim against a cigarette manufacturer based on the ground that its ads fraudulently conveyed the message that its “light” cigarettes delivered less tar and nicotine than regular brands. Noting the *Rice* presumption against preemption in areas of traditional state control, discussed in the E-Treatise at § 20.3.1.1 n.129, and building on Justice Stevens’ opinion in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), discussed in the E-Treatise at § 20.3.1.2 n.136, the Court held the state law against fraudulent messages was not based on “smoking” or “health,” areas preempted by the Labeling Act, but instead invoked a general rule that creates a duty not to deceive. 129 S. Ct. at 545-51. Four Justices dissented, arguing that the *Cipollone* claim-by-claim approach had proved unworkable in the lower courts, and the Court should ask instead whether the state law in a practical sense compels manufacturers to engage in labeling behavior that Congress has barred states from prescribing directly. *Id.* at 554-63 (Thomas, J., joined by Roberts, C.J., and Scalia & Alito, JJ., dissenting).

In *Wyeth v. Levine*, 129 S. Ct. 1187 (2009), a 6-3 Court again applied the *Rice* presumption against preemption in holding that FDA approval of a label for the drug Phenergan did not preempt the application of state law on negligence and strict liability. *Id.* at 1201-04. Justice Breyer, concurring, said the FDA can make specific regulations describing when a labeling requirement serves as a ceiling as well as a floor, but no such regulation was at issue in this case. *Id.* at 1204 (Breyer, J., concurring). Justice Thomas continued his attack on implied preemption doctrines which allow the Court to invalidate state laws whenever the Court thinks they are an obstacle to the purposes of federal law. *Id.* at 1204-05 (Thomas, J., concurring in the judgment). In dissent, Justice Alito recounted the conversations between the FDA and the drug manufacturer. What the FDA had determined to be safe, Justice Alito said, was not intended by Congress to be set aside by a jury using state tort law. *Id.* at 1217-18 (Alito, J., joined by Roberts, C.J., and Scalia, J., dissenting).

In addition to these Supreme Court decisions, on May 20, 2009, President Obama ordered all federal agencies to review their preemption regulations in order to ensure they were consistent with President Clinton’s Executive Order 13,132 of August 4, 1999 on preemption. Under that order, preemption should emanate from statutes, federal grants of authority should be interpreted modestly, no more preemption should be found than necessary, and alternatives to preemption should be considered. While President Clinton’s Executive Order was never repealed during the Bush Administration, concern had been expressed that administrative agencies under the Bush Administration were not following the cautious approach toward preemption reflected in President Clinton’s Executive Order, and were concluding in too many cases that federal law was intended to preempt state laws, particularly state tort law or state statutes regulating businesses.

During the 2010 Term, a 5-4 Court held in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1753 (2011), that the Federal Arbitration Act preempted California’s judicial rule regarding unconscionability of class arbitration waivers in consumer contracts. *Id.* at 1756 (Breyer, J., joined by Ginsburg, Sotomayor & Kagan, JJ., dissenting). In *Bruesewitz v. Wyeth*, 131 S. Ct. 1068, 1082 (2011), a 6-2 Court held that the National Childhood Vaccine Injury Act preempted 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). In *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567, 2572 (2011), a 5-4 Court held that a generic drug manufacturer’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; thus, state tort law inadequate warning label claims preempted. *Id.* at 2582 (Sotomayor, J., joined by Ginsburg, Breyer & Kagan, J., dissenting). In 2013, in *Mutual Pharmaceutical Co. v. Bartlett*, 133 S. Ct. 2466 (2013), the Court extended the failure-to-warn preemption doctrine in *PLIVA* to hold that a design defect claim, based on generic drug manufacturer’s failure to strengthen warnings on drug label, was also preempted. As in *PLIVA*, four Justices would have held the state law merely “supplements” or “complements” the federal scheme, and does not conflict with it. *Id.* at 2480-82 (Breyer, J., joined by Kagan, J., dissenting); *id.* at 2482-84 (Sotomayor, J., joined by Ginsburg, J., dissenting). But see *Wyeth, Inc. v. Weeks*, 159 So. 3d 649 (Ala. 2014) (brand-name manufacturer can be held liable for misrepresentation based on statements it made about the drug – as opposed to labels – by consumer injured by generic version, although drug manufacturer’s duty to warn is limited to an obligation to advise the prescribing physician under “learned-intermediary” doctrine).

Regarding state laws on immigration, a 5-3 Court held in *Chamber of Commerce of the United States v. Whiting*, 131 S. Ct. 1968, 1972-73 (2011), that Arizona’s requirement that every employer verify the employment eligibility of hired employees through a specific Internet-based system fell within a “savings clause” in federal immigration law, which expressly preempts “any State or local law imposing civil or criminal sanctions (other than through licensing or similar laws) upon those who employ . . . unauthorized aliens.” Thus, the Arizona law was not preempted. Three Justices dissented. *Id.* at 1987 (Breyer, J., joined by Ginsburg, J., dissenting); *id.* at 1998 (Sotomayor, J., dissenting). Justice Kagan took no part in the consideration or decision of the case. *Id.* at 1972.

In *Arizona v. United States*, 132 S. Ct. 2492 (2012) (Scalia, Thomas & Alito, JJ., concurring in part and dissenting in part) (Justices Scalia and Thomas concluded all provisions not preempted; Justice Alito concluded all provisions not preempted, except state misdemeanor for failure to comply with federal alien-registration requirements) (Kagan, J., took no part in the consideration or decision of the case), a 5-3 Court held 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. *Id.* at 2501-07. This decision is consistent with Court precedents underscoring the preeminent role given to the federal government in immigration policy. See generally *Toll v. Moreno*, 458 U.S. 1, 10 (1982), and cases cited therein. 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. 132 S. Ct. at 2507-09. However, the Court warned the provision could be challenged on an as-applied basis if the stops resulted in a detention of prolonged duration or otherwise were done inconsistent with federal policy, as if done on a racially discriminatory basis. *Id.* at 2509-10. See *Melendres v. Arpaio*, 784 F.3d 1254, 1266 (9th Cir. 2015) (district court did not abuse discretion to order data collection, and video-recording, of all traffic stops in Maricopa County, Arizona). See also *United States v. Alabama*, 691 F.3d 1269 (11th Cir. 2012) (Alabama provisions decided consistent with *Arizona v. United States*); *Georgia Latino Alliance for Human Rights v. Deal*, 691 F.3d 1250 (11th Cir. 2012) (same for Georgia).

In *Arizona v. Inter Tribal Council of Arizona, Inc.*, 133 S. Ct. 2247 (2013) (Thomas & Alito, JJ., dissenting), a 7-2 Court held that an Arizona requirement that applicants registering to vote 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 citizens. See also *Buquer v. City of Indianapolis*, 797 F. Supp. 2d 905 (S.D. Ind. 2011) (Indiana law allowing warrantless arrest of aliens for non-criminal conduct and for offering or accepting consular identification card as a valid form of identification preempted); *Villas at Parkside Partners v. Farmers Branch, Texas*, 675 F.3d 802 (5th Cir. 2012), aff’d, 726 F.3d 524 (5th Cir. 2013) (9-6 en banc opinion), (local occupancy restriction on rental properties that requires tenants to be in the country lawfully is an immigration law).
law posing as a housing regulation, and is preempted); Keller v. City of Fremont, 719 F.3d 931 (8th Cir. 2013) (same); State v. Sarrabea, 126 So. 3d 453 (La. 2013) (Louisiana law making it a felony for an alien to drive without documentation of lawful presence in the United States preempted); State v. Garcia, 401 P.3d 588 (Kan. 2017) (federal Immigration Reform and Control Act expressly preempts states from using I-9 employment verification form itself, or any information contained in form, in enforcing state laws).

On recent non-immigration matters where preemption was found, see National Meat Ass’n v. Harris, 132 S. Ct. 965 (2012) (Federal Meat Inspection Act preempts California provision prohibiting sale of meat or meat product of nonambulatory animals for human consumption and requiring euthanization of such animals, as applied to federally inspected swine slaughterhouses); 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 a regulation, not City acting as a market participant, and thus is preempted by federal law); Coventry Health Care of Mo., Inc. v. Nevils, 137 S. Ct. 1190 (2017) (Missouri law barring contractual subrogation and reimbursement prescriptions preempted by Federal Employees Health Benefits Act; state law plainly relates to benefits payments); Chaudhry v. City of Los Angeles, 573 Fed. App’x 628 (9th Cir. 2014) (Ninth Circuit, following Second, Seventh, and Tenth Circuits, held that a state law prohibition against pre-death pain and suffering in survival actions did not apply to § 1983 claims where death was caused by violation of federal law); Sherfel v. Newson, 768 F.3d 561 (6th Cir. 2014) (Wisconsin law requiring employers that offer paid disability leave to extend those benefits to new mothers preempted by Employee Retirement Income Security Act (ERISA)); New Hampshire Attorney General v. Bass Victory Committee, 104 A.3d 181 (N.H. 2014) (state law requiring disclosure of sponsors of “push-polling” preempted by Federal Election Campaign Act).

On recent non-immigration matters where preemption was not found, see Williamson v. Mazda Motor of America, Inc., 131 S. Ct. 1131, 1134 (2011) (Kagan, J., took no part in the consideration or decision of the case) (Federal Motor Vehicle Safety Standard giving auto manufacturers choice of installing either simple lap belts or lap-and-shoulder belts on rear inner seats did not preempt state law claims for products liability that could impose tort liability upon manufacturers who chose only to install a simple lap belt, distinguishing Geier v. American Honda Motor Co., 529 U.S. 861 (2000) (federal Safety Standard regarding installation of air bags preempts state tort lawsuits)); Dan’s City Used Cars Inc. v. Pelkey, 133 S. Ct. 1769 (2013) (state laws regulating storage and disposal of towed vehicles not preempted by Federal Aviation Administration rule preempting laws “related to a price, route, or service of any motor carrier . . . with respect to transportation of property”); Pharmaceutical Care Mgmt. Assoc. v. Gerhart, 853 F.3d 722 (8th Cir. 2017) (Iowa law forcing pharmacy benefit managers to disclose who they price generic drugs preempted by Employment Retirement Income Security Act (ERISA), because it interferes with uniform administration of ERISA plans nationwide).

See generally Kurns v. Railroad Friction Products Corp., 132 S. Ct. 1261 (2012) (Locomotive Inspection Act (LIA) preempts state products liability lawsuit alleging design defect and failure to warn related to asbestos where the locomotives had been approved under federal law); Delaware & Hudson Ry. Co., Inc. v. Knoedlerr Mfrs., Inc., 781 F.3d 656 (3rd Cir. 2015) (LIA does not preempt state law claims based on standards of care that stem from LIA itself); 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); U.S. Smokeless Tobacco Manufacturing Co. v. New York City, 708 F.3d 428 (2nd Cir. 2013) (New York City ordinance effectively banning all sales of flavored smokeless tobacco not preempted by Federal Smoking Prevention and Tobacco Control Act); R.J. Reynolds Tobacco Co. v. Marotta, 214 So. 2d 590 (Fla. 2017) (state-law claims related to injuries from smoking not preempted by federal requirements regarding uniform labeling and advertising requirements); Graham v. R.J. Reynolds Tobacco Co., 2017 WL 2176488 (11th Cir. 2017) (same; 8-1 en banc decision, with one judge deciding the case on other grounds).

Market Participant Exception to the Dormant Commerce Clause

§ 20.2.2.3.B, page 878, n.225: 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. See Mason and Dixon Lines v. Steudle, 683 F.3d 289 (6th Cir. 2012). The market participant exception was also held to apply to a case involving dormant commerce clause doctrine applied to foreign commerce. See Antilles Cement
Commerce Clause Review of State Taxation

§ 20.3.2.4.A, page 883, text at n.250: In Department of Revenue of Kentucky v. Davis, 128 S. Ct. 1801 (2008), the Court rejected a dormant commerce clause challenge directed at Kentucky tax provisions that exempted from state income tax the interest on bonds issued by Kentucky, but did not exempt the interest on bonds of other states. For the Court, Justice Souter noted that most states have similar laws, and the Court was reluctant to upset a market in bonds that had been in place for almost a century. Reasoning from precedent, he said this holding followed logically from United Haulers, 127 S. Ct. 1786 (2007), discussed in this Supplement at § 20.3.2.4.B text following n.262. Justice Souter interpreted the case as holding that there was no discrimination against interstate commerce where the government was pursuing goals unrelated to protectionism, and its law was directed instead to what was typically and traditionally a local government function. Justice Souter’s opinion also included a Part III(B), where Justice Souter said that dormant commerce clause analysis did not apply because under the market-participant doctrine Kentucky had entered the market for debt securities, just as Maryland had entered the market for automobile hulks in Hughes v. Alexandria Scrap Co., and South Dakota had entered the cement market in Reeves, Inc. v. Stake. 128 S. Ct. at 1811-14 (Souter, J., joined by Stevens & Breyer, JJ., as to Part III(B)). Hughes and Reeves are discussed in the E-Treatise at § 20.3.2.2.B nn.218-20. Justices Roberts and Scalia said that there was no need to engage in this analysis since the statute survived dormant commerce clause analysis anyway. 128 S. Ct. at 1821 (Roberts, C.J., concurring in part); id. at 1821 (Scalia, J., concurring in part). Justice Ginsburg also did not join in Part III(B), but gave no reason. Id. at 1804. In Part IV, Justice Souter concluded the challenger could not meet its burden of proving the burden on interstate commerce was “clearly excessive” under the Pike v. Bruce Church test, discussed in the E-Treatise at § 20.3.2.2.A n.196, because the Court was in no position to engage in a cost-benefit analysis of the long settled habits of the current state bond system to determine whether the burden was excessive. 128 S. Ct. at 1817-19 (opinion for the Court). Justice Scalia, concurring, reiterated his view that he would abandon Pike balancing altogether. Id. at 1821 (Scalia, J., concurring in part). Justice Thomas reiterated his stronger view that the Court should abandon dormant commerce clause analysis altogether. Id. at 1821-22 (Thomas, J. concurring in the judgment). In dissent, Justice Kennedy said precedents had established that laws with either the purpose or effect of discriminating against interstate commerce to protect local trade trigger the Maine v. Taylor test, discussed in the E-Treatise at § 20.3.2.2.A nn.209-16. United Haulers is not controlling because in that case the law applied equally to in-state and out-of-state commerce. Id. at 1824-29 (Kennedy, J., joined by Alito, J., dissenting). Kennedy also said a tax exemption is not the sort state involvement that falls within the market-participant exemption. Id. at 1829-30 (Kennedy, J., joined by Alito, J., dissenting). See also Matkovich v. CSX Transp., Inc., 793 S.E.2d 888 (W. Va. 2016) (taxpayer who is required to pay a motor fuel tax imposed by state law is entitled to a sales tax credit, under state law, not only for sales taxes paid to other states, but also sales taxes paid to subdivisions and municipalities of other states).

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 just 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 the National Bellas Hess ruling 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.

Dormant Commerce Clause: Requiring Business Operations in the Home State

§ 20.3.2.4.B, page 885, text following n.262: In United Haulers Ass’n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth., 127 S. Ct. 1786 (2007), the Court was faced with a “flow control” ordinance which required trash haulers to deliver solid waste to a particular waste processing facility. In C & A Carbone, Inc. v. Town of Clarkstown, discussed at § 20.3.2.4.B n.262, the Court had struck down a flow control ordinance that forced haulers to deliver waste to a particular private processing facility. In United Haulers, the Court faced a flow control ordinance requiring haulers to bring waste to facilities owned and operated by a state-created public benefit corporation. The Court found this difference significant, noting that disposing of trash has been a traditional government activity for years, and laws that favor the government in such areas – but treat every private business, whether in-state or out-of-state, exactly the same – do not discriminate against interstate commerce. Id. at 1795-98. Justices Scalia and Thomas reaffirmed their view that the Court should abandon existing dormant commerce clause review as unjustified judicial activism without authorization in explicit constitutional text. Id. at 1798-99 (Scalia, J., concurring in the judgment); id. at 1799 (Thomas, J., concurring in the judgment). Three Justices dissented, viewing the flow control ordinances here as essentially identical to the ones ruled unconstitutional in Carbone. Id. at 1803-04 (Alito, J., joined by Stevens & Kennedy, JJ., dissenting). See also Rocky Mountain Farmers Union v. Corey, 730 F.3d 1070 (9th Cir. 2013) (California’s low carbon fuel standard is not facially discriminatory, even though formed with reference to state boundaries, since it treats ethanol from all sources evenhandedly); Pharmaceutical Res. & Mfrs. of America v. County of Alameda, 768 F.3d 1037 (9th Cir. 2014) (requiring prescription drug manufacturers to pay cost of collecting and disposing unused medicines from local residents constitutional under Pike v. Bruce Church).

Scope of Article IV, § 2 Privileges and Immunities Clause

§ 20.3.3.2, page 893, text following n.300: In 2013, the Supreme Court held that access to public information under a state’s Freedom of Information Act is not a “fundamental” right, and thus Virginia could restrict application of its Freedom of Information Act to Virginia residents. McBurney v. Young, 133 S. Ct. 1709 (2013) (unanimous opinion).

Article IV, § 2 Privileges and Immunities Clause and Attorney Regulation


Recent State Action Cases

§ 22.1.2.3, page 920, n.14 & § 22.1.2.5, page 927, end of section: Mark D. Rosen’s draft article, cited in the E-Treatise, was published at Mark D. Rosen, Was Shelley v. Kraemer Incorrectly Decided? – Some New Answers, 95 Calif. L. Rev. 451, 458-70 (2007). For a recent state action 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).
Modern Contract Clause Doctrine

§ 22.1.5, page 960, end of section: See Borman, LLC v. 18718 Borman, LLC, 777 F.3d 816 (2015) (Michigan Nonrecourse Mortgage Loan Act which applied retroactively to render solvency covenant in nonrecourse commercial mortgage-backed securities not a substantial impairment of loan to trigger further Contract Clause analysis); Cherry v. Mayor and City Council of Baltimore, 762 F.3d 366 (4th Cir. 2014) (city’s substitution of “cost-of-living” adjustment for “variable benefit” in calculating pension benefits not substantial impairment as pensioners have breach of contract claim). But see Michigan State AFL-CIO v. Schuette, 847 F.3d 800 (6th Cir. 2017) (amendments to Michigan Campaign Finance Act which prohibit payroll deductions for union PACs, which conflict with payroll deduction provision in existing union contracts, violate Contract Clause as being neither “necessary” nor “reasonable”; amendment valid as to contracts in the future). In Sveen v. Melin, 138 S. Ct. 1815 (2018), the Supreme 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. Id. at 1826 (Gorsuch, J., dissenting) (impairment of contract rights based on original meaning of the Contract Clause).

Property Interests and Takings Clause Doctrine

§ 22.2, page 962, n.42: See also 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). 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).

Standard Takings Clause Doctrine

§ 22.2.5.1, page 976, n.103: Consistent with the analysis in the E-Treatise, the Court held, in Koontz v. St. Johns River Water Management, 133 S. Ct. 2586 (2013), that monetary exactions as a condition of a land use permit, just as regulatory conditions, such as requiring a party to grant easements in Dolan v. Tigard, must be tested under the more rigorous Dolan standard. Similar to Dolan itself, the four more liberal members of the Court dissented, and would have just applied Penn Central to the case. Id. at 2603-06 (Kagan, J., joined by Ginsburg, Breyer & Sotomayor, JJ., dissenting). See also 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).

Exceptions to Standard Takings Clause Doctrine

§ 22.2.5.3, page 977, text following n.110: For an example of a limitation on property rights when title was acquired, see 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).

Temporary Takings Clause Doctrine

§ 22.2.5.4, page 982, end of section: Consistent with the analysis in the E-Treatise, see 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).
§ 23.1.1, page 987, n.6: Following District of Columbia v. Heller, discussed in this Supplement at §23.1.1 text following n.19, Courts of Appeals considered whether the Second Amendment should be incorporated into the 14th Amendment Due Process Clause and made applicable against the states. See, e.g., Maloney v. Cuomo, 554 F.3d 56 (2nd Cir. 2009) (Second Amendment not incorporated); NRA of America, Inc. v. City of Chicago, 567 F.3d 856 (7th Cir. 2009) (same), rev’d sub. nom. McDonald v. City of Chicago, 130 S. Ct. 3020 (2010); Nordyke v. King, 563 F.3d 439 (9th Cir. 2009) (Second Amendment is incorporated), opinion vacated in light of McDonald, 611 F.3d 1015 (9th Cir. 2010) (en banc). The Supreme Court resolved the issue in McDonald v. City of Chicago, 130 S. Ct. 3020 (2010), holding, as suggested in the E-Treatise at § 27.2.5.1 text following n.128, the Second Amendment is incorporated. As they did in Heller, four Justices dissented. Id. at 3088 (Stevens, J., dissenting); id. at 3120 (Breyer, J., joined by Ginsburg & Sotomayor, JJ., dissenting).

The Second Amendment: Right to Bear Arms

§ 23.1.1, page 992, text following n.19: In District of Columbia v. Heller, 128 S. Ct. 2783 (2008), the Court held 5-4 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 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 Scalia acknowledged that the principal purpose of the Second Amendment may have been to ensure individuals had a right to own guns to bring them when participating in organized state militias. However, Justice Scalia’s noted that the framers chose to protect state militias by granting to individuals the right to keep and bear arms; that at the time of the Second Amendment individuals would use those guns not only for militia service, but also for self-protection; and thus that right to own guns for self-protection still applied today. Scalia’s opinion made clear the right is not unlimited, and existing precedents and legislative and executive practice should be respected. Providing a non-exhaustive list of examples, he said that nothing in the opinion should be taken “to cast doubt on longstanding prohibitions on possession of firearms by felons or 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.” Id. at 2816-17. The Court also noted that the right only extends to the “sorts of weapons” that were “in common use” at the time the Second Amendment was adopted. Thus, the right does not protect “dangerous and unusual weapons.” Id. at 2817. 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, 307 U.S. 174 (1939), 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 nonmilitary use and ownership of weapons. Id. at 2822-24 (Stevens, J., joined by Souter, Ginsburg & Breyer, JJ., dissenting). Miller is discussed in the E-Treatise at § 23.1.1 nn.7-8.

Justice Scalia said that the District of Columbia law would violate any standard of scrutiny higher than minimum rationality review, which he rejected since that standard applies to any typical social or economic regulation under equal protection or due process review, and here a fundamental right was involved. Id. at 2817-18 & n.27. In dissent, Justice Breyer called for something less than strict scrutiny, but greater than minimum rationality review, making reference to a balancing test of some sort. See id. at 2851-53 (Breyer, J., joined by Stevens, Souter & Ginsburg, JJ., dissenting). The Court is most likely to adopt one of two approaches. First, the Court could adopt the doctrine used in unenumerated fundamental rights cases, as discussed in the E-Treatise at § 21.2.3, that substantial burdens on the right trigger strict scrutiny, but less than substantial burdens trigger a reasonable analysis under second-order reasonableness review. This would be consistent with how many states read their protection for gun ownership under their state Constitutions, as Justice Breyer noted in his dissent. 128 S. Ct. at 2853 (Breyer, J., joined by Stevens, Souter & Ginsburg, JJ., dissenting), citing, inter alia, Adam Winkler, Scrutinizing the Second Amendment, 105 MICH. L. REV. 683 (2007). Alternatively, the Court could look to the First Amendment and hold that while bans on gun use trigger strict scrutiny, reasonable time, place, and manner regulations trigger only intermediate review. This alternative is discussed in the E-Treatise at § 23.1.1 n.19, citing, inter alia, David G. Browne, Treating the

Courts seem to be adopting strict scrutiny for “core” burdens on Second Amendment rights, but what they call “intermediate scrutiny” for less severe burdens. Cf. Nordyke v. King, 644 F.3d 776, 782-85 (9th Cir. 2011) (citing cases holding only substantial burdens trigger strict scrutiny); Andrew R. Gould, The Hidden Second Amendment Framework Within District of Columbia v. Heller, 62 VANDERBILT L. REV. 1535 (2009). Sometimes, the court defines “intermediate review” as requiring the regulation be “reasonably adapted to a substantial government interest.” See, e.g., NRA of America, Inc. v. Bureau of Alcohol, Tobacco, Firearms, and Explosives, 700 F.3d 185, 194-98 (5th Cir. 2012), and cases cited therein. This approach is a hybrid level of review between standard intermediate scrutiny, which requires a regulation to be “substantially” (not merely “reasonably”) related to “a substantial government interest” and reasonableness balancing, which requires the regulation be reasonable and not an “excessive” or “undue” burden given the state’s “legitimate” (not “substantial”) interest in regulating. Time will tell whether the courts eventually move in the direction of standard intermediate review, regular reasonableness balancing, or maintain this hybrid between the two. Based on loose language in some Supreme Court opinions, some courts use the terms “reasonable fit” and “substantially related” interchangeably. See, e.g., Jackson v. City and County of San Francisco, 746 F.3d 953, 965-66 (9th Cir. 2014) (San Francisco ordinance banning sale of hollow-point ammunition and requiring citizens to disable or lock-up handguns when not physically carrying them constitutional). See also Silvester v. Becerra, 138 S. Ct. 945 (2018) (Thomas, J., dissenting from a denial of certiorari) (Thomas’ view that although the 9th Circuit claimed to apply intermediate review, the opinion actually applied minimum rationality review); Wrenn v. District of Columbia, 864 F.3d 650 (D.C. Cir. 2017) (2-1 panel decision) (right to carry a concealed weapon a “core” right which under Heller is “categorically” unconstitutional to limit to “good reason” to carry; acknowledging Second, Third, Fourth, and Ninth Circuits have held regulations regarding concealed weapons trigger only intermediate review and are typically upheld).

Regardless of which standard is adopted, the decision in Heller may have limited impact. Only a few cities had ordinances similar to the absolute ban in Heller, and it is unclear how much such statutes were enforced in practice. While Heller is an invitation to much litigation, its result may be similar to Lopez and Morrison, which have had little impact on Congress’ power to regulate under the Commerce Clause, discussed in the E-Treatise at § 18.2.5 text following n.118. For cases upholding government regulations under less than “intermediate review”—often because the regulation concerns matters historically not protected by the Second Amendment (what courts call the “first step” in a two-part analysis) and thus Heller does not apply at all—see United States v. Fincher, 538 F.3d 868 (8th Cir. 2008) (machine gun, as well as sawed-off shotgun, not covered by Heller because they are “dangerous and unusual weapons”); United States v. Portillo-Munoz, 643 F.3d 437 (5th Cir. 2011) (illegal aliens have no Second Amendment right to firearms); Nordyke v. King, 681 F.3d 1041 (9th Cir. 2012) (11-0 en banc) (county ordinance banning guns on county property survives challenge by gun show organizers seeking to set up a booth at a local fairgrounds; 4 Judges concurred in the judgment indicating law would be valid even under intermediate scrutiny); 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; would be valid even under intermediate scrutiny); United States v. Huet, 665 F.3d 588 (3rd Cir. 2012) (right to own firearms no bar to prosecuting an individual for aiding and abetting her live-in boyfriend’s unlawful possession of a gun based on being convicted felon); 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, not a substantial burden, and thus no form of heightened review appropriate); United States v. One (1) Palmetto State Armory PA-15 Machinegun Receiver/Frame, 822 F.3d 136 (3rd Cir. 2016) (federal law prohibiting person from possessing a machine gun extends to trusts); Friedman v. City of Highland Park, 784 F.3d 406 (7th Cir. 2015) (ban on large-capacity magazines, defined as more than 10 rounds, and semi-automatic guns that use such magazines, constitutional); Kolbe v. Hogan, 849 F.3d 114 (4th Cir. 2017) (10-4 en banc) (9 judges: assault weapons and large-capacity magazines not protected by Second Amendment; 10 judges: law would survive intermediate review anyway); Bezet v. United States, 714 Fed. App’x 336 (5th Cir. 2017) (no right to convert semi-automatic pistol into fully automatic rifle); Teixeira v. County of Alameda, 873 F.3d 670 (9th Cir. 2017) (8 of 11 judges en banc hold gun sellers, as opposed to gun owners, have no Second Amendment rights). See also Hoven v. Walgreen Co., 751 F.3d 778 (6th Cir. 2014) (Walgreen has right to fire pharmacist after he tried to ward off robbers with concealed handgun he was legally carrying).
If the Second Amendment fully applies (what courts call the “second step” in the two-part analysis), but the case does not involve a severe burden, some courts will apply the hybrid kind of “intermediate scrutiny.” See United States v. Masiandaro, 638 F.3d 458 (4th Cir. 2011) (constitutional to ban carrying guns into national parks); United States v. Staten, 666 F.3d 154 (4th Cir. 2011) (federal law banning someone previously convicted of domestic violence from possessing firearm valid); Silvester v. Harris, 843 F.3d 816 (9th Cir. 2016) (10-day waiting period before purchasers can obtain firearms valid); Norman v. Florida, 2017 WL 823613 (Fla. Sup. Ct. 2017) (complete state ban on openly carrying guns valid); Bauer v. Becerra, 858 F.3d 1216 (9th Cir. 2017) (allocating $5 of $19 firearms transfer fee to combat illegal firearms purchases valid).

Other courts will apply standard “intermediate scrutiny.” See United States v. Skoien, 614 F.3d 638 (7th Cir. 2010) (10-1 en banc) (federal law prohibiting persons convicted of domestic violence from owning firearms constitutional); Heller v. District of Columbia, 670 F.3d 1244 (D.C. Cir. 2011) (registration requirement presumptively valid; bans on assault weapons and large-capacity guns valid as content-neutral regulation to protect police officers and control crime); 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 valid); 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; ban on 7-round load limit and non-semiautomatic shotgun unconstitutional); Fortson v. L.A. City Attorney’s Office, 852 F.3d 1190 (9th Cir. 2017) (10-year possession ban for misdemeanor domestic violence conviction constitutional, even though conviction later vacated after probation completed); See also Mance v. Sessions, 896 F.3d 699 (5th Cir. 2018) (federal law preventing federally licensed gun dealers from selling handguns to out-of-state residents to out-of-state constitutional even assuming strict scrutiny, not intermediate review, applies), en banc review denied, 896 F.3d 390 (5th Cir. 2018) (8-7 decision).

Under Takings Clause doctrine, the Court eventually rejected a “reasonableness/intermediate review” hybrid approach in favor of normal reasonableness balancing in Lingle v. Chevron, Inc., 544 U.S. 528, 540-48 (2005), discussed in the E-Treatise at § 22.2.5.1 n.94. It would be useful if the courts would also clarify who has the burden of proof: the government, as at standard intermediate review or third-order reasonableness review, as noted in the E-Treatise at § 7.2.1 & Table 7.2 (page 186), or the challenger, as at second-order reasonableness review. See, e.g., United States v. Skoien, 614 F.3d 638, 653-54 (7th Cir. 2010) (10-1 en banc) (Sykes, J., dissenting) (not clear the majority required “the government to shoulder its burden” under standard intermediate scrutiny); Hamilton v. Pallozzi, 848 F.3d 614, 623-24, 629 (4th Cir. 2017) (since prohibitions on felons possessing firearms are presumptively valid, felon has the burden to show he is now a “law-abiding, responsible citizen”; to make that showing he would have to show he “has received a pardon or the law forming the basis of conviction has been declared unconstitutional or otherwise unlawful”); Binderup v. Attorney General of the United States, 836 F.3d 338, 350-53 (3rd Cir. 2016) (splintered en banc opinion) (controlling opinion held defendants met their burden to show misdemeanor convictions were not sufficiently serious; intermediate review applied and government did not meet its burden to ban defendants owning guns).

In some cases, the Second Amendment challenge has prevailed. For example, after holding that bans on all firing ranges within Chicago likely is unconstitutional, Ezell v. City of Chicago, 651 F.3d 684 (7th Cir. 2011), the Seventh Circuit held unconstitutional a later ordinance which effectively foreclosed gun ranges by not permitting a gun range within 100 feet of another range or 500 feet of a residential district, school, place or worship, or multiple other uses, leaving only 2.2% of the city’s total acreage available. Ezell v. City of Chicago, 846 F.3d 888 (7th Cir. 2017) (law’s ban on any person under 18 from entering gun range also failed intermediate review). A 2-1 panel of the Seventh Circuit held an Illinois law prohibiting most people from carrying a gun in public unconstitutional, Moore v. Madigan, 702 F.3d 933 (7th Cir. 2012) (case mooted by passage of Illinois Firearm Concealed Carry Act in Shepard v. Madigan, 958 F. Supp. 2d 996 (S.D. Ill. 2013)). See generally Rachal v. Westchester County, N.Y., 701 F.3d 81 (2nd Cir. 2012) (“proper cause” to obtain permit to carry gun constitutional); Drake v. Filko, 724 F.3d 426 (3rd Cir. 2013) (“justifiable need” to carry gun constitutional); Peruta v. County of San Diego, 824 F.3d 919 (9th Cir. 2014) (7-4 en banc) (no right to concealed carry of gun outside home; any right to open carry not considered); Palmer v. District of Columbia, 59 F. Supp. 3d 173 (D.D.C. 2014) (total ban on carrying gun outside home unconstitutional); Walters v. Wolf, 660 F.3d 307 (8th Cir. 2011) (city violated due process for not having procedures for return of a handgun following dismissal of charges); Gadomski v. Tavares, 113 A.3d 387 (R.I. 2015) (individual entitled to more than “mere recital” denying permit to carry a gun). The attorneys who litigated Heller were awarded $1,132,182 in attorneys’ fees. Heller v. District of Columbia, 832 F. Supp. 2d 32 (D.D.C. 2011).
Protection of Lawful Commerce in Arms Act

§ 23.1.1.1, page 993, text following n.21: The proposed Protection of Lawful Commerce in Arms Act is now law, and has been used to preempt state laws. For example, in Illeto v. Glock, Inc., 565 F.3d 1126 (9th Cir. 2009), the Ninth Circuit held the Act preempts shooting victims' tort claims under California statutes against federally licensed gun manufacturers and distributors; Act does not violate the Due Process Clause, Equal Protection Clause, Takings Clause, or general separation of powers concerns. See generally Allen Rostron, A New State Ice Age for Gun Policy, HARV. L. & POL. REV. 327 (2016). On other laws regulating guns, see Abramski v. United States, 134 S. Ct. 2259 (2014) (defendant’s misstatement that he, and not another, was actual buyer on required form is a “material misrepresentation” making him liable for false statement); id. at 2275 (Scalia, J., joined by Roberts, C.J., and Thomas & Alito, JJ., dissenting) (since other person could have bought gun legally, not a material misrepresentation); Wollslaeber v. Governor of Florida, 848 F.3d 1293 (11th Cir. 2017) (10-1 en banc) (Florida Firearm Owners’ Privacy Act, which prevents physicians from routinely asking patients if they own guns, unconstitutional under either Central Hudson Gas’ intermediate review as regulation of commercial speech or under strict scrutiny); Daniel v. Armslist, LLC, 913 N.W.2d 211 (Ct. App. Wis. 2018) (federal Communications Decency Act of 1996 does not preempt state tort law claim that Armslist used website to facilitate illegal firearms purchases which were used in mass casualty shooting).

Constitutionality of Federal Defense of Marriage Act

§ 23.1.3, page 1001, text following n.49: In 2010, the Defense of Marriage Act was ruled unconstitutional under the Fifth Amendment in Massachusetts v. United States Department of Health and Human Services, 682 F.3d 1 (1st Cir. 2012). In 2013, the Supreme Court agreed in United States v. Windsor, 133 S. Ct. 2675 (2013), discussed in this Supplement at § 26.4.6 n.488.

Recent Decisions Under the Full Faith and Credit Clause

§ 23.1.3, page 1001, text following n.51: As predicted in the E-Treatise, a number of states since 2006 moved to recognize gay marriage or civil unions. These developments are discussed in this Supplement at § 26.4.6 n.480. In consequence, an increased number of same-sex marriages required states to decide what “full faith and credit” to give such marriages, both in light of the federal Defense of Marriage Act, discussed in this Supplement at § 26.4.6 n.488, and under state laws, see Andrew Koppelman, The Difference the MinidOMAs Make, 38 LOY. U. CHI. L.J. 265 (2007) (discussing a range of issues, including 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, child support or money judgments rendered in another state). These issues all became moot when in Obergefell v. Hodges, 135 S. Ct. 2584 (2015), discussed in this Supplement at § 26.4.6 n.480, the Court struck down bans on same-sex marriage nationwide, requiring all states to recognize same-sex marriages. On full faith and credit generally, see V.L. v. E.L., 136 S. Ct. 1017 (2016) (Alabama Supreme Court required to give full faith and credit to adoption order issued by Georgia superior court to female partner of children’s biological mother); Franchise Tax Bd. of California v. Hyatt, 136 S. Ct. 1277 (2016) (law allowing a citizen to win greater damages against another state’s agency than against own state agency represents hostility to the public acts of the other state, and is unconstitutional).

The Fourth Amendment: Protection Against Unreasonable Searches and Seizures

§ 23.2.1.1, page 1004, text following n.59: In Arizona v. Gant, 129 S. Ct. 1710 (2009), a 5-4 Court held it is unreasonable to search a vehicle incident to an arrest unless the arrestee is (a) within reaching distance of the passenger compartment (here arrestee was handcuffed and in police car) or (b) it is reasonable to believe the vehicle contains evidence of the offense leading to arrest. Id. at 1723-24. The dissent said the ruling was an unjustified limitation on the rule of New York v. Belton, 453 U.S. 454 (1981), which allowed a search of the passenger compartment whenever incident to a valid arrest. Id. at 1726 (Alito, J., joined by Roberts, C.J., and Kennedy, J., and Breyer, J., except as to Part II-E, dissenting). Justice Scalia provided the fifth vote for the majority, but no other Justice shared his view that a vehicle search incident to an arrest is reasonable only
when the object of the search is evidence of the crime for which the arrest was made, or another crime that the officer has probable cause to believe occurred. *Id.* at 1724-25 (Scalia, J., concurring). See also *Michigan v. Summers*, 133 S. Ct. 1031 (2013) (rule authorizing police officers executing a search warrant to detain occupants to ensure officer safety, prevent flight, and promote orderly search does not allow officers to detain and search former occupants who are no longer in the immediate vicinity); *Navarette v. California*, 134 S. Ct. 1683 (2014) (highway patrol officer had reasonable suspicion to stop motorist for suspected drunk driving based on anonymous 911 caller’s report, despite the officer not observing any suspicious driving conduct) (Scalia, joined by Ginsburg, Sotomayor & Kagan, J.J., dissenting); *Rodriguez v. United States*, 135 S. Ct. 1609 (2015) (police may not extend an otherwisecompleted traffic stop, absent reasonable suspicion, in order to conduct a dog sniff) (Kennedy, Thomas & Alito, J.J., dissenting); *City of Los Angeles v. Patel*, 135 S. Ct. 2443 (2015) (city ordinance requiring hotel operators to disclose contents of guest registries to police without pre-compliance review violates Fourth Amendment) (Roberts, C.J., and Scalia, Thomas & Alito, J.J., dissenting); *County of Los Angeles v. Mendez*, 137 S. Ct. 1539 (2017) (“excessive force” claim under the Fourth Amendment must be analyzed in light of then-existing circumstances; fact that need for force was “provoked” by prior Fourth Amendment “warrantless entry” or “failure to knock-and-announce” violations irrelevant).

In *Florida v. Jardines*, 133 S. Ct. 1409 (2013), the Court held that police officers who took a drug-sniffing dog onto a homeowner’s porch to investigate the contents of the house conducted a “search” under the Fourth Amendment. *Cf. United States v. Whitaker*, 820 F.3d 849 (7th Cir. 2016) (*Jardines* applies to drug-dog sniff in common hallway of apartment complex); *State v. Nguyen*, 841 N.W.2d 676 (N. Dak. 2013) (*Jardines* does not apply to such drug-dog sniff); *Florida v. Harris*, 133 S. Ct. 1050 (2013) (whether alert by drug-detection dog satisfies probable cause depends on totality of the circumstances, including whether dog had been certified by a bona fide organization that had tested dog’s reliability). See also *United States v. Jones*, 132 S. Ct. 945 (2012) (physical attachment of Global Positioning System device to individual’s vehicle constitutes a “search”); *United States v. Davis*, 750 F.3d 1186 (10th Cir. 2014) (car passenger has no standing to rely on *Jones*); *People v. Sotelo*, 336 P.3d 188 (Colo. 2014) (passenger can challenge search of his or her possessions in car); *United States v. Gilliam*, 842 F.3d 801 (2d Cir. 2016) (no warrant required for request to mobile phone operator for GPS coordinates under Stored Communications Act, and Fourth Amendment not violated when exigent circumstances exist – here to capture suspect before he took underage girl to be a prostitute).

Regarding searches incident to car stops, see *Missouri v. McNeely*, 133 S. Ct. 1552 (2013) (natural dissipation of alcohol in bloodstream of does not always constitute exigency to justify nonconsensual blood test without search warrant; exigency must be determined based on totality of circumstances); *id.* at 1569 (Roberts, C.J., joined by Breyer & Alito, J.J., concurring in part and dissenting in part) (exigent circumstances exist unless officer could reasonably conclude there is time to secure warrant before blood can be drawn); *id.* at 1574 (Thomas, J., dissenting) (given natural dissipation of alcohol, exigent circumstances always exist); *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016) (warrantless search of defendant’s breath for alcohol permissible as search incident to arrest, and state may arrest for failure to submit to a breath test under “implied consent” law; *McNeely* still applies to drawing blood); *id.* at 2187 (Sotomayor, J., joined by Ginsburg, J., concurring in part and dissenting in part) (*McNeely* should apply to breath and blood tests); *id.* at 2196-97 (Thomas, J., concurring in part and dissenting in part) (breath and blood tests should be valid as search incident to arrest); *People v. Hyde*, 393 P.3d 962 (Colo. 2017) (“implied consent” permits drawing blood to determine intoxication where driver is unconscious); *Fitzgerald v. People*, 394 P.3d 671 (Colo. 2017) (prosecution’s use at trial of refusal to consent to breath or blood test as evidence of guilt does not violate Fourth or Fifth Amendment privilege against self-incrimination, since not testimonial); *Tarabochia v. Adkins*, 766 F.3d 1115 (9th Cir. 2014) (warrantless roving auto stop of fishers to check catch and fishing records unconstitutional).

Resolving a circuit split, in *Riley v. California*, 134 S. Ct. 2473 (2014), a unanimous Court held that in a normal arrest situation neither an interest in preventing destruction of evidence, or protecting officers’ safety, justified dispensing with warrant requirement given a mobile phone’s capacity to store large amounts of data, similar to data stored at home. Although numerous federal Courts of Appeal had held otherwise, a 5-4 Court ruled in *Carpenter v. United States*, 138 S. Ct. 2206 (2018), that a warrant is usually required to get cell phone tower location records absent exigent circumstances under “reasonable expectation of privacy” test from *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring). *Id.* at 2223, 2226 (Kennedy, J., joined by Thomas & Alito, J.J., dissenting) (citing Courts of Appeal opinions); *id.* at 2235 (Thomas, J.,
dissenting) (cell towel records are not “property” of individual, so no search of individual’s property; Court should reconsider Katz reasonable expectation of privacy test); id. at 2261-64, 2272 (Gorsuch, J., dissenting) (while under Katz the dissenting opinions are correct, Court should reconsider Katz, and sympathetic to notion individual does have property interest in his own cell phone records, triggering Fourth Amendment protection). See generally United States v. Stanley, 753 F.3d 114 (3rd Cir. 2014) (accused tapping into neighbor’s unsecured wireless router had no expectation of privacy even in his own home); Huff v. Spaw, 794 F.3d 543 (6th Cir. 2015) (no expectation of privacy in 90-minute inadvertent “poocket dial” call); United States v. De L’Isle, 825 F.3d 426 (8th Cir. 2016) (no warrant needed to scan magnetic strips on credit, debt, and gift cards). But see United States v. Otero, 563 F.3d 1127 (10th Cir. 2009) (search warrant for defendant’s computer files failed 4th Amendment’s particularity requirement); United States v. Cotterman, 709 F.3d 952 (9th Cir. 2013) (reasonable suspicion of criminal activity required for forensic search of computers, smart phones, or other digital media brought across the border, as opposed to warrantless physical search permitted under “border exception” doctrine); United States v. Lopez-Cruz, 730 F.3d 803 (9th Cir. 2013) (federal agent who obtained consent to search suspect’s mobile phone violated Fourth Amendment by answering incoming call without consent); United States v. Garias, 755 F.3d 125 (2nd Cir. 2014) (officers executing search warrant to copy hard drives from suspect’s computer, but holding them for 2½ years before rummaging through data for evidence of different crime, violated 4th Amendment); United States v. Lara, 815 F.3d 605 (9th Cir. 2016) (government agents may not comb through digital data on probationer’s mobile phone just because he signed a condition of probation saying government could search his property any time); In the Matter of Warrant to Search a Certain E-Mail Account Controlled and Maintained by Microsoft v. United States, 829 F.3d 197 (2d Cir. 2016) (Stored Communications Act’s (SCA) authorization to search e-mail account does not apply extraterritorially to server located in Ireland) (SCA amended by CLOUD Act of 2018 to provide for such searches); State v. Earls, 70 A.3d 630 (N.J. 2013) (New Jersey Constitution requires search warrants before tracking location of cellular phone); Commonwealth v. Augustine, 4 N.E.3d 846 (Mass. 2014) (same under Massachusetts Constitution); Zanders v. State, 73 N.E.3d 178 (Ind. 2017) (no search warrant required for tracking location under Indiana Constitution). Courts have split on expectation of privacy in text messages. See, e.g., State v. Patino, 93 A.2d 40 (R.I. 2014), and cases cited therein. Courts have also split over whether “dragnet” warrants, which permit the government to hack into any computer accessing a government-operated “sting” website, such as to combat child pornography, satisfy the 4th Amendment “particularity” requirement. See, e.g., United States v. Graver, 2017 WL 1134814 (S.D. Ohio 2017), and cases cited therein.

Prior to 2013, courts divided on whether routine collection of DNA samples of persons arrested, but not yet convicted, was constitutional. In Maryland v. King, 133 S. Ct. 1958 (2013), a 5-4 Supreme Court held that it is constitutional for officers to take swabs from all people subjected to custodial arrest for serious crimes and to catalog their DNA profiles in a database for identification purposes. Four Justices dissented. Id. at 1980 (Scalia, J., joined by Ginsburg, Sotomayor & Kagan, JJ., dissenting) (DNA samples are not comparable to fingerprinting, and real purpose of DNA swabs is to help solve crimes, and thus the search needs to satisfy probable cause). Cf. Raynor v. State, 99 A.3d 753 (Md. 2014) (DNA testing of material individual not in custody left on chair at police station not a “search”); Commonwealth v. Arzola, 26 N.E.3d 185 (Mass. 2015) (DNA testing of bloodstain found on shirt worn by defendant at time of arrest not a “search,” but for purposes of identifying to whom the blood belonged). But see State v. Medina, 102 A.3d 661 (Vt. 2015) (routine collection of DNA samples from persons under custodial arrest violates Vermont State Constitution).

In Florence v. Board of Chosen Freeholders of Burlington County, N.J., 132 S. Ct. 1510, 1518-20 (2012), a 5-4 Court held that a person arrested even for a minor traffic offense can be subjected to an invasive strip search before being admitted into the general jail population, both to ensure the safety of prison personnel and safety of other prisoners. Id. at 1525 (Breyer, J., joined by Ginsburg, Sotomayor & Kagan, JJ., dissenting) (reasonable suspicion should be required to authorize strip search). In Manuel v. City of Joliet, Illinois, 137 S. Ct. 911 (2017), the Court adopted the view of 10 of 11 Circuits who had considered the issue to hold the Fourth Amendment right extends through the pre-trial period – in this case after the judge’s determination of probable cause. Id. at 923 (Alito, J., joined by Thomas, J., dissenting) (right extends only through “first”/“initial” appearance, but not entire pretrial detention). See also United States v. Stokes, 725 F.3d 880 (7th Cir. 2013) (Fourth Amendment does not apply to search of overseas homes of U.S. citizens); United States v. Robinson, 846 F.3d 694 (4th Cir. 2017) (12-4 en banc) (police may frisk lawfully stopped individuals they believe to be carrying a gun even in states which permit concealed-carry permits).
The Fourth Amendment: Consent to Search

§ 23.2.1.1, page 1005, n.63: The Texas Court of Criminal Appeals held in State v. Copeland, 399 S.W.3d 159 (Tex. Crim. App. 2013), that the Georgia v. Randolph rule that one resident’s objection to a police search of a home will override another resident’s consent does not apply to vehicle searches, where expectations regarding privacy are different. In Fernandez v. California, 134 S. Ct. 1126, 1130-31 (2014), the Court held a defendant’s previously stated objected, while physically present, can be overridden by a co-tenant when the defendant is no longer present, in this case because he had been arrested. Id. at 1138 (Ginsburg, J., joined by Sotomayor & Kagan, JJ., dissenting). See also United States v. Wahchumwah, 710 F.3d 862 (9th Cir. 2012) (undercover agent’s secret videotaping when invited into suspect’s home no violation of Fourth Amendment); United States v. Hill, 776 F.3d 243 (4th Cir. 2015) (standard condition of supervised release that authorizes home visits by Probation Officer does not indicate consent to “warrantless searches”); Dinh v. California, 2016 WL 4256896 (6th Dist. Ct. App. Cal. 2016) (consent by third party to search valid even if consent is obtained, in part, by use of information obtained in prior illegal search); United States v. Escamilla, 852 F.3d 474 (5th Cir. 2017) (consent to cell phone search ends when phone returned).

The Fourth Amendment and Searches of the Workplace

§ 23.2.1.1, page 1008, n.76: In City of Ontario, California v. Quon, 130 S. Ct. 2619, 2631-33 (2010), citing O’Connor v. Ortega, 480 U.S. 709 (1987), the Court held, without dissent, that it was reasonable for the City to conduct a warrantless search of text messages on a police officer’s pager, which the City had provided, to determine if number of text messages bought by City each month was sufficient for work-related purposes. The officer was disciplined for non-work-related texts.

The Fourth Amendment and Searches of Student Property and Persons


The Fourth Amendment: The Exclusionary Rule

§ 23.2.1.1, page 1012, text following n.94: In Herring v. United States, 129 S. Ct. 695, 698 (2009), a 5-4 Court held that the exclusionary rule does not require suppression of evidence when the police mistakenly believed that an individual had an outstanding arrest warrant, but that belief turned out to be wrong because of negligent bookkeeping by another police officer, rather than systemic errors or recklessness in police behavior. Id. at 710 (Ginsburg, J., joined by Stevens, Souter & Breyer, JJ., dissenting) ( “Negligent recordkeeping errors by law enforcement threaten individual liberty, are susceptible to deterrence by the exclusionary rule, and cannot be remedied effectively by other means.”). Earlier, in Hudson v. Michigan, 126 S. Ct. 2159, 2165 (2006), a 5-4 Court held that the exclusionary rule does not apply when the police have a valid search warrant, but fail to “knock and announce” their presence, as they are required to do. Again, the more liberal Justices on the Court dissented. Id. at 2171 (Breyer, J., joined by Stevens, Souter & Ginsburg, JJ., dissenting). See also Davis v. United States, 131 S. Ct. 2419, 2423-24 (2011) (good faith exception to exclusionary rule allows admission of evidence seized during an unconstitutional search conducted in objectively reasonable reliance on then-binding appellate precedent subsequently overruled); id. at 2436 (Breyer, J., joined by Ginsburg, J., dissenting); Heien v. North Carolina, 135 S. Ct. 530 (2014) (reasonable mistake of law – here thinking motorist needed two functional brake lights, not merely one – can give rise to reasonable suspicion necessary to uphold “seizure”); Utah v. Strieff, 136 S. Ct. 2056 (2016) (evidence of drug possession obtained from search incident to arrest for outstanding arrest warrant for traffic violation can be admitted under “attenuation” doctrine of Brown v. Illinois, 422 U.S. 590 (1975) (consideration of 3 factors: “temporal proximity”, “presence of intervening circumstances”; and “particularity,” that is “purpose or
flagrancy of the official misconduct”), even though initial stop which led to learning about arrest warrant was unlawful) (Ginsburg, Kagan, Sotomayor, JJ., dissenting); United States v. Warshak, 631 F.3d 266 (6th Cir. 2010) (Fourth Amendment applies to “e-mail communications,” but good faith reliance on Stored Communications Act (SCA) means exclusionary rule does not apply); United States v. Guerrero, 768 F.3d 351 (5th Cir. 2014) (failure to follow SCA procedures to obtain cell phone use records from service provider does not bar use of evidence, as exclusionary rule inapplicable to SCA violations); United States v. Massi, 761 F.3d 512 (5th Cir. 2014) (good-faith exception applies even if affidavit supporting search warrant based in part on earlier-in-time detention violating Fourth Amendment); United States v. Ganias, 824 F.3d 199 (2nd Cir. 2016) (12-1 en banc) (good faith exception applies to computer data found after second warrant in 2006, even though initial 2003 warrant did not cover data).

The Fifth Amendment: Double Jeopardy

§ 23.2.1.2B, page 1016, n.114: See also Evans v. Michigan, 133 S. Ct. 1069 (2013) (8-1 Court held that midtrial directed verdict and dismissal by judge, based on judge’s erroneous requirement of extra element for charged offense, was acquittal for double jeopardy purposes, preventing defendant from being retried) (Alito, J., dissenting) (retrial would give prosecution fair opportunity to prove case); Martinez v. Illinois, 134 S. Ct. 2070 (2014) (Double Jeopardy attaches when jury is sworn, even if prosecutors refuse to participate after jury swearing because motion for continuance denied).

The Fifth Amendment: Determining Existence of Miranda Rights

§ 23.2.1.2C, page 1018, n.123: In Berghuis v. Thompkins, 130 S. Ct. 2250, 2262 (2010), a 5-4 Court held that a suspect’s invocation of the Miranda right to remain silent must be unambiguous. A suspect who has received the Miranda warning, and who remains silent during the first two hours and 45 minutes of a three-hour interrogation, but who then responds to questions, has not invoked his Miranda right. Police are not required to obtain an express waiver. The dissent held that a clear-statement rule was inconsistent with Miranda’s concern with protecting accused parties from self-incrimination. Id. at 2266 (Sotomayor, J., joined by Stevens, Ginsburg & Breyer, JJ., dissenting). In J.D.B. v. North Carolina, 131 S. Ct. 2394, 2398-99 (2011), a 5-4 Court held that the age of a juvenile if known to the officer at the time of interrogation, or would have been objectively apparent to a reasonable officer, is relevant to whether the child was “in custody” for purposes of Miranda. Four Justices dissented. Id. at 2408 (Alito, J., joined by Roberts, C.J., and Scalia & Thomas, JJ., dissenting). See also Moore v. State, 30 A.3d 945 (Md. 2011) (police officers’ intentional foot-dragging in bringing a 16-year-old murder suspect before a judge, coupled with refusal to comply with his 13 requests to speak with his mother, rendered the youth’s confession involuntary). See also Howes v. Fields, 132 S. Ct. 1181 (2012) (determining whether prisoner is in custody made upon totality of the circumstances, and prisoner was not in custody when he was isolated in a prison conference room and told he could terminate the interview when he wanted; concurrence concluded that in this habeas case it was not “clearly established” that petitioner was in custody, but if the case were on direct review they would hold that petitioner was in custody for Miranda purposes, id. at 1194 (Ginsburg, J., joined by Breyer & Sotomayor, JJ., concurring in part and dissenting in part)); People v. Dunbar, 23 N.E.3d 946 (N.Y. 2014) (preamble to Miranda warning urging suspects to take advantage of their “only opportunity” to tell their side of the story and tell us if “there is something you need us to investigate” rendered subsequent Miranda waiver ineffective); State v. McAdams, 193 So. 3d 824 (Fla. 2016) (under Florida Constitution, must tell suspect his lawyer had arrived at police station, even though the individual was not technically in custody at the time).

The Fifth Amendment: Break in Custody Under Miranda

§ 23.2.1.2C, page 1018, n.124: In Maryland v. Shatzer, 130 S. Ct. 1213 (2010), the Court held that the rule of Edwards v. Arizona, 451 U.S. 477, 484-85 (1981), which provides that a suspect who has invoked his Miranda right to remain silent cannot be further questioned until either counsel has been made available or the suspect initiates further exchanges with the police, does not apply when there has been a break in custody of sufficient duration to dissipate the coercive effects of the previous interrogation, as long as new Miranda warning given. The Court majority set a bright-line rule of 14 days for the break-in-custody rule to apply. Id. at 1122-23. Justice Thomas would have allowed for the break-in-custody rule to apply for less than 14
The Fifth Amendment: Voluntary Confessions During Unreasonable Delay in Presentment

§ 23.2.1.2C, page 1019, text following n.128: In 18 U.S.C. § 3501(c), passed in 1968, Congress provided that a confession made while under arrest shall not be inadmissible solely because of delay in bringing such person before a magistrate judge if the confession is found voluntary and made within six hours of arrest. In Corley v. United States, 129 S. Ct. 1558 (2009), the government argued that despite this section a confession is admissible if a district court finds the confession voluntary, regardless of whether the delay in presentment was within or longer than six hours. Rejecting this argument, a 5-4 Court agreed with a convicted defendant that § 3501(c) did not do away with the McNabb-Mallory rule, established by the Court under its supervisory power, see McNabb v. United States, 318 U.S. 332 (1943); Mallory v. United States, 354 U.S. 449 (1957), that a confession is inadmissible if given during a delay that is unreasonable. Thus, § 3501(c) merely created a limit on the McNabb-Mallory rule for confessions given within six hours. After that, normal McCabb-Mallory delay analysis applies. Id. at 1571. Four Justices in dissent said that § 3501(a) clearly provided that a confession is admissible if voluntarily given, and § 3501(c) was directed to confessions that were otherwise voluntary, that is, where there was no basis other than prepresentment delay for concluding that the confession was coerced. Under this view, the statute would have done away with the McNabb-Mallory analysis for all voluntary confessions, even those after six hours, as the government argued in the case. Id. at 1574-76 (Alito, J., joined by Roberts, C.J., and Scalia & Thomas, JJ., dissenting).

The Fifth Amendment: Privilege Against Self-Incrimination

§ 23.2.1.2C, page 1021, n.137: In Salinas v. Texas, 133 S. Ct. 2174 (2013), the Court held that a prosecutor’s comments at trial about defendant’s silence in response to a question during a non-custodial police interview did not violate the defendant’s privilege against self-incrimination, since the individual did not expressly invoke the privilege during the course of the interview. Id. at 2178 (Alito, J., joined by Roberts, C.J., and Kennedy, J., announcing the judgment of the Court). Two other Justices would have held the prosecutor’s comments could be admitted because the defendant was not in custody and subject to the Miranda warning requirement when silence occurred. Even had the defendant been in custody, these two Justices questioned the long-established doctrine of Griffin v. California, 380 U.S. 609 (1965), that the privilege against self-incrimination includes not only the right not to testify or answer questions, but prevents a prosecutor from commenting on that silence. 133 S. Ct. at 2184 (Thomas, J., joined by Scalia, J., dissenting). Consistent with their dissent in Berghuis, discussed in this Supplement at § 23.2.1.2C n.123, a four-Justice dissent said the prosecutor’s comments undermined the purpose of the privilege against self-incrimination. In this case, the police “made clear he [Salinas] was a suspect. The interrogation took place at the police station. The relevant question – about whether the shotgun from Salinas’ home would incriminate him – amounted to a switch in subject matter. And it was obvious that the new question sought to ferret out whether Salinas was guilty of murder.” 133 S. Ct. at 2185, 2188-89 (Breyer, J., joined by Ginsburg, Sotomayor & Kagan, JJ., dissenting).

In Vogt v. City of Hays, Kansas, 844 F.3d 1235 (10th Cir. 2017), the Tenth Circuit held the right against self-incrimination applies to pre-trial proceedings, joining the Second, Seventh, and Ninth Circuit which “have held certain pretrial uses of compelled statements violate the Fifth Amendment”; the Third, Fourth, and Fifth Circuits have held the right against self-incrimination “is only a trial right.” See also Kansas v. Cheever, 134 S. Ct. 596 (2013) (privilege not violated when state rebutted defendant’s expert in support of voluntary intoxication defense, which he alleged rendered him incapable of premeditation, with testimony of psychiatrist from defendant’s court-ordered mental evaluation); In re Grand Jury Investigation, 22 N.E.3d 927 (Mass. 2015) (“attorney-client privilege” permits law firm to resist grand jury subpoena to turn over client’s mobile phone, where request to individual would involve “self-incrimination”); United States v. Apple MacPro Computer, 851 F.3d 238 (3rd Cir. 2017) (man who refused to decrypt two external hard drives believed to obtain child pornography properly held in civil contempt; under the “foregone conclusion” exception to privilege against self-incrimination, it was a “foregone conclusion” the files were on the drives).
Due Process of Law: The Brady Rule

§ 23.2.1.2D, page 1021, text following n.138: In Brady v. Maryland, 373 U.S. 83, 86-87 (1963), the Court held it violated due process for the prosecution to fail to disclose to the defense material evidence of the accused’s innocence, such as a confession by another person. In Smith v. Cain, 132 S. Ct. 627 (2012), the Court held where eyewitness testimony was the sole evidence linking defendant to the crime, prosecutor’s failure to disclose police files containing statements eyewitness made that directly contradicted trial testimony violated Brady requiring reversal. Cf. Turner v. United States, 137 S. Ct. 1885 (2017) (Gorsuch, J., not participating) (evidence questioning reliability of some eyewitness testimony that suggested victim was murdered not by gang, but by smaller group of individuals, not sufficient to create “reasonable probability” that “withheld evidence would have changed the outcome of petitioners’ trial” when defense did not question “gang” murder scenario at trial); id. at 1896-99 (Kagan, J., joined by Ginsburg, J., dissenting) (“reasonable probability” established, since defense denied evidence from which challenge to “gang” murder scenario could have been constructed); Saunders-El v. Rohde, 778 F.3d 556 (7th Cir. 2015) (Brady not violated when police officers failed to tell prosecutors they planted accused’s blood at crime scene, since Brady only requires disclosure of “evidence,” not “creating evidence” by fabrication; accused acquitted at trial).

Due Process of Law in Criminal Proceedings

§ 23.2.1.2D, page 1022, text following n.146: In District Attorney’s Office v. Osborne, 129 S. Ct. 2308 (2009), a 5-4 Court held that although a convicted felon could bring an action under 42 U.S.C. § 1983, rather than being limited to a habeas corpus action, to challenge Alaska’s refusal to turn over DNA evidence for testing, there was nothing fundamentally unfair in the Alaska requirement that a prisoner show the evidence was diligently pursued and was sufficiently material. The Court expressed reluctance to extend due process and short circuit what looked to be a prompt and considered legislative response among states post-conviction use of DNA. Id. at 2312, 2320-21. Justice Alito said when a criminal defendant, for tactical purposes, passes up DNA testing at trial, defendant has no right to demand DNA testing after conviction. Id. at 2323-24 (Alito, J., joined by Kennedy, J., and Thomas, J., as to Part II, concurring). The dissent said a plaintiff has a liberty interest in presenting evidence that might establish innocence, and a procedural and substantive right to present evidence available for testing free of arbitrary government action. Id. at 2331 (Stevens, J., joined by Ginsburg & Breyer, JJ., and joined by Souter, J., as to Part I, dissenting). Justice Souter added that the state had violated procedural due process by making such untenable arguments as the plaintiff had not claimed factual innocence or excluding plaintiff as the source of semen in a condom found near bloody snow would not undermine confidence in the verdict. Id. at 2340-43 (Souter, J., dissenting).

See also Perry v. New Hampshire, 132 S. Ct. 716 (2012) (due process does not require preliminary judicial inquiry into reliability of eyewitness identification unless that identification was procured under suggestive circumstances arranged by law enforcement; dissent argued that if suggestive circumstances exist, even if not arranged by law enforcement, the rule regarding preliminary judicial review for reliability stated in Simmons v. United States, 390 U.S. 377 (1968), should apply. 132 S. Ct. at 730-31 (Sotomayor, J., dissenting)); Taylor v. Nevada, 371 P.3d 1036 (Nev. 2016) (although earlier eyewitness identification was unreliable, positive identification during trial cured the error of the admission of the out-of-court identification, and clear beyond a reasonable doubt the error did not contribute to the verdict); Dietz v. Bouldin, 136 S. Ct. 1885 (2016) (federal courts have limited inherent power to recall discharged jury in civil cases after returning legally impossible/ erroneous verdict – here, jury verdict of $0 in damages despite stipulated medical damages of $10,136) (Thomas, J., joined by Kennedy, J., dissenting) (proper remedy would be remand for new trial); United States v. DeCoster, 828 F.3d 626 (8th Cir. 2016) (corporate officers may be criminally liable and imprisoned for negligence or reckless disregard without proof of intent to cause harm, here a large-scale salmonella outbreak from tainted eggs); United States v. Blodgett, 872 F.3d 66 (1st Cir. 2017) (10-year mandatory minimum sentence for child pornography defendants with prior state child sex abuse convictions does not violate due process as rationally related to legitimate government interests). But see Nelson v. Colorado, 137 S. Ct. 1249, 1252 (2017) (defendants whose criminal convictions are overturned are entitled to presumption of innocence, and thus law requiring defendants to prove innocence by clear and convincing evidence to recover fines paid to the state based on the criminal conviction violates due process; states may only impose “minimal procedures” on refund); id. at 1263 (Thomas, J., dissenting) (defendant had not shown

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a continuing property interest in funds once they were paid to the state); United States v. Gillenwater, 717 F.3d 1070, 1077-80 (9th Cir. 2013) (individual has due process right not only to be present at a pre-trial competency hearing, see Sturges v. Goldsmith, 796 F.2d 1103, 1108-09 (9th Cir. 1986), but also right to testify, even over objection of his attorney); United States v. Harden, 758 F.3d 886 (7th Cir. 2014) (under Federal Magistrates Act, magistrates cannot accept guilty pleas in felony cases, even with accused’s consent, acknowledging Circuit split); Reid v. Donelan, 819 F.3d 486 (1st Cir. 2016) (due process limitation of “reasonableness” of detention of aliens pending removal proceedings involves “individualized determination,” joining 3rd and 6th Circuits; 2nd and 9th Circuits hold detention longer than 6 months presumptively unreasonable); Ingram v. Cole County, 846 F.3d 282 (8th Cir. 2017) (inmates forced to sleep naked because of jail’s laundry schedule state colorable claim of deprivation of due process, aff’d en banc by equally divided court, 732 Fed. App’x 496 (8th Cir. 2018); Mulvania v. Sheriff of Rock Island City, 850 F.3d 849 (7th Cir. 2017) (jail policy requiring female detainees to wear white underwear, or go without underwear, based on speculative fear that detainees would make tattoo ink from colored underwear, state colorable claim detainee’s dignity interest outweighs fear under due process reasonableness balancing test, citing, inter alia, Kingsley v. Hendrickson, 135 S. Ct. 2466, 2471-75 (2015) (reasonableness balancing test for pre-trial detainee excessive force claim under due process clause)); United States v. Sanchez-Gomez, 2017 WL 2346995 (9th Cir. 2017) (automatically shackling defendants in courtrooms violates presumption of innocence; individualized potential dangerousness decision required).

The Sixth Amendment: Right to a Public Trial

§ 23.2.1.3.A, page 1026, text following n.163: In Presley v. Georgia, 130 S. Ct. 721, 725 (2010), a 7-2 Court held that the accused’s right to a public trial obligates a trial judge to consider all reasonable alternatives to closing jury selection to the public, including ones not requested by the accused. Two Justices objected to the Court’s summary extension of the right of a public trial to (1) voir dire of the jury, and (2) the requirement to consider alternatives not proffered by the accused. Id. at 726-27 (Thomas, J., joined by Scalia, J., dissenting). Cf. Weaver v. Massachusetts, 137 S. Ct. 1899 (2017) (while violation of right to public trial is a structural error requiring reversal if raised at trial, if raise on post-conviction appeal as part of ineffective assistance of counsel claim petitioner must show prejudice) (Breyer, J., joined by Kagan, J., dissenting).

The Sixth Amendment: Right to Speedy, Fair and Impartial Jury Trial

§ 23.2.1.3.A, page 1027, n.172: In Southern Union Co. v. United States, 132 S. Ct. 2344 (2012), a 6-3 Court extended Apprendi to hold that the Sixth Amendment guarantee of a jury trial on any fact (other than a prior conviction) that increases a criminal defendant’s maximum potential sentence applies to imposition of criminal fines. Three Justices dissented, indicating support for the dissent in Apprendi. Id. at 2357-58 (Breyer, J., joined by Kennedy & Alito, J.J., dissenting). See also Pena-Rodriguez v. Colorado, 137 S. Ct. 855, 868-69 (2017) (where juror makes a clear statement indicating reliance on racial stereotypes or animus, Sixth Amendment requires usual “no-impeachment” rule to give way to permit trial court to consider evidence whether defendant received a fair and impartial trial); id. at 874-75 (Alito, J., joined by Roberts, C.J., and Thomas, J., dissenting) (Holmesian deference-to-government opinion); id. at 872-74 (Thomas, J., dissenting) (formalist “original intent” opinion); People v. Hensley, 330 P.3d 296 (Cal. 2014) (juror’s act of calling pastor for advice on penalty phase in death penalty case misconduct, requiring reversal, even though pastor told him the Bible required him to follow secular law and make own conclusions); State v. Betterman, 342 P.3d 971 (Montana 2015) (no Sixth Amendment right to speedy sentencing, noting federal Circuit and state court split; delay of 14 months between guilty plea and sentencing did not violate due process), aff’d Betterman v. Montana, 136 S. Ct. 1609 (2016) (no Sixth Amendment right; due process not addressed); United States v. Tigano, 880 F.3d 602 (2nd Cir. 2018) (speedy trial rights violated when man held in custody for almost 7 years on drug-related charges, including manufacture of 1,400 marijuana plants).

The Sixth Amendment: Sentencing

§ 23.2.1.3.A, page 1028, n.173: In Dorsey v. United States, 132 S. Ct. 2321 (2012), a 5-4 Court held that the new, more lenient mandatory minimum sentencing provisions of the Fair Sentencing Act of 2010 established for crack cocaine offenses apply to sentencing of defendants who committed crimes before the Act took effect
but were sentenced after it became law, even if sentencing took place before the Sentencing Guidelines amendments took effect; id. at 2339 (Scalia, J., joined by Roberts, C.J., and Thomas & Alito, JJ., dissenting).

In *Alleyne v. United States*, 133 S. Ct. 2151 (2013), a 5-4 Court held that any fact which increases the mandatory minimum sentence for a crime is an “element” of the crime, not a “sentencing factor,” that therefore must be submitted to a jury, overruling *Harris v. United States*, 536 U.S. 545 (2002). Despite his disagreement with *Appendi*, Justice Breyer joined the majority on the grounds that *Appendi* is now the law of the land, and the distinction drawn in *Harris* between minimum and maximum sentences was an anomaly he could no longer follow. 133 S. Ct. at 2166 (Breyer, J., concurring in part and concurring in the judgment).

Four Justices dissented in *Alleyne*. *Id.* at 2167-68 (Roberts, C.J., joined by Scalia & Kennedy, JJ., dissenting) (increasing mandatory minimum sentences limits discretion of a judge in sentencing, but does not affect the jury’s role); *id.* at 2172 (Alito, J., dissenting) (*Appendi* should be overruled, not *Harris*). *See also Descamps v. United States*, 133 S. Ct. 2276 (2013) (courts may not use “modified categorical approach” to decide whether a prior conviction qualifies as a predicate for recidivist enhancement statute when the crime has a single, indivisible set of elements; courts must follow “elements-based,” not “fact-based,” inquiry) (Alito, J., dissenting); *Mathis v. United States*, 136 S. Ct. 2243 (2016) (“elements-based” approach prevents enhancement where statute permits alternative means broader than generic offense to meet elements) (Breyer, J., joined by Ginsburg, J., dissenting; Alito, J., dissenting); *United States v. Johnson*, 583 Fed. App’x 503 (6th Cir. 2014) (no Sixth Amendment right to jury determination of restitution under Mandatory Victim Restitution Act); *Medina v. United States*, 642 Fed. App’x 59 (2d Cir. 2016) (district court may consider facts relevant to sentencing proved by preponderance of the evidence, even if defendant acquitted by jury of crimes based on those facts under the beyond a reasonable doubt standard, as long as facts do not increase punishment beyond maximum allowed for crimes on which defendant was convicted); *United States v. Wireman*, 849 F.3d 956 (10th Cir. 2017) (judges do not have to respond specifically to a defendant’s sentencing arguments as long as they follow sentencing guidelines); *United States v. Velasco*, 855 F.3d 691 (5th Cir. 2017) (shoes can be a dangerous weapon, subjecting a defendant to an increased sentence).

**The Sixth Amendment: Right to Confront Witnesses**

§ 23.2.1.3.B, page 1029, n.182: In *Giles v. California*, 128 S. Ct. 2678 (2008), the Supreme Court noted that in addition to the “dying declaration” exception to the right to confront witnesses, a second exception applies when the witness is “detained” or “kept away” by the defendant – the so-called “forfeiture by wrongdoing” exception. In *Giles*, a 6-3 Court held this exception did not apply when the defendant murdered the witness 3 weeks after she filed a domestic violence complaint, because he did not intend to prevent her from testifying by killing her, but killed her for other reasons. The prosecution had used statements in her compliant about their relationship to rebut the accused’s defense that he killed her in self-defense. *Id.* at 2693, 2683-84. The dissent would have applied the “forfeiture by wrongdoing” doctrine because the natural consequence of the defendant’s act in committing the murder would prevent the witness from testifying about her statement. *Id.* at 2696-98 (Breyer, J., joined by Stevens & Kennedy, JJ., dissenting). The doctrine for the future is unclear, because both Justices Thomas and Alito noted in concurrences that they viewed the statements made to the police in the domestic violence complaint as not covered by the Confrontation Clause, since the statements were not the equivalent of witness testimony in court. Thus, had that issue been before the Court, they would have permitted the evidence to be used at trial on that ground. *Id.* at 2693-94 (Thomas, J., concurring); *id.* at 2694 (Alito, J., concurring). *See also Michigan v. Bryant*, 131 S. Ct. 1143, 1150 (2011) (where statements by mortally wounded victim about shooter’s description and location of shooting objectively indicate that the “primary purpose of the interrogation” was “to enable police assistance to meet an ongoing emergency” rather than to preserve his testimony about his killer, statements are not testimonial and Confrontation Clause does not apply). *Id.* at 1168 (Scalia, J., dissenting); *id.* at 1176 (Ginsburg, J., dissenting).

In *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009), a 5-4 Court held that affidavits reporting the results of forensic analysis which showed material seized by the police was cocaine were “testimonial” in nature, rendering the affiants “witnesses” subject to the defendant’s right of confrontation. The affidavits do not qualify as traditional official or business records. The argument that the statements result from neutral scientific testing is an invitation to return to the overruled decision in *Ohio v. Roberts*, 448 U.S. 56, 66 (1980), which held that evidence with “particularized guarantees of trustworthiness” was admissible without confrontation. Petitioner’s power to subpoena the analysts is no substitute for confrontation. Many states’
practice accords with today’s decision; serious disruption predicted by respondent and dissent is not likely. As in 
Crawford v. Washington, 541 U.S. 36 (2004), discussed in the E-Treatise at § 23.2.1.3.B n.176, which overruled Roberts, the majority in Melendez-Diaz was formalist Justices Scalia and Thomas; liberal instrumentalist Justices Stevens and Ginsburg, and instrumentalist-leaning Justice Souter. 129 S. Ct. at 2530. Four Justices dissented. They noted, “Until today, scientific analysis could be introduced into evidence without testimony from the ‘analyst’ who produced it. This rule has been established for at least 90 years. It extends across at least 35 States and six Federal Courts of Appeals. Yet the Court undoes it based on two recent opinions that say nothing about forensic analysts: Crawford v. Washington, 541 U.S. 36 (2004), and Davis v. Washington, 547 U.S. 813 (2006). . . . The immediate systemic concern is that the Court makes no attempt to acknowledge the real differences between laboratory analysts who perform scientific tests and other, more conventional witnesses – ‘witnesses’ being the word the Framers used in the Confrontation Clause [not analysts].” 129 S. Ct. at 2543 (Kennedy, J., joined by Roberts, C.J., and Breyer & Alito, JJ., dissenting). See also Bullcoming v. New Mexico, 131 S. Ct. 2705, 2709 (2011) (Sixth Amendment not satisfied by presentation of a different analyst who is knowledgeable about the testing procedures, but who neither performed the testing, observed the testing, nor signed a certification in the report regarding handling the sample) (Kennedy, J., joined by Roberts, C.J., and Breyer & Alito, JJ., dissenting); Russell v. Texas, 2016 WL 1402943 (Tex. Ct. App. (14th Dist.) 2016) (Sixth Amendment satisfied by testimony of analyst who performed blood test for intoxication; testimony by nurse who drew the blood not required).

In Williams v. Illinois, 132 S. Ct. 2221, 2227-28 (2012), the 4 dissenting Justices in Melendez-Diaz and Bullcoming formed a 4-Judge plurality that concluded testimony by an expert from a state’s crime laboratory that a defendant’s DNA profile matched the DNA profile produced by another lab, Cellmark, was not admitted for the purpose of establishing the accuracy of the profile that Cellmark produced, but rather merely expressing “an opinion that is based on facts that the expert assumes, but does not know, to be true.” Thus, the Confrontation Clause did not apply. Justice Thomas held that the statement was admitted for purposes of truth, but the Cellmark report was not a sufficient “formalized” document to which the Confrontation Clause should apply. Id. at 2255-56 (Thomas, J., concurring in the judgment). The other Justices in the majority in Melendez-Diaz and Bullcoming dissented, concluding the testimony was introduced for establishing truth, and was testimonial to which the Confrontation Clause should apply. Id. at 2264-65 (Kagan, J., joined by Scalia, Ginsburg & Sotomayor, JJ., dissenting). See generally People v. Lopez, 286 P.3d 469 (Cal. 2012) (laboratory report that linked the results of a blood-alcohol test to defendant admissible without the testimony of the analyst who prepared the report, because the report lacked the level of formality required to be considered “testimonial” under Williams); People v. Dungo, 286 P.3d 442 (Cal. 2012) (statements in autopsy report describing the condition of the murder victim not “testimonial” under Williams); State v. Maxwell, 9 N.E.3d 930 (Ohio 2014) (autopsy report “business record,” not “testimonial”); State v. Michaels, 95 A.3d 648 (N.J. 2014) (substitute analyst who conducts “independent review” of laboratory testing and “verifies” machine-generated testing processes can testify, noting split among states following Bullcoming/Williams). See also State v. McLeod, 66 A.3d 1221 (N.H. 2013) (expert can testify about cause of a fire even if that testimony was based, in part, on statements of the resident that could not be admitted under Crawford because individual had died of unrelated causes prior to trial; court admitted the evidence under a hearsay exception that allows a witness to testify to an opinion that is based on inadmissible evidence when it is evidence that experts in the field reasonably rely upon in forming an opinion); People v. Duncan, 835 N.W.2d 399 (Mich. 2013) (hearsay statements of child too frightened to testify at trial can be admitted under exception for statements of declarants who are “unavailable” by reason of “mental infirmity”); Ohio v. Clark, 135 S. Ct. 2173 (2015) (three-year-old’s statements to preschool teachers identifying defendant as person who caused injuries not “testimonial”; primary purpose to deal with child abuse emergency).

The Harmless Error and Plain Error Rules

§ 23.2.1.3.B, page 1030, n.185: For applications of the “harmless error” rule, see United States v. Davila, 133 S. Ct. 2139 (2013) (improper judicial participation in plea negotiations does not require vacatur of guilty plea unless error prejudiced the defendant’s decision to plead guilty); People v. Aranda, 283 P.3d 632 (Cal. 2012) (trial judge’s failure to give standard jury instruction on the prosecution’s burden of proving an offense beyond a reasonable doubt deprives defendant of due process, but is subject to review for harmless error; in this case, the error was harmless); State v. Schwartz, 327 P.3d 108 (N. Mex. 2014) (admitting video testimony
of forensic scientists, without making necessary finding video testimony necessary, violates Confrontation Clause; not harmless on these facts); United States v. Lee, 760 F.3d 692 (7th Cir. 2014) (denial of defendant’s right to self-representation – here at a pretrial suppression hearing – can never be harmless). For application of the “plain error” rule, see Henderson v. United States, 133 S. Ct. 1121 (2013) (federal plain error rule, Fed. R. Crim. P. 52(b), which authorizes an appellate court to correct an error to which the defendant did not object at trial if the error affects “substantial” rights, applies even when the error did not become plain until the time of the defendant’s appeal); id. at 1131 (Scalia, J., joined by Thomas & Alito, JJ., dissenting).

The Sixth Amendment: Ineffective Assistance of Counsel

§ 23.2.1.3.C, page 1032, end of section: The Court reaffirmed in Buck v. Davis, 137 S. Ct. 759 (2017), the Strickland rule that in addition to showing (1) “that counsel performed deficiently” because his “performance fell outside the bounds of competent representation” a litigant (2) “must also demonstrate prejudice – ‘a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.’” Strickland v. Washington, 466 U.S. 686, 694 [1984].” The Court held in Buck that ineffective assistance of counsel prejudiced defendant who received the death penalty when defense counsel entered into evidence a report containing expert testimony that the defendant was more inclined toward future dangerousness because he was black. Id. at 767. Two Justices concluded that given the heinousness of the crime, the defendant was not prejudiced by report. Id. at 780-81 (Thomas, J., joined by Alito, J., dissenting) In phrasing the proper test, Justice Thomas substituted for Strickland’s “reasonable probability” the phrase “a ‘substantial’ likelihood of a different result,” citing Harrington v. Richter, 562, 86, 111-12 (2011). While Harrington did characterize the Strickland holding in that matter, that characterization is inaccurate. The term “substantial” does not appear in Strickland’s phrasing of the test, and is inconsistent with Strickland’s statement that its test does not require a changed result to be “more likely than not.” 466 U.S. at 693-94. See generally Lafler v. Cooper, 132 S. Ct. 1376 (2012) (when petitioner prejudiced by counsel’s deficient performance in advising rejection of plea offer; proper remedy is to order state to reoffer plea agreement) (Scalia, J., joined by Roberts, C.J., and Thomas, J., dissenting; Alito, J., dissenting); Missouri v. Frye, 132 S. Ct. 1399 (2012) (right to effective assistance extends to the negotiation and consideration of plea offers that lapse or are rejected) (Scalia, J., joined by Roberts, C.J., and Thomas & Alito, JJ., dissenting); Trevino v. Thaler, 133 S. Ct. 1911 (2013) (ignorance or inadvertence on part of state post-conviction counsel can establish basis for excusing federal habeas corpus procedural default of an ineffective assistance claim); United States v. Luis, 564 Fed. App’x 493 (11th Cir. 2014) (forfeiture of “property of equivalent value” to that traceable to alleged fraud does not impair right to counsel); United States v. Ragan, 820 F.3d 609 (4th Cir. 2016) (lawyer who fell asleep several times during trial constitutes ineffective assistance; no need to show individualized prejudice); Bahtuoh v. Smith, 855 F.3d 868 (8th Cir. 2017) (not ineffective assistance to tell jury client will testify, but then doesn’t; contra Ouber v. Guarino, 293 F.3d 19 (1st Cir. 2002)). Cf. Molen v. Christian, 388 P.3d 591 (Ida. 2017) (plaintiff must prove some kind of “exoneration” to bring malpractice claim against criminal defense attorney, but not actual innocence, as that runs counter to presumption of innocence; citing Rantz v. Kaufman, 109 P.3d 132 (Colo. 2005) (discussion of various states’ approaches)).

In Padilla v. Kentucky, 130 S. Ct. 1473, 1482-83 (2010), the Court held it is ineffective assistance of counsel if counsel fails to advise a noncitizen that a guilty plea carries a risk of deportation; where the law is “succinct and straightforward” the attorney must provide competent advice. Two Justices agreed the attorney should advise the client that a criminal conviction may have adverse consequences, but attorney only must suggest client consult an immigration attorney and refrain from unreasonably providing incorrect advice. Id. at 1487 (Alito, J., joined by Roberts, C.J., concurring in the judgment). Two Justices would have limited the Sixth Amendment analysis to effective assistance on the criminal prosecution, not collateral consequences, such as deportation. Collateral consequences should be handled by legislation which could specify “what collateral consequences counsel must bring to a defendant’s attention” and “legislation could provide consequences . . . other than nullification of a criminal conviction.” Id. at 1495-97 (Scalia, J., joined by Thomas, J., dissenting). See also Chaidez v. United States, 133 S. Ct. 1103 (2013) (because Padilla announced a new rule, it does not apply retroactively to already-final convictions) (Sotomayor, J., joined by Ginsburg, J, dissenting); Jae Lee v. United States, 137 S. Ct. 1958 (2017) (even when case against accused is strong, prejudice established where plea bargain led to deportation, even if going to trial might have resulted in substantially longer sentence) (Gorsuch, J., not participating) (Thomas, J., joined by Alito, J., dissenting).
§ 23.2.1.4, page 1033, n.201: In Hall v. Florida, 134 S. Ct. 1986 (2014), a 5-4 Court extended Atkins v. Virginia to hold ban on death penalty for intellectual disabled defendants does not allow states to require defense to present evidence of IQ below 70 before being presenting other evidence of intellectual disability. Id. at 2001-02 (Alito, J., joined by Roberts, C.J., and Scalia & Thomas, JJ., dissenting) (national restriction on IQ use unsound). See also Brumfield v. Cain, 135 S. Ct. 2269, 2273 (2015) (death row inmate sentenced before Atkins entitled to Atkins hearing on these facts; state court contrary determination an “unreasonable determination of the facts”); id. at 2289 (Thomas, J., joined in all but Part I-C by Roberts, C.J., and Scalia & Alito J., dissenting) (state court decision not “unreasonable”); Moore v. Texas, 137 S. Ct. 1039, 1044 (2017) (states may not rely on superseded medical standards in determining who is intellectual disabled for purposes of execution); id. at 1053–54 (Roberts, C.J., and Thomas & Alito, JJ., dissenting) (state had independent grounds to determine lack of intellectual disability; majority did not give sufficient deference).

The Eighth Amendment: Cruel and Unusual Punishment & The Mentally Impaired

§ 23.2.1.4, page 1034, n.206: In Kennedy v. Louisiana, 128 S. Ct. 2641 (2008), a 5-4 Court held that the Eighth Amendment bars imposition of the death penalty for the rape of a child where the crime did not result, and was not intended to result, in the victim’s death. Justice Kennedy, joined by Justices Stevens, Souter, Ginsburg, and Breyer, reasoned that punishment for a crime must be proportional to the offense as determined by evolving standards of decency that mark the progress of a maturing society. Those standards are determined by national consensus (the history of the Amendment, judicial precedents, legislative enactments, and state practice), and by the Court’s independent judgment. Justice Kennedy found consensus in evidence such as only six of the 36 states which have the death penalty authorize it for the rape of a child; no federal law imposes the death penalty for rape; in Coker v. Georgia, 433 U.S. 584 (1977), the rape of a 16-year-old woman, characterized as an adult, was held not to authorize the death penalty; and only one state since 1964 has sentenced to death an individual for the crime of child rape. Justice Kennedy also noted that the goal of retribution needed to be considered in light of the risks of wrongful execution because of the unreliability of testimony by children, and, as a matter of deterrence, the death penalty adds to the risk of non-reporting and it removes an incentive for the rapist not to kill. Justice Kennedy said that the Court’s holding was limited to crimes against individuals, and did not extend to such crimes as treason, espionage, terrorism, and drug kingpin activity. However, he added, “As it relates to individuals, though, the death penalty should not be expanded to instances where the victim’s life was not taken.” 128 S. Ct. at 2659. Following the decision, it emerged that under the Military Code of Justice the death penalty is authorized for rape of a child when done by military personnel. This additional provision, not used in recent history, would likely not have made any difference in the case outcome. See Kennedy v. Louisiana, 129 S. Ct. 1 (2008) (motion for rehearing denied).

Justice Alito’s dissent, joined by Chief Justice Roberts and Justices Scalia and Thomas, assailed the majority opinion, stating: “[T]he Court holds that the Eighth Amendment categorically rules out the death penalty in even the most extreme cases of child rape even though: (1) this holding is not supported by the original meaning of the Eighth Amendment; (2) neither Coker nor any other prior precedent commands this result; (3) there are no reliable objective indicia of a “national consensus” in support of the Court’s position; (4) sustaining the constitutionality of the state law before us would not ‘extend’ or ‘expand’ the death penalty; (5) this Court has previously rejected the proposition that the Eighth Amendment is a one-way ratchet that prohibits legislatures from adopting new capital punishments statutes to meet new problems; (6) the worst child rapists exhibit the epitome of moral depravity; and (7) child rape inflicts grievous injury on victims and on society in general.” Id. at 2677 (Alito, J., joined by Roberts, C.J., and Scalia & Thomas, JJ., dissenting).

In Graham v. Florida, 130 S. Ct. 2011, 2023-25 (2010), Justice Kennedy joined with Justices Stevens, Ginsburg, Breyer, and Sotomayor to hold unconstitutional life imprisonment without parole for juveniles for non-homicide offenses. Justice Kennedy had observed in Roper v. Simmons, 543 U.S. 551 (2005), discussed in the E-Treatise at § 23.2.1.4 nn.203-06, that juveniles “cannot with reliability be classified among the worst offenders” because of “a lack of maturity and an underdeveloped sense of responsibility”; “juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure”; and the “personality traits of juveniles are more transitory, less fixed.” Roper, 543 U.S. at 569-70. Further, only 12
states had 129 juveniles in total sentenced to such imprisonment for non-homicide offenses in 2010, while such imprisonment was authorized in 37 states and the District of Columbia. Thus, legislative authorization supported constitutionality, but executive practice suggested the case was similar to Roper. Being more deferential to legislative practice, Chief Justice Roberts agreed that a life sentence without parole for armed burglary was unconstitutional, but was unwilling to adopt that rule for any non-homicide offense. Id. at 2039-40 (Roberts, C.J., concurring in the judgment). In a formalist dissent, focused on text and specific historical intent, Justice Thomas, joined by Justices Scalia and Alito, noted that “the text of the Constitution is silent regarding the permissibility of this sentencing practice, [and] it would not have offended the standards that prevailed at the founding.” Id. at 2043 (Thomas, J., joined by Scalia, J., and Alito, J., as to Parts I and III).

In Miller v. Alabama, 132 S. Ct. 2455 (2012), a 5-4 Court extended Roper and Graham to hold that the Eighth Amendment forbids imposition of life imprisonment without parole upon a homicide offender younger than 18 at the time of the offense. The dissent noted that, unlike Graham, both legislative and executive practice supports states having discretion to sentence juvenile homicide offenders to life imprisonment without parole, and that nearly 2,500 such prisoners were currently serving such sentences at the time Miller was decided. Id. at 2477-79 (Roberts, C.J., joined by Scalia, Thomas & Alito, JJ., dissenting). See also Virginia v. LeBlanc, 137 S. Ct. 1726 (2017) (per curiam) (Virginia’s program providing possibility of parole for juvenile only after 60 years of age not unconstitutional under habeas standard of being unreasonable application of clearly established law); People v. Caballero, 282 P.3d 291 (Cal. 2012) (sentence providing equivalent of life without parole – juvenile left with possibility of parole after 110 years – unconstitutional); State v. Null, 836 N.W.2d 41 (Iowa 2013) (parole for juvenile only after 52 years unconstitutional under Iowa Constitution, which provides greater protection than Miller); Aiken v. Byars, 765 S.E.2d 572 (S. Car. 2014) (3-2 decision: Miller applies retroactively, 2 judges rest decision on U.S. Constitution, 1 on South Carolina Constitution); People v. Carp, 852 N.W.2d 801 (Mich. 2014) (4-3 decision: Miller does not apply retroactively).

The Eighth Amendment: Cruel and Unusual Punishment Generally

§ 23.2.1.4, page 1036, n.214: In Baze v. Rees, 128 S. Ct. 1520, 1533-34 (2008), a 7-2 Court upheld Kentucky’s three-drug lethal injection method of capital punishment. Chief Justice Roberts held that the Eighth Amendment prohibits wanton exposure to objectively intolerable risk, which was not present here. Justices Scalia and Thomas said the Eighth Amendment is violated only by methods deliberately designed to inflict pain. Id. at 1156 (Thomas, J., joined by Scalia, J., concurring in the judgment). Justice Stevens reiterated his view to invalidate the death penalty, but agreed under existing precedents Kentucky’s procedure was constitutional. Id. at 1552 (Stevens, J., concurring in the judgment). Justice Breyer agreed with Justice Ginsburg’s statement of the law, however he was not persuaded that Kentucky’s method created such a risk. Id. at 1563-64 (Breyer, J., concurring in the judgment). Justice Ginsburg said the test should be whether the method creates an untoward, readily avoidable risk of inflicting severe and unnecessary suffering. She said the case should be remanded to consider whether omission of safeguards used by many other states to confirm that the inmate is unconscious before injection of the second and third drugs (e.g., shaking and brushing the eyelids) poses an untoward, readily avoidable risk. Id. at 1567 (Ginsburg, J., joined by Souter, J., dissenting). See also Glossip v. Gross, 135 S. Ct. 2728 (2015) (Oklahoma’s three-drug injection method, including use of midazolam to render inmate unable to feel pain, rather than earlier court-approved sodium thiopental or pentobarbital, no longer available, due in part to anti-death penalty activism, constitutional) (Breyer, J., joined by Ginsburg, J., dissenting) (Court should consider if the death penalty is unconstitutional) (Sotomayor, J., with Ginsburg, Breyer & Kagan, JJ., dissenting) (use of midazolam poses substantial, intolerable risks). On death penalty procedures, see generally Owens v. Hill, 758 S.E.2d 794 (Ga. 2014) (no constitutional right to make state reveal the source of lethal injection drugs used); Staley v. State, 420 S.W.3d 785 (Tex. Crim. App. 2013) (death-row inmate cannot be forcibly drugged to make him sane enough to be executed); State v. Medina, 306 P.3d 48 (Ariz. 2013) (Arizona law that allows second capital sentencing proceeding with new jurors after original jury deadlocked does not violate the Eighth Amendment); Bosse v. Oklahoma, 137 S. Ct. 1 (2016) (per curiam) (while Payne v. Tennessee, 501 U.S. 808 (1991), overruled Booth v. Maryland, 482 U.S. 496 (1987), to permit victim impact evidence to be admitted at the sentencing phase relating to personal characteristics of the victim and the emotional impact of the crime on the victim’s family, it did not overrule Booth v. Maryland on the admission of a victim’s family members’ characterizations and opinions about the
crime, the defendant, and the appropriate sentence; such evidence is still barred by the Eighth Amendment, citing, inter alia United States v. Hatter, 532 U.S. 557, 567 (2001) (“[I]t is the Court’s prerogative alone to overrule one of its precedents.”).

On substantive rights, see Fields v. Smith, 653 F.3d 550 (7th Cir. 2011) (Wisconsin law that bars Wisconsin Department of Corrections from providing hormone therapy or sexual reassignment surgery to inmates violates Eighth Amendment ban on cruel and unusual punishments); Hinds v. Lynch, 790 F.3d 239 (1st Cir. 2015) (deportation of non-citizen not “punishment” to which Eighth Amendment applies; individual received process that was due aliens, which does not include “proportionality” review); Marin-Marin v. Sessions, 852 F.3d 192 (2d Cir. 2017) (same); Boyer v. Davis, 136 S. Ct. 1446 (2016) (Breyer, J., dissenting from denial of certiorari) (Court should consider if 32 years on death row constitutes “cruel and unusual” punishment).

The Eighth Amendment: Excessive Fines Clause

§ 23.2.1.4, page 1037, text following n.216: Courts have split over whether to consider if criminal forfeiture will deprive accused of future ability to earn a living. United States v. Viloski, 814 F.3d 104 (2nd Cir. 2016) (future ability relevant in determining excessiveness; acknowledging 9th and 11th Circuits have held excessiveness only determined by looking at characteristics of the offense).

Ex Post Facto Clause

§ 23.2.2.2, page 1041, text following n.231: In Peugh v. United States, 133 S. Ct. 2072 (2013), a 5-4 Court held that the Ex Post Facto Clause is violated when the defendant is sentenced under current Sentencing Guidelines providing higher sentencing range than Guidelines in effect at the time of the offense; id. at 2088 (Thomas, J., joined by Roberts, C.J., and Scalia & Alito, JJ., dissenting) (retroactive application of the Guidelines did not alter the statutory punishment range). See also Hinojosa v. Davey, 803 F.3d 412 (9th Cir. 2015) (statutory amendment that did away with gang member’s ability to earn “good-time” credits violates Ex Post Facto Clause as retroactively increasing punishment), rev’d, Kernan v. Hinojosa, 136 S. Ct. 1603 (2016) (habeas case should have been dismissed on state procedural grounds); Doe v. State, 111 A.3d 1077 (N.H. 2015) (amendments to sex offender registration scheme requiring offenders to register for life without any possibility of judicial review makes scheme punitive and violates New Hampshire’s Ex Post Facto Clause); Does #1-5 v. Snyder, 2016 WL 4473231 (6th Cir. 2016) (retroactive application of Michigan Sex Offenders Registration Act (SORA) is punishment and violates Ex Post Facto Clause, distinguishing Smith v. Doe, 538 U.S. 84 (2002) (Alaska SORA nonpunitive and no violation of Ex Post Facto Clause)).

Recent Cases Involving Habeas Corpus

§ 23.2.2.3, page 1043, n.236: Substantial deference is given to state proceedings in federal habeas cases. See Jenkins v. Hutton, 137 S. Ct. 1769 (2017) (per curiam) (question is not whether alleged error might have affected jury’s verdict, but whether “clear and convincing evidence” shows “no reasonable juror” would have reached the same decision); Davis v. Ayala, 135 S. Ct. 2187 (2015) (any constitutional error in defense counsel’s absence from ex parte hearing regarding Batson challenge was harmless) (Sotomayor, joined by Ginsburg, Breyer & Kagan, JJ., dissenting); Lopez v. Smith, 135 S. Ct. 1 (2014) (9th Circuit failed to apply deferential habeas review when it relied on own precedent, not “clearly established law,” to hold murder defendant had constitutional right to advance notice prosecutors would seek aiding-and-abetting instruction); White v. Woodall, 134 S. Ct. 1697 (2014) (not clearly established that defendant always entitled to privilege against self-incrimination jury instruction not to draw negative inferences from silence at penalty phase of trial) (Breyer, J., joined by Ginsburg & Sotomayor, dissenting); Stanton v. Sims, 134 S. Ct. 3 (2013) (not clearly established that warrantless entry into a home, in hot pursuit of suspect whom officer had probable cause to arrest only for a misdemeanor, violated Fourth Amendment); 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, not 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 raised federal claim in state court, and the state court ruled against him 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); 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) (challenging sufficiency of the evidence, deference must be given both to jury and state court’s consideration of whether jury’s verdict based on adequate evidence); Coleman v. Johnson, 132 S. Ct. 2060 (2012) (same); Hardy v. Cross, 132 S. Ct. 490 (2011) (state court did not unreasonably apply Confrontation Clause in determining complainant was unavailable to testify at retrial); Greene v. Fisher, 132 S. Ct. 38 (2011) (habeas court should focus on whether federal law was clearly established at time of last adjudication on the merits in state court, not when conviction became final); Bobby v. Dixon, 132 S. Ct. 26 (2011) (not unreasonable for state court to hold intentional violation of Miranda that did not produce a confession did not render inadmissible a later, properly warned confession); Cavazos v. Smith, 132 S. Ct. 2 (2011) (state court decision that disputed expert testimony regarding shaken baby syndrome was sufficient to sustain assault conviction not unreasonable determination of facts or unreasonable application of law). But see Wetzel v. Lambert, 132 S. Ct. 1195 (2012) (federal habeas court must consider each ground state court relied upon to reject inmate’s claim an allegedly exculpatory police report undermined his capital murder conviction); McWilliams v. Dunn, 137 S. Ct. 1790 (2017) (unreasonable application of clearly established law to deny accused access to competent psychiatrist when his sanity is an issue) (Alito, J., joined by Roberts, C.J., and Thomas & Gorsuch, JJ., dissenting).

Where the habeas action involves ineffectiveness of counsel, fuller review seems to be given. See Christeson v. Roper, 135 S. Ct. 891 (2015) (attorney’s failure to meet deadline for federal habeas application entitles defendant to substituted counsel); Hinton v. Alabama, 134 S. Ct. 1081 (2014) (appointed capital defense attorney’s failure to request additional funding to replace expert he knew was inadequate constitutes ineffective assistance); Martinez v. Ryan, 132 S. Ct. 1309 (2012) (federal habeas court is not barred from hearing claim of ineffective assistance of counsel at trial if, in the state court’s initial review of ineffective assistance, there was no counsel or counsel was ineffective); 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 procedural default); McQuiggin v. Perkins, 133 S. Ct. 1924 (2013) (actual innocence, if proved, permits federal habeas action despite procedural bar or expiration of a statute of limitations) (Roberts, C.J., and Scalia, Thomas & Alito, JJ., dissenting); Wood v. Milyard, 132 S. Ct. 1826 (2012) (federal court of appeals has the authority, but not the obligation, to address timeliness of a federal habeas petition on the court’s own initiative); Gonzalez v. Thaler, 132 S. Ct. 641 (2012) (failure of certificate of appealability to comply with statutory requirements does not deprive court of appeals of jurisdiction to review district court’s denial of relief). But see Burt v. Titlow, 134 S. Ct. 10 (2013) (when a state prisoner asks a federal court to set aside a sentence due to ineffective assistance of counsel during plea bargaining, federal court must use doubly deferential standard that gives both the state court and defense attorney benefit of the doubt); Woods v. Etherton, 136 S. Ct. 1149 (2016) (Sixth Circuit incorrectly denied deference to findings of the state court on whether defendant received ineffective assistance of counsel under the Sixth Amendment); Davila v. Davis, 137 S. Ct. 2058 (2017) (Martinez and Trevino exceptions do not apply to procedural defaults caused by ineffective assistance of appellate counsel, since no constitutional right to appellate counsel) (Breyer, J., joined by Ginsburg, Sotomayor & Kagan, JJ., dissenting).

Right to Habeas Corpus in the Context of the War of Terrorism

§ 23.2.2.3, page 1043, end of the section: In Boumediene v. Bush, 128 S. Ct. 2229 (2008), discussed in this Supplement at § 27.4.4.8 text preceding n.418, a 5-4 Court held that aliens designated as enemy combatants and detained at Guantanamo Bay have the right of habeas corpus since the United States has practical control over Guantanamo Bay. Id. at 2253-62. In contrast, in Al Maqaleh v. Gates, 605 F.3d 84 (D.C. Cir. 2010), the court held that alien enemy combatants held at Bagram Airfield Military Base in Afghanistan may not invoke the writ of habeas corpus to challenge their detention. The Court noted the United States does not exercise de facto sovereignty over the base, in contrast to de facto sovereignty over Guantanamo Bay. Further, “practical obstacles” of adjudicating detainees’ entitlement to habeas corpus in a theater of war.
counseled against application of the writ. Cf. Dan Bilefsky, *Court Censures Poland Over C.I.A. Renditions*, N.Y. Times (July 24, 2014) (European Court of Human Rights ruled Poland violated rights of two terrorism suspects by allowing transfer of suspects to CIA detention facility in Poland where they were tortured); *United States v. Brehm*, 691 F.3d 547 (4th Cir. 2012) (prosecution of foreign employee of U.S. defense contractor in U.S. court for crime committed on military base in Afghanistan does not violate due process).

In *Munaf v. Geren*, 128 S. Ct. 2207 (2008), a unanimous Supreme Court held that 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, however, is not a sufficient basis, without considering the merits of the case, to grant a preliminary injunction against transferring individuals detained within another sovereign’s territory 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. *Id.* at 2220-28. Justice Souter, joined by Justices Ginsburg and Breyer, wrote a concurring opinion which he sought to limit the holding to the precise facts of the case. He said here there was no habeas corpus relief only because of circumstances which included the following: (1) the petitioners voluntarily traveled to Iraq; (2) they are held in the territory of Iraq; (3) Iraq is an ally of the United States; (4) the petitioners are held by our troops; (5) hostilities are ongoing; (6) our troops are involved in those hostilities; (7) the government of Iraq decided to prosecute them for crimes committed in Iraq; and (8) the State Department has determined that the Iraq department that would have authority over them has generally met internationally accepted standards for basic prisoner needs. *Id.* at 2228 (Souter, J., joined by Ginsburg & Breyer, JJ., concurring). Chief Justice Roberts’ majority opinion gave no indication that it was so limited.


**Citizenship Clause**

§ 25.2, page 1071, end of the section: 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).
§ 25.4, page 1079, n.83: See also Davis v. Commonwealth Election Commission, 844 F.3d 1087 (9th Cir. 2016) (provision in territory’s constitution that restricted voting in certain elections to individuals of Northern Marianas descent a form of ethnic/racial discrimination, and violates 15th Amendment).

“Class-of-One” Equal Protection Claims Do Not Apply in Government Employment Cases

§ 26.1, page 1085, text following n.8: In Engquist v. Oregon Dep’t of Agriculture, 128 S. Ct. 2146 (2008), a 6-3 Court held that the “class-of-one” theory does not apply in the context of public employment. Per Chief Justice Roberts, the Court noted, “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], but the Equal Protection Clause is not one of them.” Id. The dissent noted that “a discretionary decision with any ‘reasonably conceivable’ rational justification will not support an equal protection claim; only a truly arbitrary one will.” Id. at 2159 (Stevens, J., joined by Souter & Ginsburg, JJ., dissenting). The majority opinion agreed there would be few such cases, but noted 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.” Id. 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, 547 F.3d 28 (1st Cir. 2008), the First Circuit allowed a developer to proceed on a “class of one” claim that a local conservation commission singled it out for wetlands protection enforcement. See also Del Marcelle v. Brown County Corp., 680 F.3d 887 (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).

Examples of Minimum Rationality Review

§ 26.1.1.1, page 1089, text following n.27: See also 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); Ohio ex rel. Walgate v. Kasich, 93 N.E.3d 417 (Ohio Ct. App. 2017) (state decision to limit casino gambling to properties owned or operated by two gaming companies constitutional under rational basis review); Niang v. Carroll, 879 F.3d 870 (8th Cir 2018) (requirement that African-style hair braiders be licensed as cosmetologists or barbers constitutional under rational basis review based, in part, on ensuring braiders are trained in health risks associated inflammation and scalp infection and recognize scalp conditions unsuitable for braiding). 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 and Immunities Clause, which is given “independent interpretation” from federal Equal Protection).

The Intent Requirement under the 14th Amendment

§ 26.2.1.2, page 1115, n.148: In Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009), the Court held 5-4 that a complaint by a former federal prisoner alleging invidious discrimination by the Attorney General and the Director of the Federal Bureau of Investigation was subject to a motion to dismiss for not stating a claim against them. Justice Kennedy wrote for the Court that a claim for invidious discrimination in contravention of the First and
Fifth Amendments requires pleading and proving that the defendant acted with a discriminatory purpose, that is, the defendant undertook a course of action “because of” and not merely “in spite of” the action’s adverse effect upon an identifiable group. Plaintiff had alleged that his rights were violated because the defendants were responsible for policies of detaining him as a person of high interest in the search for terrorists because of his race, religion, or national origin. Justice Kennedy said these were conclusory statements that did not allege sufficient facts to create the plausibility of entitlement to relief based upon the defendant’s state of mind. \textit{Id}. at 1949-54. Justice Souter, dissenting with Justices Stevens, Ginsburg, and Breyer, said that knowledge and deliberate indifference are adequate proof of purpose, and he pointed to allegations that defendants helped create the particular, discriminatory policy detailed in the complaint. \textit{Id}. at 1958-61 (Souter, J., joined by Stevens, Ginsburg & Breyer, JJ., dissenting).

On proving discriminatory intent, see \textit{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); \textit{Lewis v. Bentley}, 2017 WL 432464 (N.D. Ala. 2017) (mere speculation that state law banning local cities and municipalities from adopting any minimum wage law higher than that required by federal or state law was passed with racially discriminatory intent).

The Intent Requirement under Title VII

§ 26.2.1.2, page 1117, n.160: In \textit{Ricci v. Destefano}, 129 S. Ct. 2658 (2009), the Court held 5-4 that a city violated the disparate treatment provisions of Title VII, which require finding only of discriminatory impact, not discriminatory intent, when it refused to certify test results for promotions in its fire department because only a few minorities passed the test, and the city feared certification would violate the disparate impact provisions of Title VII. Justice Kennedy wrote that before an employer 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 certification. \textit{Id}. at 2675-81. Justice Scalia, concurring, suggested Title VII might violate the Equal Protection Clause if it required an employer to take race-based actions when a disparate-impact violation would otherwise ensue. \textit{Id}. at 2681-82 (Scalia, J., concurring). Justice Alito, concurring, argued the dissenting opinion left out important facts which tended to show the city’s real reason for scrapping the test was a desire to placate a politically important racial constituency. \textit{Id}. at 2683 (Alito, J., joined by Scalia & Thomas, JJ., concurring). The dissent emphasized the city was trying to overcome a past system in which racial minorities were denied positions in the fire department. \textit{Id}. at 2689-94 (Ginsburg, J., joined by Stevens, Souter & Breyer, JJ., dissenting). The dissent would allow an employer to use racial classifications in refusing to certify results if the employer acted in good faith and reasonably in an effort to avoid disparate impact liability. \textit{Id}. at 2703-07. On the intent requirement generally, see \textit{Texas Dept. of Housing and Community Affairs v. Inclusive Communities Projects, Inc.}, 135 S. Ct. 2507 (2015) (similarity of Fair Housing Act to Title VII of Civil Rights Act and Age Discrimination in Employment Act means disparate impact claims authorized under Fair Housing Act) (Alito, J., joined by Roberts, C.J., and Scalia & Thomas, JJ., dissenting); \textit{Blunt v. Lower Merion School Dist.}, 767 F.3d 247 (3rd Cir. 2014) (higher ratio of African-American students in remedial classes insufficient to show discriminatory intent required under Title VI of Civil Rights Act of 1964).

Anti-Affirmative Action State Referenda and Discriminatory Intent

Desegregation Plans in the Public Schools

§ 26.2.1.3.B.4, page 1128, end of section: On continuing desegregation efforts, see Cowan v. Cleveland Sch. Dist., 748 F.3d 233 (5th Cir. 2014) (district court must justify decision to remedy discrimination by allowing students to choose which school to attend, given long-standing doctrine questioning whether a “free choice” plan will work to end segregation, citing, inter alia, Green v. County Sch. Bd. of New Kent County, Va., 391 U.S. 430 (1968); Thomas v. School Bd. of St. Martin Parish, 756 F.3d 380 (5th Cir. 2014) (oversight by district court should be terminated only upon finding that all “vestiges of past discrimination” have been eliminated, citing Board of Educ. of Oklahoma City Public Schools v. Dowell, 498 U.S. 237, 245-46 (1991)).

Affirmative Action in the Context of School Admissions Policies

§ 26.2.1.4.D, page 1146, n.272: As predicted in the E-Treatise text, Justice Kennedy did apply a hard look to the race-based affirmative action programs in Parents Involved in Community Schools v. Seattle School District No. 1, 127 S. Ct. 2738 (2007), a case consolidating the appeals in Parents Involved in Comm. Schools v. Seattle Sch. Dist. No. 1, 426 F.3d 1162 (9th Cir. 2005) and Meredith v. Jefferson County Bd. of Educ., 416 F.3d 513 (6th Cir. 2005). While acknowledging diversity in a student body is a compelling interest, Justice Kennedy concluded the affirmative action programs in these cases either did not clearly indicate whether they were using race as a factor, which would be permissible under Grutter v. Bollinger, as discussed in the E-Treatise at § 26.2.1.4.D n.250, or race as an absolute point preference or quota or set-aside, which would be impermissible under Gratz v. Bollinger, as discussed at § 26.2.1.4.D n.251 (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). 127 S. Ct. at 2789-91 (Kennedy, J., concurring in part and concurring in the judgment).

In their opinions, formalist Justices Scalia, Thomas, and Alito, along with Holmesian Chief Justice Roberts, did not conclude, as did Justice Kennedy, that racial diversity in educational settings was a compelling interest. Id. at 2755-59 (Roberts, C.J., joined by Scalia, Thomas & Alito, JJ., as to Part III(B)); id. at 2789 (Kennedy, J., concurring in part and dissenting in part). They avoided that issue by agreeing with Kennedy that the programs were not the least restrictive effective alternatives under strict scrutiny review. Id. at 2759-61 (Roberts, C.J., opinion for the Court, joined by Scalia, Kennedy, Thomas & Alito, JJ.).

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, as had Justice Brennan’s four-Justice plurality in Bakke, discussed in the E-Treatise at § 26.2.1.4.A n.219, or seemingly Justice Stevens, Souter, Ginsburg, and Breyer’s dissents in Adarand, discussed at § 26.2.1.4.C. nn.246-48, they did suggest they would apply a less vigorous strict scrutiny – in terms of the “base plus six” model of review summarized in the E-Treatise in Table 7.2, at § 7.2.1, page 186, something like “loose strict scrutiny.” While requiring compelling interests, “loose strict scrutiny” only requires narrowly drawn regulations not substantially more burdensome than necessary, not the least restrictive effective alternative analysis of strict scrutiny. This difference is justified based on use of race to keep the races apart (regular strict scrutiny), versus use of race to bring the races together (loose strict scrutiny should apply). 127 S. Ct. at 2816-20 (Breyer, J., joined by Stevens, Souter & Ginsburg, JJ., dissenting).

Per Justice Kennedy, the Court underscored in Fisher v. University of Texas at Austin, 133 S. Ct. 2411 (2013), that strict scrutiny must be strict. 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.” Id. at 2419-22. Justices Scalia and Thomas said they would overrule Grutter and hold all race-based affirmative action programs in higher education invalid. Id. at 2422 (Scalia, J., concurring); id. (Thomas, J., concurring). Justice Kagan took no part in the consideration or decision of the case. Id. On remand, a 2-1 panel of the Fifth Circuit upheld the program in Fisher. 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 program operated when case brought in 2008; school must continue to police its operation to ensure validity); id. at 2215-16 (Alito, J., joined by Roberts, C.J., and Thomas, J., dissenting) (university has not identified what they mean
by “critical mass” for diversity, and thus have not shown program directly advanced that end); \textit{id} at 2215 (Thomas, J., dissenting) (use of race in higher education \textit{per se} unconstitutional; \textit{Grutter} should be overruled).

The ultimate holdings in \textit{Seattle School District No. 1} and \textit{Fisher} underscore the wisdom, as suggested in the E-Treatise at pages 1144-45, of moving to “Hyde Park Declaration” socio-economic affirmative action, which would be tested only by minimum rationality review, as discussed in the E-Treatise at § 26.2.1.4.D n.269 & § 26.4.1. Even Chief Justice Robert’s four-Justice plurality in \textit{Seattle School District No. 1} indicated it was legitimate to advance socio-economic diversity based on “many possible bases [such as] admits [that] 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.” 127 S. Ct. at 2753, \textit{citing} \textit{Grutter v. Bollinger}, 539 U.S. 306, 338 (2003). \textit{Cf. Rothe Development, Inc. v. United States Dep’t of Defense}, 836 F.3d 57 (D.C. Cir. 2016) (Small Business Administration program that extended special consideration to business owned by “socially and economically disadvantaged” individuals, defined in terms of “racial or ethnic prejudice or cultural bias” does not employ racial classification triggering strict scrutiny, but is constitutional under rational basis review).

Following \textit{Grutter}, Michigan voters passed a constitutional amendment to the Michigan Constitution preventing the state from adopting race-based affirmative action programs in public education, employment, and contracting. The Court upheld the amendment in \textit{Schuette v. Coalition to Defend Affirmative Action}, 134 S. Ct. 1623 (2014). The Court’s plurality distinguished \textit{Hunter v. Erickson} and \textit{Washington v. Seattle School District No. 1}, discussed at § 26.2.1.2 nn.165-66, by noting those cases involved actions designed “to encourage infliction of injury by reason of race,” while in \textit{Schuette} there was no such indication, just a desire for equal treatment. \textit{Id} at 1637-38 (Kennedy, J., joined by Roberts, C.J., and Alito, J., plurality opinion). Justice Breyer distinguished \textit{Hunter} and \textit{Seattle School District No. 1} on grounds that those cases involved “reordering of the political process,” while here unelected officials made the original decision to adopt the affirmative action program. \textit{Id} at 1650 (Breyer, J., concurring in the judgment). Justices Scalia and Thomas would have overruled \textit{Hunter} and \textit{Seattle School District No. 1}. \textit{Id} at 1640 (Scalia, J., joined by Thomas, J., concurring in the judgment). The dissent said the Michigan action was invalid, since the referendum made it harder for minorities to overturn than if the change just statutory. \textit{Id} at 1651-54 (Sotomayor, J., joined by Ginsburg, J., dissenting); \textit{id} at 1638 (Kagan, J., took no part in the consideration or decision in the case).

\textbf{Racial Redistricting Cases}

\textbf{§ 26.2.1.5, page 1151, n.294:} See \textit{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); \textit{Cooper v. Harris}, 137 S. Ct. 1455, 1468-70 (2017) (district court did not “clearly err” in finding District 1 & 12 in North Carolina were drawn with “predominate intent” to discriminate on race; redistricting cannot survive “strict scrutiny” applied in such cases, since even if complying with § 2 of the Voting Rights Act (VRA) is a compelling interest, to be “narrowly drawn” the state much show “good reasons” for thinking Act requires that redrawing – following the three preconditions of \textit{Thornburgh v. Gingles}, 478 U.S. 30, 50-51 (1986) that (1) the minority group is “sufficiently large and geographically compact to be a majority” in some reasonably configured district; (2) the minority group must be “political cohesive”; and (3) the white majority must vote “sufficiently as a bloc” to usually “defeat the minority’s preferred candidate” – and such “good reasons” did not exist here); \textit{id} at 1485-86 (Thomas, J., concurring) (§ 2 of the VRA does not apply to redistricting; thus could never justify a racial gerrymander); \textit{id} at 1486-87 (Alito, J., joined by Roberts, C.J., and Kennedy, J., concurring in the judgment in part and dissenting in part) (predominate discriminatory intent finding in District 12 clear err); \textit{Abbott v. Perez}, 138 S. Ct. 2305, 2324-25 (2018) (burden of proof always on plaintiff and presumption of legislative good faith not changed by prior discriminatory intent); \textit{id} at 2335 (Thomas, J., joined by Gorsuch, J., concurring) (VRA does not apply to redistricting); \textit{id} at 2346 (Sotomayor, J., joined by Ginsburg, Breyer & Kagan, J., dissenting) (district court followed proper standards; did not commit clear err); \textit{Alabama Legislative Black Caucus v. Alabama}, 231 F. Supp. 3d 1026 (M.D. Ala. 2017) (3-0 decision of 3-judge district court) (race predominated in design of some state Senate districts). \textit{Cf. North Carolina v. Covington}, 137 S. Ct. 1624 (2017) (\textit{per curiam}) (district court must do more than cursory evaluation of costs and benefits before imposing special election as remedy for election based on racially gerrymanded district).
Peremptory Challenges

§ 26.2.1.6, page 1154, n.308: On whether *Batson* applies to sexual orientation, compare *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471 (9th Cir. 2013) (*Batson* applies, in part because heightened scrutiny applies to sexual orientation after *Windsor*, 133 S. Ct. 2675 (2013), discussed in this Supplement at § 26.4.6, n.488) with *United States v. Blaylock*, 421 F.3d 758 (8th Cir. 2005) (expressing doubt *Batson* applies to sexual orientation). Cf. *Berthiaume v. Smith*, 875 F.3d 1354 (11th Cir. 2017) (jurors should have been asked about any bias based on sexual orientation in case involving allegations of excessive force, false arrest, and malicious prosecution against gay man).

In *Rivera v. Illinois*, 129 S. Ct. 1446, 1450 (2009), the Court reaffirmed its rule that peremptory challenges are not constitutionally required, and held that wrongfully denying a peremptory challenge does not require automatic reversal, which is required if the error is “structural.” In *Rivera*, despite alleged gender discrimination, the juror who was seated was not shown to be biased. See also *Davis v. Ayala*, 135 S. Ct. 2187 (2015) (any constitutional error in defense counsel’s absence from ex parte hearing regarding *Batson* challenge involving race discrimination was harmless) (Sotomayor, joined by Ginsburg, Breyer & Kagan, JJ., dissenting); *Foster v. Chatman*, 136 S. Ct. 1737 (2016) (compelling evidence indicates strikes in this case were motivated in substantial part by discriminatory intent, overruling state court decisions); id. at 1761-65 (Thomas, J., dissenting) (review of this 30-year old trial improper on numerous procedural grounds).

Classifications Involving Non-Permanent Resident Aliens

§ 26.2.1.8, page 1158, n.336: See also *LeClerc v. Webb*, 419 F.3d 405 (5th Cir. 2005) (5th Circuit holding rational review also applies to state laws regulating non-permanent lawful resident aliens; strict scrutiny applies only to state laws discriminating against permanent resident aliens, the specific facts in *Graham*; *Van Staden v. St. Martin*, 664 F.3d 56 (5th Cir. 2011) (constitutional under rational review to require practical nursing licensees to be permanent residents or citizens of the United States). But see *Dandamudi v. Tisch*, 686 F.3d 66 (2nd Cir. 2012) (similar law unconstitutional under strict scrutiny). Cf. *Korah 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); *Din v. Kerry*, 718 F.3d 856 (9th Cir. 2013) (generic citation to Immigration and Naturalization Act containing numerous categories not adequate to deny visa application).

Use of Intermediate Scrutiny for Gender Discrimination


Classifications Involving Illegitimacy

§ 26.3.2, page 1182, end of section: See also *Flores-Villar v. United States*, 536 F.3d 990 (9th Cir. 2008), aff’d 131 S. Ct. 2312 (2011) (4-4 decision; Kagan, J., took no part in the consideration or decision) (affirming 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), abrogated by *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 contract with, their children than unwed citizen mothers; harsher 5-year requirement applied to both unwed father and mother until Congress passes gender neutral provision).
Classifications Involving Sexual Orientation Under Heightened Scrutiny

§ 26.4.6, page 1192, n.466: By vote of 4-3, in “In re Marriage Cases” (six consolidated cases), 183 P.3d 384 (Cal. 2008), the California Supreme Court held on May 15, 2008 that a California statute barring same-sex marriage violated the Equal Protection Clause of the California Constitution. The Court said that sexual orientation was a suspect classification. It explained that immutability was not invariably required; rather, the most important factors were historically invidious and prejudicial treatment and a current recognition by society that the characteristic in question generally had no relationship to the ability to perform or contribute to society. Under strict scrutiny, the state interest in limiting marriage to opposite-sex couples was not compelling. Events subsequent to this case in California are discussed in this Supplement at § 26.4.6 n.480.

In another variation on the level of scrutiny to be applied in cases involving same-sex marriage, in Kerrigan v. Commissioner of Public Health, 957 A.2d 407 (Conn. 2008) and Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009), both courts applied intermediate scrutiny in concluding that a ban on gay marriage was unconstitutional under their respective state Constitutions.

Recent Court Decisions and Legislative Action Regarding Same-Sex Marriage

§ 26.4.6, page 1196, n.480: By a vote of 7-0, in Lewis v. Harris, 188 N.J. 415, 908 A.2d 196 (2006), the New Jersey Supreme Court struck down New Jersey’s denial of equal benefits to same-sex couples, but left it to the legislature to provide equal rights either by civil unions or marriage. The Court based its decision on the irrationality of the ban under minimum rationality review. Three of the seven Justices would have required the legislature to grant same-sex couples full marriage rights.

In “In re Marriage Cases” (six consolidated cases), 183 P.3d 384 (Cal. 2008), a 4-3 California Supreme Court held on May 15, 2008 that a California statute barring same-sex marriage violated the Equal Protection Clause of the California Constitution. Dissenting Justices complained that the majority was engaged in judicial legislation, since California voters in 2000 had approved by 61% a legislative proposition that the state could only recognized marriage between a man and a woman. They wanted a stay of the decision until the voters in November 2008 could vote on a Referendum proposition, which would amend the California Constitution to restrict marriage to a man and a woman. Such a ballot proposition – Proposition 8 – was placed on the ballot, and on November 4, 2008, the voters in California approved such a restriction by a 52-48% vote. Proposition 8 was upheld as valid by the California Supreme Court in Strauss v. Horton, 46 Cal. 4th 364, 207 P.3d 48 (Cal. 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, 704 F. Supp. 2d 921 (N.D. Cal. 2010), 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, discussed in the E-Treatise at § 26.4.6 nn.469-71. The Governor and Attorney General of California acquiesced in this ruling. As discussed in this Supplement at § 17.3.1.3A n.396, in Hollingsworth v. Perry, 133 S. Ct. 2652 (2013); id. at 2668 (Kennedy, J., joined by Thomas, Alito & Sotomayor, JJ., dissenting), a 5-4 Court held that proponents of California Proposition 8 did not have standing to appeal the district court’s order declaring Proposition 8 unconstitutional.

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 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, at that time 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 the subject of a November 2012 referendum. Maine conducted a new referendum to seek approval of same-sex marriage in November 2012. All three of these states supported same-sex marriage in the November 2012 referenda. During 2013, Delaware, Minnesota, and Rhode Island passed statutes permitting same-sex marriage. In 2014, Hawaii, Illinois, New Jersey, and Oregon, which all had recognized civil unions, legalized 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. After Windsor, discussed in this Supplement at § 26.4.6, n.488, same-sex marriage bans were challenged in every state, and a number of lower federal courts and state courts ruled bans unconstitutional, but most decisions were stayed pending appeal.

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 § 27.1.1 n.9-11, 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., joined by Scalia & Thomas, JJ., dissenting) (if right is not part of “history and tradition” courts should not create such rights). In contrast, the majority’s view was that 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 the reasons behind the fundamental 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 as opposite-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 also 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.”

The Full Faith and Credit issue regarding states recognizing these marriages is discussed in this Supplement at § 23.1.3, text following n.51. Laws around the world regarding gay marriage and civil unions are discussed in this Supplement at § 16.1, end of second full paragraph. See also Luttrell v. Cucco, 784 S.E.2d 707 (Va. 2016) (same-sex couples may be deemed to be cohabiting “in a relationship analogous to marriage” as that term is used in state alimony termination statutes); Summers v. Whittis, 2016 WL 7242483 (S.D. Ind. 2016) (county did not violate Title VII of the Civil Rights Act of 1964 which prevents, among other things, religious discrimination in employment, when it fired a Christian clerk who refused to process a same-sex couple’s marriage license; firing was based on refusal to perform assigned work; no religious accommodation required since duties were purely ministerial and no objective conflict with religious beliefs, which might exist if she were required perform ceremonies, attend ceremonies, or offer a blessing); State v. Arlene’s Flowers, Inc., 389 P.3d 543 (Wash. 2017) (flower shop owner violated Washington Law Against Discrimination (WLAD) by refusing to provide flowers for same-sex wedding; law is generally applicable neutral law triggering only rational basis review under Free Exercise Clause), vacated on other grounds, 2018 WL 3096308 (U.S. Sup. Ct. 2018) (consider whether law was applied with discriminatory intent, as in Masterpiece Cakeshop, discussed next); Craig v. Masterpiece Cakeshop, Inc., 370 P.3d 272 (Colo. App. 2015) (anti-discrimination law neutral and rational; cake maker has no Free Exercise right to refuse to make wedding cake for same-sex couple), cert. denied, 2016 WL 1645027 (Colo. Sup. Ct. 2016), rev’d, 138 S. Ct. 1719 (2018) (application of anti-discrimination law in this case was tainted by religious intolerance triggering strict scrutiny; issue dodged whether law constitutional in other cases); Smith v. Pavin, 505 S.W.3d 169 (Ark. 2016) (4-3 Arkansas Supreme Court holds state may refuse to list both names of same-sex married couple on a child’s birth certificate, despite the fact the state would list both names of opposite-sex married couple without inquiry into biological parentage, and only remove non-biological parent’s name if challenged), rev’d, 137 S. Ct. 2075 (2017) (per curiam opinion) (Thomas, J., joined by Alito & Gorsuch, JJ., dissenting); In re Neely, 390 P.3d 728 (Wyo. 2018) (judge who refuses to perform same-sex marriages violated Judicial Code of Conduct and may be removed from office), cert. denied, 138 S. Ct. 639 (2018). But see Ansley v. Warren, 2017 WL 2782622 (4th Cir. 2017) (absent specific injury plaintiffs have no standing to challenge North Carolina law allowing state magistrates to recuse themselves from performing same-sex marriages on religious grounds).
Bans on Adoption by Gays and Lesbians

§ 26.4.6, page 1197, n.486: But see In re Adoption of Doe, 2008 WL 5006172 (Fla. Cir. Ct. 2008) (not reported in So.2d) (district court struck down Florida’s ban on adoption by homosexuals, concluding that while evidence existing in 2004 was not enough to conclude the ban was irrational in Lofton, 358 F.3d 804 (11th Cir. 2004), evidence by 2008 did show ban irrational; unconstitutional under Florida Constitution); Campaign for Southern Equality v. Mississippi Dep’t of Human Servs., 2016 WL 1306202 (S.D. Miss. 2016) (Mississippi ban unconstitutional after Obergefell v. Hodges, 135 S. Ct. 2584 (2015), which required states to recognize same-sex marriages, discussed in this Supplement at § 26.4.6 n.480); 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). Today, no state bans adoption purely on grounds of sexual orientation. Bans on adoption by unmarried couples, in states where they exist, are also likely to be held 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, 2017 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).

Constitutionality of the Federal Defense of Marriage Act (DOMA)

§ 26.4.6, page 1198, n.488: In contrast to Wilson v. Ake, 354 F. Supp. 2d 1298 (M.D. Fla. 2005), see Gill v. Office of Personal Mgmt., 699 F. Supp. 2d. 374 (D. Mass. 2010), aff’d, Massachusetts v. United States Dep’t of Health and Human Serv., 682 F.3d 1 (1st. Cir. 2012) (DOMA invalid under Equal Protection component of 5th Amendment Due Process). 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. In United States v. Windsor, 133 S. Ct. 2675 (2013), a 5-4 Court held DOMA unconstitutional under due process. Because federal law usually adopts state rules on marriage, the Court ruled that DOMA’s refusal to recognize same-sex marriages in states where it is legal could only be the product of animus toward same-sex marriage, and, as in Romer v. Evans, discussed in the E-Treatise at § 26.4.6 nn.469-71, and Lawrence v. Texas, discussed at § 27.3.4.2 nn.259-60, such animus was an illegitimate interest. 133 S. Ct. at 2691-96. The United States had standing to appeal because the United States refused to pay plaintiffs the money to which they were entitled if their marriage were treated as valid. Regarding equitable discretion concerns that there exist sufficient adversariness, the majority noted attorneys for the Bipartisan Legal Advisory Group (BLAG) presented “a substantial argument for the constitutionality” of DOMA. Id. at 2685-88. The formalist and Holmesian Justices on the Court dissented, concluding it was legitimate for the government to adopt a preference for one man/one woman marriage to promote stability and uniformity in what marriages count as legally valid. Three of four dissenters also thought that because plaintiffs had won in the lower federal courts, and the Obama Administration had indicated it would no longer oppose such rulings, there was no standing. Id. at 2696 (Roberts, J., dissenting) (no standing; DOMA constitutional on the merits); id. at 2696-97 (Scalia, J., joined by Thomas, J., dissenting) (no standing; DOMA constitutional on the merits); id. at 2711-12 (Alito, J., dissenting) (BLAG has standing to support constitutionality of DOMA; DOMA constitutional).

After Windsor, but before Obergefell, there was an issue whether individuals legally married in one state, who moved to a state which did not recognize same-sex marriage, should be treated by the federal government as validly married (i.e., follow the state law where marriage “celebration” took place) or as unmarried (i.e., following the law where the parties are “domiciled”). In February 2014, Attorney General Eric Holder said same-sex marriages would be viewed as valid if the parties were married in a state lawfully (place of “celebration”). The issue became moot when the Court struck down all state bans on same-sex marriage in Obergefell v. Hodges, 135 S. Ct. 2584 (2015), discussed in this Supplement at § 26.4.6 n.480.
§ 26.4.6, page 1198, end of section: In addition to Obergefell v. Hodges, 135 S. Ct. 2584 (2015), discussed in this Supplement at § 26.4.6 n.480, the Obama Administration improved the legal landscape for gay and lesbian individuals. “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. . . . 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.” Michael D. Shear, Washington Post Staff Writer, Obama Uses Powers to Expand Federal Rights, Benefits for Gays and Lesbians (Tuesday, June 22, 2010) (available at www.washingtonpost.com). In addition, a congressional bill to repeal the military’s “don’t ask, don’t tell” policy was passed by Congress 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. Certifications were sent on July 22, 2011; the policy ended on September 20, 2011. The military ended its service ban on transgendered persons on June 30, 2016, but the Trump Administration delayed implementation, and may be ultimately reversed. 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 100 (2d Cir. 2018) (10-3 en banc) (same); EEOC v. R.G. & G.R. Harris Funeral Homes, 884 F.3d 560 (6th Cir. 2018) (discrimination against transgendered individual violates Title VII as sex discrimination). But see Evans v. Georgia Regional Hospital, 850 F.3d 1248 (11th Cir. 2017) (sexual orientation discrimination not covered by 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, Arkansas, 510 S.W.3d 258 (Ark. 2017) (striking down local law banning discrimination based 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).

Right to Travel Considerations

§ 26.5.1, page 1203, end of section: Consistent with the E-Treatise view that less than substantial burdens on right to travel trigger 2nd-order “reasonableness,” the Second Circuit uphold a discounted tolls program for Staten Island residents, using dormant commerce clause “reasonableness” balancing in Janes v. Triborough Bridge & Tunnel Auth., 774 F.3d 1052 (2d Cir. 2014), citing Northwest Airlines, Inc. v. County of Kent, 510 U.S. 355 (1994). But see Connelly v. Steel Valley Sch. Dist., 706 F.3d 209 (3rd Cir. 2013) (public school teacher paid more for in-state teaching experience “incidental” burden; minimum rationality review applied).

Population Variance and Other Forms of Gerrymandering and the Right to Vote

§ 26.5.3, page 1206, n.520: In Tennant v. Jefferson County Commission, 133 S. Ct. 3 (2013), the Court held, per curiam, that West Virginia had legitimate reasons for adopting its 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; given this, a population variation of less than 1% (.79%) was constitutional under Reynolds v. Sims. Regarding state redistricting plans, the Court held in Harris v. Arizona Indep. Redist. Comm’n, 136 S. Ct. 1301 (2016), that since population deviations between the largest and smallest districts was less than 10%, and thus redistricting was not presumptively invalid, challengers failed to show existing deviations were result of illegitimate considerations. But see Raleigh Wake Citizens Ass’n v. Wake County Bd. of Elections, 827 F.3d 333 (4th Cir. 2016) (even though population deviations were
under 10%, preponderance of the evidence showed improper considerations of partisan political advantage motivated state redistricting plan, rather than legitimate concerns with population equality, keeping municipalities intact, keeping precincts whole, and geographic compactness, using second-order reasonableness balancing, not minimum rational basis review deference). Cf. 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); id. at 1142-49 (Alito, J., joined by Thomas, J. except as to Part III-B, concurring in the judgment) (the majority hints, but does not decide, that a state must use total population; thus, although no state currently does it, a state might use voter population in drawing districts).

In most states, state legislatures draft redistricting plans, typically subject to Governor’s veto power. In some states the state legislature has delegated the redistricting power to “independent state commissions” in order to minimize political gerrymandering. See generally Justin Levitt, All About Redistricting (http://redistricting.ils.edu/who.php). In Arizona, the voters imposed an “independent commission” through the state referendum process. In Arizona State Legislature v. Arizona Indep. Redistr. Comm’n, 135 S. Ct. 2652 (2015), a 5-4 Court upheld the commission, reasoning that 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 many referendum-inspired laws. The dissent focused on the literal text of the Elections Clause which provides that the “Legislature” must make the required decision, and an imposed referendum process is not legislatively approved. Id. (Roberts, C.J., joined by Scalia, Thomas & Alito, J.J., 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).

As discussed at § 17.3.4.5 n.568, a 5-4 Court held in Vieth v. Jubelirer, 541 U.S. 267 (2004), that based on a lack of judicially manageable standards cases involving political gerrymandering are political questions. The Court was poised to revisit this issue in Whitford v. Gill, 218 F. Supp. 3d 837 (2016) (2-1 decision by 3-judge district court) (political gerrymandering by Republicans 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. 2289 (2017) (judgment stayed pending review), but dismissed the case on grounds that the parties lacked standing. Gill v. Whitford, 138 S. Ct. 1916 (2018).

Right to Vote and Access to the Ballot

§ 26.5.3, page 1206, text following n.521: In Crawford v. Marion County Election Bd., 128 S. Ct. 1610 (2008), the Court upheld an Indiana voter identification law that required citizens voting in person on election day, or casting a ballot in person with the clerk prior to election day, to present photo identification issued by the government. Voters who do not have proper identification could cast a provisional ballot, and then meet the statute’s requirement within 10 days following the election. Justice Stevens said that however slight the burden may appear, it must be justified by legitimate state interests sufficiently weighty to justify the limitations. This is consistent with Burdick v. Takashi, discussed in the E-Treatise at § 26.5.3 n.518, whereby substantial burdens on voting rights trigger strict scrutiny, but less burdens trigger second-order rational review, where the test is whether the regulation is “unreasonable” or “excessively burdensome.” Justice Stevens concluded the state’s interest in deterring and detecting voter fraud, modernizing voting procedures, and safeguarding voter confidence justified the photo requirement, and given the evidence presented by the challengers, it was not “excessively burdensome” on any class of voters. The opinion did imply, however, that new facts might call for a different balancing of benefits and burdens of voter ID laws in the future. 128 S. Ct. at 1617-23 (Stevens, J., joined by Roberts, C.J., and Kennedy, J. plurality opinion). See also ACLU of New Mexico v. Santillanes, 546 F.3d 1313 (10th Cir. 2008) (upholding Albuquerque, New Mexico photo ID law); Common Cause/Georgia v. Billups, 554 F.3d 1340 (11th Cir. 2009) (upholding Georgia photo ID law). In his concurrence in the case, Justice Scalia phrased the Burdick test as a “deferential ‘important regulatory interests’ standard.” 128 S. Ct. at 1624 (Scalia, J., joined by Thomas & Alito, JJ., concurring in the judgment). As with Timmons v. Twin Cities Area New Party, discussed in the E-Treatise at § 21.2.4.2 nn.81, 88-93, instead of phrasing the test as intermediate “important” interests, but then using the word
“deferential,” it would be better to phrase the test as second-order rational review determining whether the government’s “legitimate” interests are “excessively burdensome.” In dissent, Justice Souter, joined by Justice Ginsburg, concluded that the state interests failed to justify the limitations placed on the right to vote by travel costs and fees needed for acquiring a photo, particularly for those the poor or old. 128 S. Ct. at 1628-31, 1643 (Souter, J., joined by Ginsburg, J., dissenting). In a separate dissent, Justice Breyer similarly concluded that the statute was unconstitutional for imposing a disproportionate burden on eligible voters who lack a driver’s license or other statutorily valid forms of photo ID. Id. at 1643 (Breyer, J., dissenting).

Since 2010, a number of states have passed various versions of photo ID laws. 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 birth certificate, will require some expenditure of money—certainly an amount more than $1.50 poll tax (in today’s money roughly $10) which was ruled unconstitutional in Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 666-700 (1966). This issue is likely to come before the Court soon, as jurisdictions never covered by the preclearance requirement of the Voting Rights Act, such as Wisconsin, and jurisdictions whose voter ID laws are no longer blocked by a preclearance requirement after Shelby County, discussed in this Supplement at § 28.4 n.65, such as North Carolina and Texas, will have their voter ID laws tested in court. Such voter restrictions will be tested both under the Crawford analysis discussed here, and under § 2 of the Voting Rights Act, discussed in this Supplement at § 28.4 n.65, as creating an unlawful disparate impact on voting based on race. See generally Claire Foster Martin, Comment, Block the Vote: How a New Wave of State Election Laws is Rolling Unevenly Over Voters & The Dilemma of How to Prevent It, 43 CUMB. L. REV. 95 (2012-13); National Conference of State Legislatures, Voter Identification Requirements by State (2015) (www.ncsl.org/research/elections-and-campaigns/voter-id.aspx). See also Frank v. Walker, 768 F.3d 744 (7th Cir. 2014) (upholding Wisconsin voter ID law based on Crawford), rehearing en banc denied by an equally divided 5-3 vote, 773 F.3d 783 (2014) (Wood, C.J., joined by Posner, Rovner, Williams & Hamilton, JJ., dissenting) (Wisconsin voter ID law unconstitutional, applying Crawford’s “reasonableness balancing” approach given facts developed since Crawford), cert. denied, 135 S. Ct. 1551 (2015); Frank v. Walker, 819 F.3d 384 (7th Cir. 2016) (as-applied challenge by individual voter to Wisconsin voter ID law may proceed); Veasey v. Abbott, 830 F.3d 216 (5th Cir. 2016) (9-6 en banc decision) (Texas voter ID law discriminatory under § 2 of Voting Rights Act); North Carolina State Conference of the NAACP v. McCrory, 831 F.3d 204 (4th Cir. 2016) (preliminary injunction granted on North Carolina photo ID law under §2 of Voting Rights Act), cert. denied, 137 S. Ct. 1399 (2017) (Roberts, C.J., filed statement respecting denial of certiorari, emphasizing given the complex procedural posture of the case “it is important to recall our frequent admonition” that “denial of a writ of certiorari imports no expression of opinion on the merits of the case”); Lee v. Virginia State Board of Elections, 843 F.3d 592 (4th Cir. 2017) (Virginia photo ID law, which permits ID to be granted without birth certificate or other documentation, valid as less burdensome than ID requirement in Crawford); Greater Birmingham Ministries v. Merrill, 284 F. Supp. 3d 1253 (N.D. Ala. 2017) (Alabama voter ID law does not involve discrimination based on race, and thus does not violate § 2 of Voting Rights Act constitutional, in part based on ease of acquiring valid photo ID); Martin v. Kohls, 444 S.W.3d 844 (Ark. 2014) (Arkansas voter ID law invalid under Arkansas Constitution).

See generally Libertarian Party of New Hampshire v. Gardner, 843 F.3d 20 (1st Cir. 2016) (reducing time period to collect signatures to appear on statewide ballot from at least 3% of total voters in last general election from that election to August of next election (21 months) to January-August of election year (7 months) reasonable as related to measuring current interest and not excessively burdensome; requirement does not apply to any party which received at least 4% of the vote in last statewide election); Libertarian Party of Illinois v. Scholz, 872 F.3d 518 (2017) (Illinois law requiring political parties deemed not “established” to enter candidates for all offices to appear on ballot for any office (“full slate” requirement), a substantial burden on rights of political association and violates strict scrutiny); Valenti v. Lawson, 889 F.3d 427 (7th Cir. 2018) (as felons have limited constitutional voting rights, restriction on released sex offender from being able to vote at neighborhood school, but have to use other polling place or absentee ballot, rationally related to legitimate purpose of keeping convicted sex offenders away from schools); United States v. Alabama, 778 F.3d 926 (11th Cir. 2015) (Alabama statute requiring runoff election be held within 42 days
of primary violates Uniformed and Overseas Citizens Absentee Voting Act which requires ballot transmission 45 days before election); *Husted v. A. Philip Randolph Institute*, 138 S. Ct. 1833 (2018) (Ohio law which removes voter from voting rolls if they do not vote for four years after being sent return-card notice after failing to vote for two years does not violate National Voter Registration Act, since failure to vote not sole criteria for being removed) (Breyer, J., joined by Ginsburg, Sotomayor & Kagan, JJ., dissenting).

**Minimum Rationality Review Economic Due Process**

§ 27.1.2.1, page 1225, n.49: See also *St. Joseph Abbey v. Castille*, 712 F.3d 215 (5th Cir. 2013) (state law restricting the sale of intrastate caskets to state-licensed funeral directors and funeral parlors bears no rational relationship to any legitimate state interest; casket-making Benedictine abbey is allowed to compete in the sale of caskets market); *Heffner v. Murphy*, 745 F.3d 56 (3rd Cir. 2014) (prohibiting serving food and alcohol in “funeral establishments” rational as “health” measure); *Sensational Smiles, LLC v. Mullen*, 793 F.3d 281, 286-88 (2nd Cir. 2015) (split among some federal courts and state courts on whether “economic protectionism” can ever be a legitimate interest, outside dormant commerce clause review where it is clearly illegitimate).

**Recent Supreme Court Cases on Excessive Punitive Damages Awards**

§ 27.1.2.4, page 1235, end of section: Similar to the analysis suggested in the E-Treatise at § 27.1.2.4 text following n.90, the Court held in *Philip Morris USA, Inc. v. Williams*, 127 S. Ct. 1057, 1065 (2007), that states may only impose punitive damages for wrongful conduct against the party involved in the litigation, but that conduct against other parties can affect how reprehensible the defendant’s conduct is viewed. Justice Stevens dissented from the conclusion that only conduct against the plaintiff can form the basis for a punitive damage award. *Id.* at 1066 (Stevens, J., dissenting). Justice Ginsburg dissented, stating the Oregon Supreme Court had applied the proper standard. *Id.* at 1068 (Ginsburg, J., joined by Scalia & Thomas, JJ., dissenting). On remand, the Oregon Supreme Court adhered to its previous result and upheld the $79.5 million punitive damage award (ratio 97:1 of compensatory award). The Supreme Court granted certiorari, but dismissed writ as improvidently granted in *Philip Morris USA, Inc. v. Williams*, 129 S. Ct. 1436 (2009). See also *Robinson v. R.J. Reynolds Tobacco Co.*, Fla. Cir. Ct. No. 2008 CA 000098 (Jan. 27, 2015) ($23 billion punitive damage verdict ruled excessive; trial judge reduced punitive damage award to $16.9 million, matching compensatory award, but R.J. Reynolds opted for a new trial); *In re Actos (Pioglitazone) Products Liability Litigation*, 2014 WL 5461859 (Oct. 27, 2014) ($9 billion punitive damage award excessive; reduction to $36.8 million, ratio of 25:1 of compensatory award, rejected by Takeda Pharmaceutical Co. and Eli Lilly & Co.).

In *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605 (2008), the Court considered limits on punitive damages 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 that a 1:1 ratio between compensatory and punitive damages is a fair upper limit in a maritime case where the tort action was worse than negligence but less than malicious. Thus, the Court ordered the $2.5 billion punitive damages award reduced to $507.5 million. *Id.* at 2611, 2626-34. In dissent, Justice Stevens said that Congress was better equipped than the Court to determine rules on punitive damages in maritime cases. *Id.* at 2634-35 (Stevens, J., concurring in part and dissenting in part). Justice Ginsburg agreed. *Id.* at 2639 (Ginsburg, J., concurring in part and dissenting in part). Justice Breyer indicated saw no reason to depart from the Ninth Circuit’s judgment, given their extensive review of the egregious nature of Exxon’s actions and reduction of the punitive damage award of $5 billion to $2.5 billion, *Id.* at 2640-41 (Breyer, J., concurring in part and dissenting in part). Because it involved statutory damages under maritime law, the majority opinion was joined by Justices Scalia and Thomas. Those Justices reiterated their view that they do not believe the 14th Amendment imposes any due process limit on punitive damages awards. *Id.* at 2634 (Scalia, J., joined by Thomas, J., concurring). Thus, applied to constitutional doctrine, Justice Souter’s reasoning commanded only the votes of Chief Justice Roberts and Justice Kennedy.

**Content of Bill of Rights Provisions When Applied to States Under the Due Process Clause**

§ 27.2.5.1, page 1244, end of section: 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*, 378 U.S. 1, 10-11 (1964) (citations omitted), 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, in *Williams v. Florida*, 399 U.S. 78 (1970), the Court held that states need not use 12-person juries in criminal cases, even though they are required in federal criminal cases. Thus, for misdemeanors, like traffic violations in municipal courts, many states use 6-person juries. A few states provide for 6-person or 8-person juries in some or all noncapital felonies. See Alisa Smith & Michael J. Saks, *The Case for Overturning Williams v. Florida and the Six-Person Jury: History, Law, and Empirical Evidence*, 60 Fla. L. Rev. 441, 442-44 (2008) (Connecticut & Florida: 6-person jury in all noncapital felonies; Indiana: 6-person jury in felony cases below class A, B, and C; Massachusetts: 6-person jury in some district court cases; Utah: 8-person jury in felony cases; Arizona: 8-person jury in felony cases where sentence cannot be more than 30 years). Juries smaller than 6 persons not permitted in criminal cases. *Ballew v. Georgia*, 435 U.S. 223 (1978). Second, in *Johnson v. Louisiana*, 406 U.S. 356 (1972), and *Apodaca v. Oregon*, 406 U.S. 404 (1972), the Court held a unanimous jury verdict is not required in state courts, even though unanimity is required in federal courts; state court juries can convict on an 11-1, 10-2, or 9-3 vote. See Kate Riordan, *Ten Angry Men: Unanimous Jury Verdicts in Criminal Trials and Incorporation after McDonald*, 101 J. Crim. L. & Criminology 1403, 1404-06 (2011) (only Louisiana and Oregon had such general non-unanimous verdict provisions as of 2011). In Oklahoma, under Okla. Const. Art. 2, § 19, if imprisonment cannot be for more than 6 months, a 9-3 vote can convict. In Florida, until 2016, after unanimous conviction for a death penalty crime, the death penalty could be imposed by simple majority vote. 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. Unanimity is constitutionally required for 6-person juries. *Burch v. Louisiana*, 441 U.S. 130 (1979).

**Fundamental Freedom from Bodily Restraint**

§ 27.2.5.2, page 1244, text following n.130: See also *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772 (9th Cir. 2014) (strict scrutiny used to strike down Arizona provision prohibiting state courts from setting bail for detainees who are in the United States illegally).

**Lochner as Reflecting Both Due Process and Equal Protection Concerns**


**Right to Marry, Establish a Home, and Raise Children During the Modern Era**

§ 27.3.3.1.A, page 1258, n.181: In addition Equal Protection, discussed in this Supplement at § 26.4.6 n.466, the California Supreme Court held in “*In Re Marriage Cases,*” 183 P.3d 384 (Cal. 2008), by the same 4-3 vote, that the right to marry in California’s Constitution, Art I., §§ 1, 7, guarantees same-sex couples a constitutional right to marry. Under the United States Constitution, the Supreme Court extended the fundamental right to marry to same-sex couples in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), discussed in this Supplement at § 26.4.6 n.480, holding invalid all state bans on same-sex marriage.

**Disclosure Privacy Cases**

§ 27.3.3.4, page 1273, text following n.236: As in *Whalen v. Roe*, the Court applied reasonableness review in *National Aeronautics and Space Administration v. Nelson*, 131 S. Ct. 746, 751 (2011). The Court held 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. *Id.* at 764 (Scalia, J., joined by Thomas, J., concurring in the judgment) (no informational privacy right exists). 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.
v. Schriner, 175 F.3d 107, 111 (2d Cir. 1999) (Constitution does “protect the right to maintain the confidentiality of one’s transsexualism.”). Cf. ACLU v. United States Dep’t of Justice, 750 F.3d 927 (D.C. Cir. 2014) (to protect privacy of persons acquitted or had charges dismissed, docket information on warrantless mobile telephone tracking exempted from disclosure under Freedom of Information Act).

Decisional Privacy Regarding Abortion Rights

§ 27.3.4.1, page 1278, text following n.253: As suggested in the E-Treatise, the Court clarified in 2016 that the Casey “undue burden” doctrine involves two steps: (1) whether the regulation is a “substantial obstacle” on abortion choice, rendering it an “undue burden,” and (2) even if not, is the regulation “reasonably related” to a “legitimate” interest, balancing both benefits and burdens, a second-order “reasonableness balancing” review higher than minimum rationality review. See Whole Woman’s Health v. Hellerstedt, 136 S. Ct. 2292, 2308-10 (2016); 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).

Following the 2010 elections, a spate of new abortion restricting laws has increased abortion litigation. Many have been held unconstitutional. See, e.g., Planned Parenthood Arizona, Inc. v. Humble, 753 F.3d 905 (9th Cir. 2014) (preliminary injunction against Arizona statute requiring medications used to induce abortions be administered in compliance with FDA’s on-label regimen, when no evidence of medical justification provided, focusing on “independent review of evidence” language in Gonzales v. Carhart, discussed in this Supplement at § 27.3.4.1, n.254); Isaacson v. Horne, 716 F.3d 1213 (9th Cir. 2013) (Arizona law prohibiting abortions where the probable 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. Stenehjem, 795 F.3d 768 (8th Cir. 2015) (North Dakota law prohibiting abortions following detection of a heartbeat, which would usually occur around 6-8 weeks, long before viability, unconstitutional); McCormack v. Hiedeman, 694 F.3d 1004 (9th Cir. 2012) (Idaho law prohibiting abortion in any place other than a hospital, doctor’s office, or clinic invalid as applied to woman who terminated pregnancy by taking abortion-inducing drug prescribed by physician lawfully purchased over Internet); Whole Woman’s Health v. Hellerstedt, 231 F. Supp. 3d 218 (W.D. Tex. 2017) (preliminary injunction granted against Texas law regulating disposal of fetal tissue applying before viability), proceedings stayed pending appeal, 2017 WL 5649477 (W.D. Tex. 2017).

A number of cases have involved requiring abortion clinics to have admitting privileges at nearby hospitals. See, e.g., Planned Parenthood of Wisconsin, Inc. v. Van Holten, 738 F.3d 786 (7th Cir. 2013) (preliminary injunction granted against Wisconsin law requiring clinic to have admitting privileges at a hospital within 30 miles of clinic); 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, 760 F.3d 448 (5th Cir. 2014) (same, with respect to Mississippi law which would close only abortion facility in state). But see Planned Parenthood of Greater Texas Surgical Health Services v. Abbott, 748 F.3d 583 (5th Cir. 2014) (Texas admitting privileges law not “undue burden”), result overturned in Whole Woman’s Health v. Hellerstedt, 136 S. Ct. 2292, 2310-14 (2016) (admitting privileges law and requiring clinics meet “surgical center” standards were “undue burdens”) (Alito, J., joined by Roberts, C.J., and Thomas, J., dissenting). Cases since Hellerstedt have applied its analysis to similar abortion restrictions. See Burns v. Cline, 387 P.3d 348 (Okla. 2016) (Oklahoma admitting privileges requirement unconstitutional). But see Planned Parenthood of Arkansas & Eastern Oklahoma v. Jegley, 864 F.3d 953 (8th Cir. 2017) (district court did not make adequate finding admitting privileges law would be undue burden for large fraction of women seeking abortions).

On other abortion regulations, see Stuart v. Camnitz, 774 F.3d 238 (4th Cir. 2014) (North Carolina law that abortion providers perform ultrasound and describe images to women violate providers’ free speech rights); 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 pre-natal care violates free speech of center, required disclosure if center has no licensed medical provider on staff constitutional); National Institute of Family & Life Advocates v. Harris, 839 F.3d 823 (9th Cir. 2016) (law requiring pregnancy centers to post a notice if they do not provide or make referrals for abortion or birth control services, and law requiring clinics to post notice if they are not licensed, both constitutional); Hodes v. Nauser, Mds, P.A. v. Moser, 2012 WL 2105.
merits, a district court held the law unconstitutional.

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the Florida Supreme Court granted a stay of a Florida law which adopted a 24-hour waiting period, relying
merits, a district court held the law unconstitutional. Gainesville Woman Care, LLC v. State of Florida, 2018

In Planned Parenthood of Kansas and Mid-Missouri, Inc. v. Nixon, 220 S.W.3d 372 (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 free speech problems,
the Court read the statute to not prohibit provision of information or counseling to pregnant minors, but only
to regulate conduct, such as driving a minor across state lines to obtain an abortion. To deal with due process
and commerce clause problems, the court read the statute to not include conduct outside Missouri.
Ban on Partial-Birth Abortions

§ 27.3.4.1, page 1278, n.254: As predicted in the E-Treatise text, in Gonzales v. Carhart, 127 S. Ct. 1610 (2007), Justice Kennedy followed his dissent in Stenberg v. Carhart, discussed in the E-Treatise at § 27.3.4.1 nn.250-54, and concluded that a congressional ban on partial-birth abortions, at issue in Gonzales, like the Nebraska ban, at issue in Stenberg, was a less than undue burden on abortion rights, since it only limited one occasionally used means of abortion (so-called partial-birth abortions where part of the fetus is pulled intact through the cervix before being dismembered, rather than the standard abortion where the fetal embryo is vacuumed out or the fetus is dismembered into pieces in the uterus behind the cervix before being removed). 127 S. Ct. at 1629-35. Justice Kennedy did note that Gonzales involved a facial challenge to the statute, and thus his conclusion was based on the fact that for a “large fraction of relevant cases” of women seeking an abortion the statute was not a “substantial obstacle.” As indicated in the text of the E-Treatise at § 27.3.4.1 n.254, and stated in Justice Kennedy’s opinion in Gonzales, this leaves open the possibility of an as-applied challenge by a women to whom the ban would be a significant obstacle given her medical condition. 127 S. Ct. at 1638-39. Justice Kennedy also indicated that the Court should not “place dispositive weight on [legislative] findings [but] retains an independent constitutional duty to review factual findings.” Id. at 1610. As they had in Stenberg, discussed at § 27.3.4.1 n.250, Justices Stevens, Souter, Ginsburg, and Breyer viewed the partial-birth abortion ban as an undue burden on abortion rights, and thus unconstitutional, and the option of an as-applied challenge often unrealistic in practice. 127 S. Ct. at 1640-41 (Ginsburg, J., joined by Stevens, Souter & Breyer, JJ., dissenting). See also Richmond Medical Center for Women v. Herring, 527 F.3d 128 (4th Cir. 2008), rev’d 570 F.3d 165 (4th Cir. 2009) (6-5 en banc opinion) (Virginia ban did not require that doctor intend to perform a partial-birth abortion, and thus could apply if doctor intended to perform standard, lawful dilation and extraction abortion, but accidently pushed some part of the fetus’ body intact through the cervix; the panel concluded that the statute was unconstitutional as an unreasonable burden on abortion procedures, but the 6-5 en banc decision concluded the cases in which doctors face criminal liability are so limited it should not invalidate the law in every other circumstance.).

Right of Sexual Privacy

§ 27.3.4.2, page 1281, n.264: In Paschal v. State, 388 S.W.3d 429 (Ark. 2012), 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 was unconstitutional as infringing on individual’s right under the Arkansas Constitution to private, consensual, noncommercial acts of sexual intimacy between adults. Other courts have held there is no such fundamental right under the United States Constitution; under rational basis review bans on teacher/student sex have been upheld. See State v. McKenzie-Adams, 915 A.2d 822 (Conn. 2007) (student 17 when the sexual relationship began); Flaskamp v. Dearborn Pub. Sch., 385 F.3d 935 (6th Cir. 2004) (student 18 when the sexual relationship began). See also Perez v. City of Roseville, 882 F.3d 843, 855-56 (9th Cir. 2018) (noting split with Fifth and Tenth Circuits, holding that termination of probationary police officer in part based on her extramarital affair with fellow officer violated her constitutional rights to privacy and intimate association).

The Regulation of Sale of Sex Toys

§ 27.3.4.2, page 1284, n.269: Reflecting the post-Lawrence trend that regulations in a few states which ban sale of “sex toys” are unconstitutional, the Fifth Circuit so concluded in Reliable Consultants, Inc v. Earle, 517 F.3d 738 (5th Cir. 2008), relying Lawrence v. Texas, 539 U.S. 558 (2003), discussed in the E-Treatise at § 27.3.4.2 nn.259-64. This ruling conflicts with a pre-Lawrence decision by a Texas state court of appeals, Webber v. Texas, 21 S.W.3d 726 (2000), cited in the E-Treatise text at § 27.3.4.2 n.269. 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 in the E-Treatise at § 17.1.2.2 n.29. The Georgia obscene-device statute was struck down in This, That, and the Other Gift and Tobacco, Inc. v. Cobb County, 439 F.3d 1275 (11th Cir. 2006) (ban on广告izing of sexual devices in Act violates Central Hudson Gas, discussed in the E-Treatise at § 30.3.2 nn.228-30). Regarding such laws in Alabama, Mississippi, and Virginia, since Mississippi is within the Fifth Circuit, it is likely any attempt to enforce that law would be held unconstitutional. Given the Virginia Supreme Court’s opinion in Martin v. Zihrel, 607 S.E.2d 367 (Va. 2005), discussed in the E-Treatise at § 27.3.4.1 n.264, striking down Virginia’s fornication statute, it is likely
the Virginia Supreme Court would strike down its state’s law were it enforced. *But see Williams v. Morgan*, 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); *Flanigan’s Enterprises Inc. of Georgia v. City of Sandy Springs, Georgia*, 831 F.3d 1342 (11th Cir. 2016) (local ordinance banning sale of sex toys constitutional based on earlier 11th Circuit precedent; panel “encourages” plaintiffs to petition the 11th Circuit for *en banc* review, which could overrule earlier Circuit precedent), *en banc* granted, 864 F.3d 1258 (11th Cir. 2017), *case dismissed 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).

**State Regulation of Assisted Suicide**


**What Counts as Intentional Deprivation Under Due Process Clause**

§ 27.4.1, page 1288, text following n.291: See *Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015) (intentional excessive force shown if force used was objectively unreasonable; do not have to show officers subjectively were aware they crossed the line). *Id.* at 2477 (Scalia, J., joined by Roberts, C.J., and Thomas, J., dissenting) (objective unreasonableness does not equal intent). *Id.* at 2479 (Alito, J., dissenting) (case should be dismissed as improvidently granted).

**Constitutional Right to Damages in Tort Litigation**


**Void for Vagueness Challenges Under the Due Process Clause**

§ 27.4.3.1, page 1299, n.342: For recent cases finding vagueness, see *Johnson v. United States*, 135 S. Ct. 2551 (2015) (increased sentence in Armed Career Criminal Act for acts presenting “serious potential risk of physical injury” vague) (Justices Kennedy, Thomas, & Alito dissented from this conclusion); *Welch v. United States*, 136 S. Ct. 1257 (2016) (*Johnson* is substantive, and thus has retroactive effect in cases on collateral review); *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018) (term “crime of violence” defined as “substantial risk that physical force against the person or property of another may be used” in Immigration and Naturalization Act vague; under the Act a person convicted is virtually guaranteed to be deported) (Roberts, C.J., and Kennedy, Thomas & Alito, J.J., dissenting); *Abdullah v. County of St. Louis, Missouri*, 52 F. Supp. 3d 936 (E.D. Mo. 2014) (police policy requiring protestors to “keep moving” and not loiter vague). For recent cases finding provisions not vague, see *United States v. Gonzalez-Longoria*, 813 F.3d 225 (5th Cir. 2016) (definition of “crime of violence” in 18 U.S.C. § 16 vague), rev’d, 831 F.3d 670 (5th Cir. 2016) (11-4 *en banc*) (definition not vague); *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). Compare United States v. J.D.T., 762 F.3d 984 (9th Cir. 2014) (statute that criminalizes “sexual act with another person who has not attained the age of 12 years” not vague applied to perpetrator also under 12 years) with In re D.B., 950 N.E.2d 528 (Ohio 2011) (statute making sexual conduct unlawful with person under the age of 13 vague as applied to two parties both under 13, as both are offenders and victims under Act, encouraging arbitrary and discriminatory enforcement). See also Beckles v. United States, 137 S. Ct. 886 (2017) (because advisory only and do not “fix” permissible sentences, advisory U.S. Sentencing Guidelines are not subject to vagueness challenges under the Due Process Clause).

**Procedural Due Process in School Cases**


**Procedural Due Process for Jose Padilla**

§ 27.4.4.8, page 1315, text following n.401: As of October, 2006, Jose Padilla was awaiting trial on terrorist conspiracy charges. On August 16, 2007, Jose Padilla was convicted for aiding and assisting Al Qaeda in terrorist operations overseas, although no allegations about plotting a “dirty bomb” for detonation in the United States, for which Padilla was originally detained, was included in the indictment. 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 barred under qualified immunity because it was not well-settled in 2001-03 that his treatment while in Charleston, South Carolina brig was torture. Padilla v. Yoo, 678 F.3d 748 (9th Cir. 2012).

**Procedural Due Process for Detained Persons**

§ 27.4.4.8, page 1320, text preceding n.418: Consistent with the concern expressed in the E-Treatise regarding Congress removing habeas corpus for foreign nationals accused of being enemy combatants, a 5-4 Court held in Boumediene v. Bush, 128 S. Ct. 2229 (2008), that aliens designated as enemy combatants and detained at Guantanamo Bay have the right of habeas corpus. 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 Court of Appeals “exclusive” jurisdiction to review decisions of the Combatant Status Review Tribunals (CSRT). Those Tribunals had been established by Congress to determine if 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 Act.

In Boumediene, the Court held that the congressional action taken in CSRT, DTA, and MCA was an inadequate substitute for habeas corpus. Justice Kennedy, writing for himself and Justices Stevens, Souter, Ginsburg, and Breyer, said the DTA was inadequate because it does not allow the detainee to present exculpatory evidence discovered after CSRT proceedings have concluded. Id. at 2272-74. Justice Kennedy left for future decision a number of questions, such as when and how other cases might be channeled to
district courts (almost inevitably the District Court for the District of Columbia) that will hear habeas petitions from detainees, the evidentiary and right-to-counsel issues that may arise, and the law that governs petitioners’ detention. Id. at 2275-77. Justice Kennedy emphasized the background purposes of the habeas corpus right, which is grounded in separation of powers principles and adherence to the rule of law. Id. at 2247, 2259, 2277. 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. As for use of later discovered exculpatory evidence, Roberts noted that the D.C. Circuit had power to remand a case to the tribunal below to allow that body to consider such evidence in the first instance. Id. at 2279-80, 2289-90 (Roberts, C.J., joined by Scalia, Thomas & Alito, JJ., dissenting). Justice Scalia also dissented. He noted, “[H]ow 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.” Id. at 2296 (Scalia, J., joined by Roberts, C.J., and Thomas & Alito, JJ., dissenting). Justice Scalia also noted that the writ of habeas corpus does not, and never has, run in favor of aliens who have never been within the “territorial jurisdiction” of the United States, see, e.g., Johnson v. Eisentrager, 339 U.S. 763 (1950), and Guantanamo Bay is not literally United States territory. Id. at 2296-2302. In reply, Justice Kennedy said 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. The Court should consider the objective degree of control over the location, the practicability of having a trial there, and availability of alternatives. Under this test, de jure sovereignty is a factor that bears on 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. Id. at 2253-62. Concurring, Justice Souter said the holding was no surprise as a 5-4 Court wrote in Rasul v. Bush, 542 U.S. 466, 481 (2004), that “[a]pplication of the habeas statute to persons detained at [Guantanamo] is consistent with the historical reach of the writ of habeas corpus.” Souter added, “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.” Id. at 2277-79 (Souter, J., joined by Ginsburg & Breyer, JJ., concurring).

Since Boumedienne, cases involving enemy combatants have been tried. Most detainees have been ordered released – officially designated No Longer Enemy Combatant (NLEC) – due to lack of evidence even under flexible evidentiary standards adopted in Hamdan, discussed in the E-Treatise at § 27.4.4.8 nn.409-16, and Boumediene, discussed above. See, e.g., Al Ginco v. Obama, 634 F. Supp. 2d 109 (D.D.C. 2009). A few have been convicted under standards held adequate to satisfy due process, including the burden on the detainee to “rebut” the government’s prima facie evidence of guilt by a “preponderance” of the evidence; use of “reliable” hearsay testimony; and “reasonable” discovery procedures. See, e.g., Al-Bihani v. Obama, 590 F.3d 866 (D.C. Cir. 2010). 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, 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 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 detainment without trial, a dubious practice the Court may eventually have to confront in terms of habeas and due process concerns. 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).
Delegation of Public Policymaking Authority to a Private Entity

§ 27.4.4.9, page 1322, text following n.423: Association of Am. Railroads v. United States Dep’t of Transp., 721 F.3d 666 (D.C. Cir. 2013) (unconstitutional to delegate to Amtrak development of standards with Federal Railroad Administration on Amtrak’s intercity passenger train performance), rev’d, 135 S. Ct. 1225 (2015) (Amtrak, while nominally private corporation, is a public entity when developing standards, as political branches control most of its stock and board of directors).

Congressional Power to Enforce the 14th Amendment

§ 28.3, page 1335, n.54: Despite Hibbs, a 5-4 Court held in Coleman v. Court of Appeals of Maryland, 132 S. Ct. 1327 (2012), 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. Id. at 1339 (Ginsburg, J., joined by Breyer, J., and joined by Sotomayor & Kagan, JJ., except as to footnote 1, dissenting).

Congressional Power to Enforce the 15th Amendment

§ 28.4, page 1339, n.65: In Northwest Austin Mun. Util. Dist. No. One v. Holder, 129 S. Ct. 2504, 2513-17 (2009), a unanimous Court held that a utility district was a “political subdivision” eligible to file suit for bailing out of the preclearance requirements of § 5 of the Voting Rights Act of 1965. Justice Thomas said that since the Court could not simply order bailout, because the district had yet to prove its compliance with statutory criteria, the Court should consider if § 5 is unconstitutional. Id. at 2518 (Thomas, J., concurring in the judgment in part and dissenting in part).

In Shelby County, Alabama v. Holder, 133 S. Ct. 2612 (2013), the Court decided the question reserved in Northwest Austin and held that the preclearance requirement of § 5 was unconstitutional, because the formula used to determine which jurisdictions are covered was based on data 40 years old. Since the Act “imposes current burdens” it “must be justified by current needs,” not needs based on outdated figures. Id. at 2618-19. The ability of parties, or the federal government, to bring suit under § 2 of the Voting Rights Act against any state for voting regulations having a disparate impact on race was left unimpaired. Four Justices dissented. 133 S. Ct. at 2632-36 (Ginsburg, J., joined by Breyer, Sotomayor & Kagan, J., dissenting) (the success of § 5 in reducing voting discrimination based on race over the last 40-plus years supports finding the Act is still constitutional today). On continuing litigation under §2 of the Voting Rights Act, see Supplement, § 26.5.3, text following n.521, at page 2102.

Reasonableness Review in Non-Public Forums

Regulations of Conduct versus Regulations of Speech

§ 29.3.1, page 1360, end of section: See generally United States v. Hobgood, 868 F.3d 744 (8th Cir. 2017) (speech used to support conviction of the conduct of interstate stalking and extortion not entitled to free speech protection); Tagami v. City of Chicago, 875 F.3d 375 (7th Cir. 2017) (public nudity law which banned women, but not men, from walking around topless in public a regulation of conduct, not expression; in any case, constitutional under intermediate review of United States v. O’Brien or gender discrimination); Left Field Media LLC v City of Chicago, 822 F.3d 988 (7th Cir. 2016) (law banning all peddling on sidewalks immediately adjacent to Wrigley Field regulation of conduct, triggering only rational basis review); Pickup v. Brown, 740 F.3d 1208 (9th Cir. 2014) (California law banning state-licensed mental health providers from treating patients under 18 with “sexual orientation change efforts” regulation of conduct, not speech). But see King v. Governor of New Jersey, 767 F.3d 216 (3rd Cir. 2014) (ban valid as content-based regulation of licensed professional speech, although the King court’s view that licensed professional speech is entitled to only Central Hudson commercial speech intermediate review, not strict scrutiny, was rejected by the Supreme Court in National Institute of Family and Life Advocates v. Becerra, 138 S. Ct. 2361, 2371-76 (2018)).

The Fourth Circuit held in United States v. Hassen, 742 F.3d 104 (4th Cir. 2014), that an agreement to provide material support to terrorism was not protected speech, but “action”; making “evidentiary use” of speech to prove “conspiracy” permissible. In Holder v. Humanitarian Law Project, 130 S. Ct. 2705 (2010) (Breyer, J., joined by Ginsburg & Sotomayor, JJ., dissenting) (Kagan, J., not participating), the Supreme Court held that in any event by not criminalizing “pure political speech” the material support statute met strict scrutiny applicable to content-based regulations of speech. In Expressions Hair Design v. Schneiderman, 808 F.3d 118 (2nd Cir. 2015), rev’d 137 S Ct. 1144 (2017), and Rowell v. Pettijohn, 816 F.3d 73 (5th Cir. 2016), judgment vacated, 137 S. Ct. 1431 (2017), the Second and Fifth Circuit Courts of Appeals ruled that a ban on sellers imposing surcharges on credit-card transactions regulates conduct, not speech on prices. In Dana’s R. Supply v. Attorney General of Florida, 807 F.3d 1235 (11th Cir. 2015), the Eleventh Circuit held the anti-surcharge law regulates speech and was invalid under the Central Hudson test for commercial speech. The Supreme Court resolved this Circuit split in Expressions Hair Design v. Schneiderman, 137 S. Ct. 1144 (2017), holding that New York’s “no-surcharge” law, which permits retailers to give discounts for cash, but prevents surcharges for credit card purchases, regulate how merchants may communicate their prices, and thus triggers Central Hudson’s heightened review, not rational review applicable to economic regulations.

See also Brush & Nib Studio, LC v. City of Phoenix, 418 P.3d 426, 436-40 (Ariz. Ct. App. 2018) (anti-discrimination law applied to wedding invitation and other wedding design business is a regulation of conduct, not speech), and cases cited therein; Department of Fair Employment & Housing v. Cathy’s Creations, Inc., 2018 WL 747835 (Cal. Super. Ct., Bakerfield Dep’t, Feb. 5, 2018) (baking a wedding cake is artistic expression, and regulation unconstitutional under strict scrutiny). The Supreme Court dodged this issue in Craig v. Masterpiece Cakeshop, Inc., 138 S. Ct. 1719 (2018), by holding that application of the anti-discrimination law in this case was tainted by religious intolerance, and thus violated the Free Exercise Clause, rendering unnecessary consideration of the free speech issues possibly at issue in the case.

Supreme Court Resolves Circuit Court Split on Issue of License Plate Regulations

§ 29.3.2, page 1362, n.79 & § 30.1.1.4, page 1445, n.50: While the Sixth Circuit held in ACLU of Tennessee v. Bredesen, 441 F.3d 370 (6th Cir. 2006), that license plates are government speech, other circuit courts ruled differently. See, e.g., Arizona Life Coalition, Inc. v. Stanton, 515 F.3d 956 (9th Cir. 2008) (rejection of “Choose Life” plates viewpoint discrimination); ACLU of North Carolina v. Tata, 742 F.3d 563 (4th Cir. 2014) (if state permits pro-life plate, failure to create pro-choice plate viewpoint discrimination); Choose Life Illinois, Inc. v. White, 547 F.3d 853 (7th Cir. 2008) (rejection of “Choose Life” plate subject-matter regulation, since it excluded the “entire subject of abortion” from its program, triggering reasonableness review in non-public forum). In Walker v. Texas Div. Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2245-46 (2015), a 5-4 Court adopted the Bredesen view that license plates are government speech, and so denying a plate featuring the Confederate battle flag was not subject to free speech review. This approach permits viewpoint discrimination in license plate regulation. See, e.g., ACLU of North Carolina v. Tennyson, 815 F.3d 183 (4th Cir. 2016) (state can allow motorists to promote anti-abortion agenda on license plates, while denying plates
to pro-choice views); *Vawter v. Abernathy*, 45 N.E.3d 1200 (Ind. 2016) (Indiana law granting Bureau of Motor Vehicles broad discretion to accept or reject vanity license plates cannot be challenged for vagueness given plates are government speech). A better approach in *Walker* would have been either to find the state had a compelling interest not to promote the Confederate battle flag (as a symbol of rebellion or racism), or to hold the ban was a subject-matter regulation related to decency, as in *Finley*, discussed in the E-Treatise at § 29.4.2 n.101-03, and uphold it under reasonableness review. The dissent in *Walker* properly observed that individual-chosen specialty plates are not “government speech,” but then applied viewpoint discrimination, strict scrutiny to hold the Texas ban invalid. 135 S. Ct. at 2254-55 (Alito, J., joined by Roberts, C.J., and Scalia & Kennedy, JJ., dissenting). *Cf. Mitchell v. Maryland Motor Vehicle Admin.*, 148 A.3d 319 (Md. 2016) (vanity license plates, where individual tailors numbers and letters to form a personalized message, still subject to nonpublic forum analysis after *Walker*). Regarding “compelled speech” by government messages on license plates, discussed in the E-Treatise at § 29.6.2.1 n.266, *see Cressman v. Thompson*, 719 F.3d 1139 (10th Cir. 2013) (motorist alleging Oklahoma statute prohibiting him from covering image on license plate of Native American shooting arrow toward the sky states a First Amendment claim).

**Government Funding and Speech**

§ 29.3.2, page 1363, n.84: In *Alliance for Open Society Intern., Inc. v. United States Agency for Intern. Develop.*, 651 F.3d 218 (2nd Cir. 2011), a 2-1 panel ruled that a federal requirement that a group receiving federal funds in the fight against AIDS have a policy “explicitly opposing prostitution” compels speech, and is not permissible under *Rust*, because here the speaker had to take a position, not just remain silent. In *Agency for Intern. Develop. v. Alliance for Open Society Intern., Inc.*, 133 S. Ct. 2321, 2328-32 (2013), the Court affirmed on the ground that since the speech restriction regarding prostitution was not related to the government program, which was about fighting HIV/AIDS, the *Rust* doctrine on strings in funding programs, did not apply. As viewpoint discrimination, the restriction was invalid. A dissent concluded the restriction was part of the government program involving choosing suitable agents to eradicate HIV/AIDS; *Rust* should apply. *Id.* at 2332 (Scalia, J., joined by Thomas, J., dissenting).

The Content-Based versus Content-Neutral Distinction

§ 29.4.1, page 1365, text following n.89: The Court muddied the waters a bit in 2015 in *Reed v. Town of Gilbert, Arizona*, 135 S. Ct. 2218 (2015). *Reed* involved an sign code regulation that provided different sizes and lengths of posting times for signs based upon whether the sign was an “Ideological Sign,” “Political Sign,” or “Temporary Directional Sign Relating to a Qualifying Event.” Under traditional doctrine, use of intermediate review would depend on the town proving they had “actual” or “plausible” content-neutral substantial government interests (e.g., visual clutter, aesthetics, etc.). Three concurring Justices noted the town provided “no reason at all” for the distinctions they drew among signs, and thus the regulation “does not pass strict scrutiny, intermediate scrutiny, or even the laugh test.” *Id.* at 2239 (Kagan, J., joined by Ginsburg & Breyer, JJ., concurring in the judgment). The majority adopted a rigid rule that if a regulation is content-based “on its face,” strict scrutiny is automatically triggered. *Id.* at 2228. This is inconsistent with traditional doctrine, such as in *Renton v. Playtime Theatres, Inc.*, discussed in the E-Treatise at § 29.4.1 n.135, where zoning regulations employing “on their face” content-based regulation of “adult motion picture theaters” trigger only intermediate review because the regulation is justified by “actual” or “plausible” secondary effects concern with increased crime around such theaters, particularly prostitution and drug trafficking, and the impact such theaters have on retail trade and maintaining property values. The breath of *Reed* was mitigated by a concurrence listing ways sign ordinances could avoid strict scrutiny. *Id.* at 2233 (Alito, J., joined by Kennedy & Sotomayor, JJ., concurring) (regulating size for all signs, lighted versus unlighted signs, signs on public versus private property, commercial versus residential property, total number of signs, signs advertising a one-time event). *See also Muslim American Society Freedom Foundation v. District of Columbia*, 846 F.3d 391 (D.C. Cir. 2017) (rule requiring event-related signs on city lampposts to be removed within 30 days after the event content neutral and constitutional under intermediate review). *See generally Norton v. City of Springfield*, 806 F.3d 411 (7th Cir. 2015) (ordinance against “spoken” requests for donations, while allowing “signs,” was content-neutral given greater coercive effect of spoken request, but after *Reed* is content-based and invalid under strict scrutiny); *Herson v. City of Richmond*, 631 F. App’x 472 (9th Cir. 2016) (Richmond’s sign height and size restrictions meet strict scrutiny).
Hopefully, Reed’s approach will not be extended widely. See, e.g., BBL, Inc. v. City of Angola, 809 F.3d 317, 326 n.1 (7th Cir. 2015) (applying Renton, not Reed, to regulation of “sexually explicit entertainment”); State v. Packingham, 777 S.E.2d 738 (N. Car. 2015) (Reed does not apply to ban on registered sex offender accessing commercial social network sites that permit minors to be members, like Facebook or Twitter; incidental burden on speech for content-neutral reasons triggers O’Brien intermediate review; not overbroad, since it permits e-mail and instant messaging when communicating with adults), rev’d, Packingham v. North Carolina, 137 S. Ct. 1730 (2017) (law substantially overbroad assuming intermediate review applied, as discussed at Supplement § 30.1.4.2 n.121; the Court failed to consider if the law’s facial content-based member criteria should trigger strict scrutiny under Reed, or was it content-neutral time, place, or manner regulation to protect minors, as might be found under O’Brien/Renton). See also March v. Mills, 2016 WL 2993168 (D. Me. 2016) (law prohibiting noise with intent to disrupt medical care, such as abortion, content-based under Reed; invalid); Free Speech Coalition, Inc. v. Attorney Gen. United States, 825 F.3d 149 (3rd Cir. 2016) (requiring adult film producers to keep identity & age of every performer to stop child pornography triggers strict scrutiny after Reed; invalid); Champion v. Kentucky, 2017 WL 636420 (Kentucky Sup. Ct. 2017) (law prohibiting solicitation from public streets/intersections content-based after Reed; invalid).

### Viewpoint Neutrality versus Viewpoint Discrimination

§ 29.4.2, page 1368, n.106: In Brooklyn Institute of Arts and Sciences v. City of New York, 64 F. Supp. 184 (E.D.N.Y. 1999), the court held that New York City’s withholding appropriated funds for a museum that displayed “The Holy Virgin Mary” by Chris Ofili, which was made in part by using elephant dung and deemed offensive to Catholics, was unconstitutional viewpoint discrimination, distinguishing Feeley. In Buxton v. Kurtinitis, 862 F.3d 423 (4th Cir. 2017), the court held that plaintiff had no Free Speech claim of retaliation that he was denied admission to a public college (Radiation Therapy Program at Community College of Baltimore County) because of his religious speech in a competitive interview for admission where religion is not supposed to be “brought up in the clinic.” Perhaps a better approach would have been to apply a Finley reasonableness standard and uphold the denial of admission on the ground.

In Christian Legal Society Chapter of the Univ. of California, Hastings College of Law v. Martinez, 130 S. Ct. 2971 (2010), the Court considered a state law school policy that student organizations must open membership to all students to obtain school recognition and financial assistance, as applied to Christian Legal Society (CLS) that wanted to exclude those engaging in “unrepentant homosexual conduct.” Since under the stipulated facts the policy was applied equally to all student organizations, the Court held it was viewpoint neutral. As discussed in the E-Treatise at § 29.6.2.2 nn.303-16, such school regulations trigger non-public-forum analysis; thus, the policy would be valid if “reasonable.” The Court held it was reasonable for many reasons, including ensuring that leadership, educational, and social opportunities are available to all students; the all-policy brings together persons of different backgrounds encouraging tolation, cooperation, and learning among students; and ensuring no student is forced to fund a group that would reject student as a member. 130 S. Ct. at 2987-95. The dissent noted when the school originally refused to register CLS it claimed CLS discriminated on basis of religion and sexual orientation, thus viewpoint discriminatory. Id. at 3010 (Alito, J., joined by Roberts, C.J., and Scalia & Thomas, JJ., dissenting). In response, the majority noted that factual stipulations are “formal concessions . . . withdrawing a fact from issue.” Id. at 2983.

In Matal v. Tam, 137 S. Ct. 1744, 1751 (2017) (Gorsuch, J., not participating), the Court held a provision of federal law prohibiting registration of trademarks that may “disparage . . . or bring . . . into contempt[i] or disrepute” any “persons, living or dead” was unconstitutional as applied to an Asian-American band, “The Slants.” Four Justices held provision failed even Central Hudson Gas’ intermediate review. Id. at 1757-64 (Alito, J., joined by Roberts, C.J., and Thomas & Breyer, JJ.) (“preventing speech expressing ideas that offend . . . strikes at the heart of the First Amendment” and is viewpoint discrimination, not a “substantial interest”; provision not “narrowly drawn” to drive out trademarks supporting invidious discrimination conduct). Four Justices held that because the regulation was an viewpoint discrimination it triggered strict scrutiny even if a regulation of commercial speech. Id. at 1767 (Kennedy, J., joined by Ginsburg, Sotomayor & Kagan, JJ.) (“speech burden based on audience reactions is simply government hostility . . . long prohibited [to justify] a First Amendment burden”). Cf. In re Brunetti, 877 F.3d 1330 (Fed. Cir. 2017) (federal trademark ban on “immoral” or “scandalous” matter unconstitutional based on Tam; mark in this case was “FUCT”).
Content-Based Regulations Triggering Strict Scrutiny

§ 29.4.3.2, page 1371, text following n.118: In United States v. Alvarez, 132 S. Ct. 2537 (2012), a 6-3 Court held that the Stolen Valor Act, which made it a misdemeanor for a person to “falsely represent” the person has “been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States” violated the First Amendment. Four Justices viewed the Act as a content-based regulation, triggering strict scrutiny. Since the government could not show that the public’s perception of military awards was diluted by false claims, criminalizing the conduct was not directly related to advancing that interest. The Act was also not the least burdensome effective alternative, since it was not shown that counterspeech could not overcome the lie. Id. at 2249-50 (Kennedy, J., joined by Roberts, C.J., and Ginsburg & Sotomayor, JJ, announcing the judgment of the Court). Two Justices viewed the regulation as a content-neutral secondary effects concern with the public’s perception of military honors, and applied intermediate review. Even so, the regulation was substantially more burdensome than necessary, as it criminalized all lies, even in “family, social, or other private contexts, where lies will often cause little harm” to public perceptions. Id. at 2551-52, 2555 (Breyer, J., joined by Kagan, J., concurring in the judgment). The dissent seemed willing to create an exception to the First Amendment, like advocacy of illegal conduct or fighting words, and uphold the statute was also not the least burdensome effective alternative, since it was not shown that counterspeech could not

Content-Neutral Regulations Triggering Intermediate Review

§ 29.4.4.1, page 1373, text following n.126: In cases involving regulation of adult entertainment, some courts have adopted the flexible evidentiary approach used by Justice O’Connor in the Pap’s A.M. case. See, e.g., Entertainment Prod. Inc. v. Shelby County, Tennessee, 721 F.3d 729 (6th Cir. 2013) (rejecting argument that governments may only rely on evidence satisfying scientific validity standards of Daubert v. Merrell Dow Pharm., 509 U.S. 579 (1993); instead governments may rely on “land-use studies, prior judicial opinions, surveys of real-estate professionals (such as real-estate appraisers), anecdotal testimony, police reports, and other direct and circumstantial evidence”). But see Annex Books, Inc. v. City of Indianapolis, 740 F.3d 1136 (7th Cir. 2014) (city cannot force adult bookstores to close overnight, if other businesses can remain open, because justification of “fewer armed robberies” was not statistically significant); Foxxy Ladyz Adult World, Inc. v. Village of Dix, Illinois, 779 F.3d 706 (7th Cir. 2015) (village must present evidence that nude dancing has adverse secondary effects on “health, welfare, and safety of its citizens”); Reynolds v. Middleton, 779 F.3d 222 (4th Cir. 2015) (city must present evidence that ban on soliciting funds at intersections is not substantially too burdensome response to traffic safety and traffic flow concerns). The issue of how vigorous intermediate review is for content-neutral regulations is discussed in E-Treatise at § 29.4.4.3, pages 1384-85.

Content-Neutral Regulations: Proof Requirement

§ 29.4.4.2, page 1379, end of section: For cases involving Occupy Wall Street, see, e.g., Occupy Minneapolis v. County of Hennepin, 866 F. Supp. 2d 1062 (D. Minn. 2011) (valid to cut off electricity to protestors in public plazas and ban tents; city had content-neutral interest in controlling the aesthetic appearance of plazas); Occupy Fort Myers v. City of Fort Myers, 882 F. Supp. 2d 1320 (M.D. Fla. 2011) (ban on erection of temporary shelters at park by protestors constitutional; broad permit system to regulate protests and parades at park likely unconstitutional; preliminary injunction granted); Occupy Columbia v. Haley, 866 F. Supp. 2d 545 (D.S.C. 2011) (banning protestors after 6 p.m. from occupying park likely unconstitutional; preliminary injunction granted). Other noteworthy content-neutral regulation of speech cases include: McCullen v.
Coakley, 134 S. Ct. 2518 (2014) (Massachusetts law granting 35 foot buffer zone around abortion clinic substantially burdens more speech than necessary to prevent harassment or obstruction of entry; in response Massachusetts passed a law empowering police to issue dispersal orders, enforceable for 8 hours, against anyone blocking access to clinic, and prohibiting demonstrators from using “force, physical act, or threat of force” against anyone entering or leaving clinic); id. at 2541 (Scalia, J., joined by Kennedy & Thomas, JJ., concurring in the judgment) (law is content-based regulation of pro-life speech triggering strict scrutiny); Pine v. City of West Palm Beach, Florida, 762 F.3d 1262 (11th Cir. 2014) (banning amplified noise within 100 feet of health care clinics more narrowly tailored than McCullen, and constitutional); Johnson v. Minneapolis Park and Recreation Board, 729 F.3d 1094 (8th Cir. 2013) (attempt to restrict to festival booth Christian from distributing Bibles at Twin Cities Pride Festival substantially burdens more speech than necessary to prevent harassment/congestion); The Contributor v. City of Brentwood, Tennessee, 726 F.3d 861 (6th Cir. 2013) (homeless people can be prohibited from selling newspapers they produce to motorists at street corners to deal with traffic safety and flow; ample alternatives to sell the paper, including to pedestrians); Left Field Media LLC v. City of Chicago, 822 F.3d 988 (7th Cir. 2016) (Chicago ordinance that bans peddling outside Wrigley Field to curtail crowding content-neutral and valid under intermediate review). In 2017, the Fifth Circuit joined other Circuits in holding that a “First Amendment right to record the police does exist, subject only to reasonable time, place, and manner restrictions.” Turner v. Driver, 848 F.3d 678, 688 (5th Cir. 2017) (qualified immunity granted because such a right was not clearly established before this case; 1st, 7th, and 11th had already held such a right exists; 3rd, 4th, and 10th had held right not clearly established for purposes of qualified immunity analysis; no Circuit had refused to recognize such a right).

Public versus Nonpublic Forum Analysis

§ 29.5.2, page 1393, n.204: In United States v. Apel, 134 S. Ct. 1144 (2014), the Court held that a portion of a military base that contained a protest area and easement for a public road was still a military non-public forum. In American Freedom Defense Initiative v. Suburban Mobility Auth. for Regional Transp. (SMART), 698 F.3d 885 (6th Cir. 2012), the Sixth Circuit held a state transportation agency’s refusal to display an anti-jihad advertisement on city buses was reasonable and viewpoint-neutral based on its policy against political advertisements, applying nonpublic forum analysis as in Lehman v. City of Shaker Heights, 418 U.S. 298, 299-302 (1974); American Freedom Defense Initiative v. King County, 796 F.3d 1165 (9th Cir. 2015) (refusal to display “Faces of Global Terrorism” ad valid as “reasonable” under non-public forum analysis). But see New York Magazine v. Metropolitan Transit Auth., 136 F.3d 123, 129-30 (2nd Cir. 1998) (exterior of bus public forum because city accepted commercial and political ads). See also Minnesota Majority v. Mansky, 708 F.3d 1051 (8th Cir. 2013) (banning solicitation and display of political material within 100 feet of polling place “reasonable” and not facially unconstitutional; polling place is non-public forum); NAACP v. City of Philadelphia, 2016 WL 4435626 (3rd Cir. 2016) (access to advertising space at Philadelphia International Airport examined under nonpublic forum analysis, as the city had not opened up advertising for all kind of messages; Philadelphia’s justifications for the ban – maximize revenue and avoid controversy – were not reasonable given political and other controversial messages aired on public TVs throughout the terminal; in applying its analysis, the 3rd Circuit placed the burden on the city to show “reasonableness” – a third-order reasonableness balancing test – rather than placing the burden on the challenger, the typical second-order reasonableness balancing usually applied in such cases). See also American Freedom Defense Initiative v. Metropolitan Transit Authority, 109 F. Supp. 3d 626, 631-33 (S.D.N.Y. 2015), aff’d 815 F.3d 105 (2d Cir. 2016) (by deciding to reject all political ads, government changed forum from public to nonpublic forum, making it a content-based subject-matter regulation subject to reasonableness review, not strict scrutiny); Powell v. Noble, 36 F. Supp. 3d 818, 833-36 (S.D. Iowa 2014) (state fair grounds a non-public forum).

Recent Fee/Permit Approval Cases

§ 29.6.1.3, page 1401, n.241: See Epona, LLC v. County of Ventura, 876 F.3d 1214 (9th Cir. 2017) (county permit system for outdoor weddings gives “unbridled discretion” to officials by using factors like is wedding “obnoxious or harmful”; unconstitutional under Freeman); Moore v. Brown, 868 F.3d 398 (5th Cir. 2017) (rule requiring permit approval for structures larger than 4 feet square in a public park satisfies intermediate review of Thomas as applied to minister using a 4 foot wide and 6.5 feet high sketch board, based on concerns with safety and coordination of uses of park, including preserving line-of-sight views for all park patrons).
Vagueness Doctrine

§ 29.6.1.4, page 1402, n.246: But see Holder v. Humanitarian Law Project, 130 S. Ct. 2705 (2010) (statute not unconstitutionally vague). In FCC v. Fox Television Stations, Inc., 132 S. Ct. 2307 (2012), the Court held the FCC did not give television networks fair notice of a change in policy whereby a fleeting expletive or brief shot of nudity could be held indecent; thus new policy was unconstitutionally vague applied to charges filed. See also Kenny v. Wilson, 885 F.3d 280 (4th Cir. 2018) (students have standing to challenge as vague South Carolina Disturbing Schools Law which makes it, among other things, a criminal misdemeanor to “act in an obnoxious manner” in school or “disturb in any way” teachers or students).

Substantial Overbreadth Doctrine

§ 29.6.1.5, page 1405, n.257: In United States v. Stevens, 130 S. Ct. 1577 (2010), an 8-1 Court held that a federal statute was substantially overbroad that criminalized commercial creation, sale, or possession of any visual or auditory depiction of “conduct in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed, if such conduct is illegal under Federal law or the law of the State in which the creation, sale, or possession takes place,” except for depictions that have “serious religious, political, scientific, educational, journalistic, historical, or artistic value.” As written the statute would make illegal videos of hunting activities or livestock slaughtering practices banned by one state, although legal in other states. Id. at 1588-92. In dissent, Justice Alito concluded fears of overbroad application were unwarranted, and would remand on whether the statute was unconstitutional applied to activity involved in the case – commercialized dog fighting. Id. at 1592-97 (Alito, J., dissenting). See also United States v. Simpson, 741 F.3d 539 (5th Cir. 2014) (CAN-SPAM Act which makes it a federal crime to send bulk commercial e-mail messages with intent to deceive recipients about origin of messages neither unconstitutionally vague or overbroad); Scott v. Georgia, 788 S.E.2d 468 (Ga. 2016) (statute criminalizing internet contact with a person, with the knowledge or belief the person is a child younger than 16 and with specific intent to arouse or satisfy one’s own or other person’s sexual desire, not overbroad, particularly given “specific intent” requirement). But see State v. Hensel, 901 N.W.2d 166 (Minn. 2017) (disorderly conduct statute prohibiting “disturb[ing] an assembly or meeting, not unlawful in character” overbroad and not susceptible of being limited to fighting words, obscene speech, or true threats); Ex Parte Jones, 2018 WL 228888 (Tex. Ct. App. - Tyler 2018) (Texas revenge pornography statute overbroad as it applies not only to initial sender but anyone sharing picture even if they did not know picture was sent in violation of photographed individual’s reasonable expectation of privacy).

Coerced Membership in a Group

§ 29.6.2.1, page 1409, text following n.270: In Locke v. Karass, 129 S. Ct. 798 (2009), following Abood, 431 U.S. 209 (1977), Justice Breyer wrote that a local union can charge nonmembers a part of the affiliation fee that it pays to its national union or organization, including an appropriate share of litigation expenses that do not directly involve the local union, if: (1) the subject matter of the national litigation must bear an appropriate relation to collective bargaining, and (2) the arrangement must be reciprocal in that the litigation may ultimately inure to the benefit of the members of the local union. Id. at 801-02. A concurring opinion noted the Court had not decided whether the union or members had the burden to prove arrangement was reciprocal. Id. at 808 (Alito, J., joined by Roberts, C.J., and Scalia, J., concurring). Cf. Harris v. Quinn, 134 S. Ct. 2618 (2014) (personal assistants providing in-home health care paid by state, but otherwise not considered state employees, cannot be required to pay Abood/Karass-style fees); id. at 2644-45 (Kagan, J., joined by Ginsburg, Breyer & Sotomayor, JJ., dissenting) (these workers are public employees). In Knox v. Service Employees Int’l Union, Local 1000, 132 S. Ct. 2277 (2012), the Court held the First Amendment requires a union planning to collect a special assessment to fund political speech to give nonmembers proper notice, and assessment may not be exacted from nonmembers without their affirmative consent. Concurring in the judgment, two Justices noted that union must give members an opportunity to opt out, but did not require affirmative consent. Id. at 2296 (Sotomayor, J., joined by Ginsburg, J., concurring in the judgment). Two Justices dissented, concluding under Teachers v. Hudson, 475 U.S. 292, 310 (1986), a union can collect a fee from nonmembers as long as they provide “an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amount reasonably in dispute while such challenges are pending.” Id. at 2999-3000 (Breyer, J., joined
by Kagan, J., dissenting). *Cf. Ysura v. Pocatello Educ. Ass’n*, 555 U.S. 353 (2009) (use of a state’s payroll system to collect dues is subsidy of speech, and reasonable; strict scrutiny would be applied if viewpoint discriminatory); *Wisconsin Educ. Ass’n Council v. Walker*, 705 F.3d 640 (7th Cir. 2013) (state law prohibiting employers from deducting union dues from paychecks reasonable, not viewpoint discriminatory); *Fleck v. Wetch*, 868 F.3d 652 (8th Cir. 2017) (North Dakota integrated bar dues valid when attorneys can choose to deduct roughly 2.5% if they do not want to pay for non-germane activities). In *Friedrichs v. California Teachers Ass’n*, 2014 WL 10076847 (9th Cir. Nov. 18, 2014), aff’d by equally divided court, 136 S. Ct. 1083 (2016), the Court was poised to extend the “opt-in” requirement of *Knox*, applicable to special assessments, to regular union dues, thus overruling the “opt-out” aspect of *Abood*. With Justice Scalia’s death on February 13, 2016, the Court affirmed on a 4-4 tie vote. After Justice Gorsuch joined the Court, the Court did overrule *Abood in Janus v. American Federation of State, County, and Municipal Employees, Council 31*, 138 S. Ct. 2448 (2018) (Kagan, J., joined by Ginsburg, Breyer & Sotomayor, JJ., dissenting).

### The Government Speech Doctrine

§ 29.6.2.1, page 1411, n.279: See also *Delano Farms Co. v. California Table Grape Comm’n*, 19 P.3d 699 (Cal. 2018) (under *Johanss* California grape growers can be compelled to pay for state’s generic table grape ads). In *Pleasant Grove City, Utah v. Summum*, 129 S. Ct. 1125 (2009), a religious organization filed an action against various local officials, asserting that they had violated the Free Speech Clause by rejecting a proposed Seven Aphorisms monument for a local park that already contained a donated Ten Commandments monument. The Court held permanent monuments on public properly typically represent government speech and, although the Free Speech Clause restricts government regulation of private speech, it does not regulate government speech. Government speakers are still bound by other constitutional provisions, such as the Equal Protection Clause, which may limit partisan messages, *id*. at 1139 (Stevens, J., joined by Ginsburg, J., concurring), or on political grounds, *id*. at 1140 (Breyer, J., concurring). Establishment Clause aspects of this case are discussed in this Supplement at § 32.1.3.2.B, page 1594, n.202. See generally *Dawson v. City of Grand Haven*, 901 N.W.2d 904 (Mich. 2017) (city fixture displays on “Dewey Hill Monument” are government speech, not subject to free speech complaint by religious group wanting equal access for cross to be displayed during their nearby worship services, as had been done for many years).

### First Amendment Rights Where the Government is an Educator

§ 29.6.2.2, page 1420, n.316: Consistent with the analysis of *Bethel School District No. 403 v. Fraser, Hazelwood School District v. Kuhlmeier*, and other cases suggested in the E-Treatise text at pages 1419-20, in *Morse v. Frederick*, 127 S. Ct. 2618 (2007) (the “Bong Hits for Jesus” case), the Supreme Court indicated that reasonableness review would be applied to student speech made in the context of the non-public forum of a “school-sanctioned and school-supervised” event — here, students being led out of the classroom to watch the Olympic Torch Relay pass by their school — even though the speech could not be said to bear the “imprimatur” of the school, as in *Hazelwood*, or was “vulgar,” as in *Fraser*. In all three cases — *Morse, Hazelwood*, and *Fraser* — the speech occurred in a non-public forum — the school curriculum. In *Morse*, the school had a legitimate interest in regulating speech they could “reasonably regard” as promoting illegal drug use. 127 S. Ct. at 2625-29. A concurrence by Justices Kennedy and Alito, whose votes were critical to make up the majority, indicated that where the speech is not so connected to the school curriculum, and the speech is student generated, even if in conflict with the “educational mission” of the school, then the *Tinker* test would still apply. *Id*. at 2636-38 (Alito, J., joined by Kennedy, J., concurring). As discussed in the E-Treatise at § 29.6.2.2 n.286, *Tinker* reflects an intermediate standard of review.

A dissent by Justices Stevens, Souter, and Ginsburg viewed the schools’ reaction in this case as viewpoint discrimination. 127 S. Ct. at 2651 (Stevens, J., joined by Souter & Ginsburg, JJ., dissenting). In any event, the dissent believed the student speech should be analyzed under *Tinker*, presumably viewing the speech as student generated outside of the school-sponsored activity. *Id*. at 2647. Justice Breyer would have avoided all these issues by holding that, in any event, under *Harlow v. Fitzgerald*, discussed in the E-Treatise at § 20.1.4.2.B nn.84-87, the principal had qualified immunity for the disciplinary action taken. 127 S. Ct. at 2638 (Breyer, J., concurring in the judgment in part and dissenting in part). Justice Stevens agreed the principal had qualified immunity under *Harlow*. *Id*. at 2643 (Stevens, J., joined by Souter & Ginsburg, JJ., dissenting).
For other cases applying a Hazelwood standard of review, see Keefe v. Adams, 840 F.3d 523, 531 (8th Cir. 2016) (“college administrators and educators in a professional school [here, a nursing school] have discretion to require compliance with recognized standards of the profession, both on and off campus, ‘so long as their actions are reasonably related to legitimate pedagogical concerns [here, sexually offensive and threatening Facebook posts about other class members].’”); Pompeo v. Board of Regents of New Mexico, 852 F.3d 973, 984-86 (10th Cir. 2017) (professor cannot be sued for allegedly pressuring student to revise anti-gay language in a class assignment, as educators can restrict school-sponsored speech having inflammatory or offensive views if “reasonably related to a legitimate pedagogical concern” and not “sham pretext for an impermissible ulterior motive”; qualified immunity applies as any greater right the student had was not clearly established).

For regulation of student behavior off-campus, but which can have impacts on-campus, courts tend to use the Tinker test under one or two theories: (1) a sufficient “nexus” exists so the student’s off-campus speech is “tied closely enough to the school” or (2) it is “reasonably foreseeable” that off-campus speech would reach the school. See C.R. v. Eugene School District 4J, 835 F.3d 1142, 1149 (9th Cir. 2016) (under either approach the school can discipline student for close-to-the-school, but off-campus sexually harassing speech), citing Kowalski v. Berkeley County Schools, 652 F.3d 565 (4th Cir. 2011) (“nexus” test); S.J.W. v. Lee’s Summit R-7 School District, 696 F.3d 771 (8th Cir. 2012) (“reasonably foreseeable” test). A number of lower courts have applied this doctrine to the issue of schools disciplining students for inappropriate material posted outside of school on the Internet. In some cases, the postings involved statements made against the school administration. In other cases, the postings involved so-called “bullying” of other students. In most cases the school prevailed, satisfying the intermediate Tinker standard of advancing substantial content-neutral concerns with teaching students appropriate communication, preventing vulgar speech, or dealing with “bullying” of other students. See Doninger v. Niehoff, 642 F.3d 334 (2nd Cir. 2011) (school could properly discipline student who, after a concert at the high school was cancelled, posted on her blog a statement that the concert was cancelled “due to douchebags in the central office” and “if you want to write something to call her to piss her off more”); J.S. ex rel. Snyder v. Blue Mountain School Dist., 650 F.3d 915 (3rd Cir. 2011) (school could properly discipline student for creating fake internet profile of principal alleging he was a sex addict and pedophile); Layshock ex rel. Layshock v. Hermitage School Dist., 650 F.3d 205 (3rd Cir. 2011) (school could properly discipline student for creating fake internet profile of principal alleging drug and alcohol use and shoplifting); Kowalski v. Berkeley County Schools, 652 F.3d 565 (4th Cir. 2011) (school could properly discipline student for creating a false internet page called “S.A.S.H.”; student claimed the acronym was for “Students Against Sluts Herpes,” but the school concluded, based on posts by other students in response, that it really stood for “Students Against Shay’s Herpes,” which referred to another student at the school, and was an example of internet “bullying”); Bell v. Itawamba County Sch. Bd., 799 F.3d 379 (5th Cir. 2015) (12-4 en banc) (school could discipline student for posting threatening rap lyrics against two male teachers accused of sexually harassing minor students under Tinker). But see State v. Bishop, 787 S.E.2d 814 (N. Car. 2016) (law making it a crime to post on the Internet “private, personal, or sexual information pertaining to a minor” with the intent to “intimidate or torment” overbroad; invalid under strict scrutiny). See also Morrow v. Balaski, 719 F.3d 160 (3rd Cir. 2013) (absent creating or enhancing danger, schools have no constitutional duty under Deshaney v. Winnebago Cnty. Dep’t of Social Servs., 489 U.S. 189, 197 (1989), discussed in the E-Treatise at § 27.4.1 nn.295-96, to protect bullied students from the bully, and could tell two bullied students they could not ensure their safety and they should find another school). A number of states or local school districts do have statutes or regulations requiring schools to respond to bullying, including preemptive anti-bullying programs.

School districts have also continued to win a number of other student regulation cases under Tinker. See, e.g., Dariano v. Morgan Hill Unified Sch. Dist., 745 F.3d 354 (9th Cir. 2014) (California high school may require students not to wear shirts showing the American Flag during school-sanctioned Cinco de Mayo celebration), en banc rehearing denied, 767 F.3d 764 (9th Cir. 2014); Hardwick ex rel. Hardwick v. Heyward, 711 F.3d 426 (4th Cir. 2013) (South Carolina school district may prohibit students from wearing shirts displaying the Confederate Flag when wearing them would “materially and substantially disrupt the work and discipline of the school”); Taylor v. Roswell Indep. Sch. Dist., 713 F.3d 25 (10th Cir. 2013) (New Mexico school district’s decision to halt a group of religious students from distributing thousands of rubber fetus dolls at high schools constitutional under Tinker, and not a violation of student’s Free Exercise rights under the rational basis review standard of Employment Division v. Smith, 494 U.S. 872, 878-81 (1990)). But see Easton Area Sch.
Dist. v. B.H., 725 F.3d 293 (3rd Cir. 2013) (categorical ban on middle school students wearing bracelets saying “I [heart] boobies” as part of breast awareness campaign unconstitutional as not lewd under Fraser or disruptive under Tinker); K.A. ex rel. Ayers v. Pocono Mountain Sch. Dist., 710 F.3d 99 (3rd Cir. 2013) (Pennsylvania school district cannot ban a fifth grader from handing out invitations to a church Christmas party because the distribution would not “materially and substantially disrupt” activities at the school; the school routinely allowed students to hand out invitations during non-instructional time). See also Frudden v. Pilling, 742 F.3d 1199 (9th Cir. 2014) (school uniform policy mandating “Tomorrow’s Leaders” be displayed on shirt, but making exemption for uniforms of nationally recognized youth organization such as Boy Scouts or Girl Scouts on regular meeting days, content-based triggering strict scrutiny); Gerlich v. Leath, 2017 WL 2543363 (8th Cir. 2017) (Iowa State University’s restrictions on student group selling t-shirts with marijuana logo on back viewpoint discrimination; invalid under strict scrutiny).

First Amendment Rights versus Privacy at Funerals

§ 29.6.2.3, page 1423, n.326: For a good article on the issue of limitations on picketing to protect privacy at funerals, which suggests narrowly tailored regulations based on the content-neutral reason of protecting privacy of funeral mourners should survive the intermediate review applicable to content-neutral regulations in a public forum, see Njeri Mathis Rutledge, A Time to Mourn: Balancing the Right of Free Speech Against the Right of Privacy in Funeral Picketing, 67 MARYLAND L. REV. 295 (2008). See generally Phelps-Roper v. Koster, 713 F.3d 942 (8th Cir. 2013) (Missouri law prohibiting protests “within 300 feet of or about” a funeral from one hour before until one hour after constitutional under intermediate review); Phelps-Roper v. Ricketts, 867 F.3d 883 (8th Cir. 2017) (same for Nebraska law prohibiting picketing within 500 feet of funeral from one hour prior to two hours after). An 8-1 Court held in Snyder v. Phelps, 131 S. Ct. 1207, 1212 (2011) (Alito, J., dissenting), that where speech involved a matter of public concern (here Westboro Baptist Church protesting at military funerals against homosexuality), the First Amendment shielded protestors from state tort law for intentional infliction of emotional distress, intrusion upon seclusion, and civil conspiracy.

Regulation of Access to Polling Places and Ability to Gather News

§ 29.6.2.4, page 1426, text following n.343: In P.G. Publishing Co. v. Aichele, 705 F.3d 91 (3rd Cir. 2013), the Third Circuit upheld a Pennsylvania law requiring all persons, including journalists, to stay at least 10 feet from a polling place, reaffirming that the press have no special constitutional right of access to gather news. Cf. Beacon Journal Publishing Co., Inc. v. Blackwell, 389 F.3d 683 (6th Cir. 2004) (similar law likely unconstitutional citing free speech cases, not right of access cases).

Cases Involving True Threats

§ 30.1.1.2, page 1442, end of section: In United States v. Dillard, 835 F. Supp. 2d 1120 (D. Kan. 2011), a Kansas woman’s letter meant to dissuade a doctor from providing abortion services, which used threatening language such as “[w]e will not let this abomination continue,” raised a triable issue of fact of whether the statements constituted a true threat. The court noted that the doctor was receiving training to provide abortion services after her friend, Dr. George Tiller, a prominent provider of abortion services, had been killed by an anti-abortion activist. Id. at 1121. Another “true threat” case occurred in United States v. Turner, 720 F.3d 411 (2nd Cir. 2013). In this case, a blogger who was unhappy with the Seventh Circuit’s decision in NRA of America v. City of Chicago, 567 F.3d 856 (7th Cir. 2009) (Second Amendment not incorporated into the 14th Amendment), rev’d sub nom. McDonald v. Chicago, 130 S. Ct. 3020 (2010) (Second Amendment is incorporated and applicable against states), wrote the Seventh Circuit judges on the panel “deserve to be killed,” were “traitors” to the United States, and judges should “Obey the Constitution or die.” The court held that the individual could be convicted under 18 U.S.C. § 115(a)(1)(B), which makes it unlawful to threaten to “assault, kidnap, or murder, a United States official, a United States judge, a Federal law enforcement officer, or [other covered federal] official.” See also Brewington v. Indiana, 7 N.E.3d 946 (Ind. 2104) (“true threats” to district court judge, judge’s wife, and psychologist who was an expert witness in divorce case); Elonis v. United States, 730 F.3d 321 (3rd Cir. 2013) (defendant’s Facebook page about murdering estranged wife, massacring class of kindergartners, and slitting FBI agent’s throat would be viewed by “reasonable observer” as true threat, regardless of whether defendant’s “subject intent” was to cause fear), rev’d, 135 S.
Cases Involving Hate Speech

§ 30.1.1.4, page 1445, text following n.48: But see O’Brien v. Welty, 818 F.3d 920 (9th Cir. 2016), the Ninth Circuit upheld a California regulation allowing state universities to discipline students for action that “threatens or endangers the health or safety of any person . . . including . . . intimidation [or] harassment”; the law was neither vague nor overbroad and upheld under intermediate review; Yeasin v. Durham, 719 Fed. App’x 844 (10th Cir. 2018) (qualified immunity applies because no case clearly establishes a university student has a right to make disparaging/threatening tweets about an ex-girlfriend when a university official could reasonably believe his continuing presence at the school would interfere with her right to an education free from sexual harassment). See also 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 13th Amendment as “badge or incident” of slavery).

Indecent Material Involving Children

§ 30.1.4.1, page 1457, text following n.116: In Ashcroft v. The Free Speech Coalition, discussed in the E-Treatise at § 30.1.4.1 n.116, the Supreme Court distinguished child pornography actually involving the use of children from computer-generated images made to look like children. In 18 U.S.C. § 2252A (2003), Congress focused on prohibiting the expression of an intent to distribute or to acquire what was believed to be child pornography. In United States v. Williams, 128 S. Ct. 1830 (2008), the Court upheld the Act against an overbreadth and vagueness challenge. In an opinion by Justice Scalia, the Court held 7-2 that the law did not ban a substantial amount of protected expressive activity as it was limited to regulating the recommendation of a particular piece of purported child pornography with the intent of initiating a transfer. Nor was the Act vague since it requires a jury make findings on clear questions of fact, i.e., that the defendant hold the belief and make a statement that reflects a belief that the material is child pornography, or that he communicate in a manner intended to cause another so to believe. Id. at 1841-47. Justice Stevens concurred with Justice Breyer, saying that when the Act is interpreted to save constitutionality, it is limited to materials which are advertised, promoted, presented, distributed, or solicited with a lascivious purpose – that is, the intention of inciting sexual arousal. Id. at 1847-48 (Stevens, J., joined by Breyer, J., concurring). Justice Souter dissented with Justice Ginsburg. They found overbreadth because the Act could apply to criminalize a proposal with regard to an existing representation not involving an actual child, and that representation could not itself be made criminal under Free Speech Coalition. Id. at 1854-55 (Souter, J., joined by Ginsburg, J., dissenting). Cf. United States v. Anderson, 759 F.3d 891 (2014) (strict scrutiny satisfied in distributing child pornography case for digitally morphing actual face of minor onto body of adult having sex).

On the issue of regulating child pornography, see also People v. Kent, 970 N.E.2d 833 (N.Y. 2012) (accessing Web images of child pornography, which the user does not intentionally store, but which are automatically stored in the computer, does not constitute procurement of child pornography); People v. Gumila, 981 N.E.2d 507 (Ill. App. – 2nd Dist., 2012) (images automatically stored not enough to prove possession, but can be used as evidence that the defendant viewed the original images and intended that they be stored in the cache, from which he could view them at a later time); United States v. Fugit, 703 F.3d 248 (4th Cir. 2102) (defendant who induced preteen girls into sexually inappropriate telephone and online conversations violated federal law making it a crime to entice a minor to engage in “sexual activity” even though no proof he intended physical conduct); United States v. D’Amelio, 565 Fed. App’x 61 (2nd Cir. 2014) (conviction for attempted enticement of a minor upheld when defendant showed up to meet what he thought was 12-year-old girl); United States v. Howard, 766 F.3d 414 (5th Cir. 2014) (elaborate discussion of what “grooming” conduct, in absence of firm plans to meet, is sufficient to establish “substantial step” to prove enticement; sending sexually explicit photo to minor girl may be enough, but not to intermediary to give to girl).
On recovering damages in child pornography cases, see *Paroline v. United States*, 134 S. Ct. 1710 (2014) (restitution for child pornography possession under 18 U.S.C. § 2259 should be awarded in amount comporting with defendant’s 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”); *id*. at 1730 (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); *id*. at 1735 (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 for all of the victim’s losses); *United States v. Dunn*, 777 F.3d 1171, 1180-81 (10th Cir. 2015) (district court must use multifactored approach to determine defendant’s share of responsibility for posting child pornography picture to shared file). In some cases, a court may impose certain aspects of a defendant’s sentence, such as a term of imprisonment, while deferring a determination of the amount of restitution until entry of a later, amended judgment. In such a case, the Court made clear in *Manrique v. United States*, 137 S. Ct. 1266, 1270 (2017), that a defendant who wishes to appeal the restitution order must file a notice of appeal from that order. Notice of appeal from the original sentence is not adequate. *Id*. at 1274-75 (Ginsburg, J., joined by Sotomayor, J., dissenting).

### Indecent Material Involving Children in the Audience

§ 30.1.4.2, page 1458, n.121: In *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800 (2009), a 5-4 Court held that the FCC had appropriately exercised its power to change its interpretation of its authorizing statute to find that it had been authorized by Congress to punish the broadcasting of indecent expletives even when the offensive words were not repeated, as they had been in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). Justice Scalia said that agency’s change in interpretation would not be given more searching review than an initial interpretation, and all that was required, procedurally, was that the new policy be permissible under the statute, that there are good reasons for it, and that the agency believes it to be better. It is not necessary that the reasons for the new policy be better than the reasons for the old one. *Id*. at 1810-12. Justice Thomas, concurring, suggested that the Court should reexamine the lesser standard of review given to content-based regulation of the broadcast media, as occurs in *Pacifica* and other similar cases, such as *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). *Id*. at 1819-22 (Thomas, J., concurring). That *Red Lion/Pacifica* standard is discussed in the E-Treatise at § 30.3.1. In a 4-Justice dissent, Justice Breyer stated that the FCC’s reasons for changing its interpretation were not adequately explained and should be regarded as arbitrary and abuse of discretion. 129 S. Ct. at 1829 (Breyer, J., joined by Stevens, Souter & Ginsburg, JJ., dissenting). Justice Kennedy said he agreed an agency “must explain why ‘it now reject[s] the considerations that led it to adopt that initial policy.’” *Id*. at 1822 (Kennedy, J., concurring in part and concurring in the judgment) (quoting Justice Breyer’s dissent). He concluded the agency met this test. *Id*. at 1824.

In *Brown v. Entertainment Merchants Ass’n*, 131 S. Ct. 2729, 2732-33 (2011), the Court used a content-based, strict scrutiny analysis to hold unconstitutional a California law that banned the sale of “violent video games” to children. Two Justices concurred on narrower grounds, suggesting the Court should perhaps in some cases be more deferential to legislatures in regulating material directed at children. *Id*. at 2742-42 (Alito, J., joined by Roberts, C.J., concurring in the judgment). Two Justices dissented. *Id*. at 2751 (Thomas, J., dissenting) (“original understanding” of free speech does not include a right to speak to minors, or a right of minors to access speech, without going through the minor’s parents or guardians); *id*. at 2761 (Breyer, J., dissenting) (California has compelling government interests which can satisfy strict scrutiny).

In *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017) (Gorsuch, J., not participating), the Supreme Court held that a ban on registered sex offenders accessing commercial social network sites that permit minors to be members, like Facebook or Twitter, failed even intermediate review, as it was substantially overbroad and did not leave party with “ample alternative channels of communication” given reality of social media use today; issue of whether it should have been viewed as content-based triggering strict scrutiny not considered; *id*. at 1738 (Alito, J., joined by Roberts, C.J., and Thomas, J., concurring in the judgment) (this regulation
is overbroad, but courts should be careful not to render states “largely powerless” to restrict dangerous sexual predator access to Internet). See also Doe v. Prosecutor, Marion County, Indiana, 705 F.3d 694 (7th Cir. 2013) (similar Indiana law unconstitutional under intermediate review, given other methods to combat unwarranted and inappropriate communication between minors and sex offenders); Ex Parte Lo, 424 S.W.2d 10 (Tex. Crim. App. 2013) (Texas Penal Code § 33.021(b)(1) which makes it illegal for adults to engage minor in sexually explicit online communications, as opposed to solicitation, content-based regulation, triggering strict scrutiny; not narrowly drawn to protect children from sexual abuse). But see United States v. Gnirke, 775 F.3d 1155 (9th Cir. 2015) (supervised release condition for child molester from possessing any sexual explicit material overbroad; limited to any material involving children or material deemed inappropriate by probation officer constitutional); People v. Minnis, 67 N.E.3d 272 (Ill. 2016) (requirement that convicted sex offenders disclose their internet identities, such as e-mail, instant messaging, and chat room identities, as well any blog or other website, like Facebook or Twitter, to which they have posted content during the previous registration period (no more than 4 times a year, in this case once a year), constitutional under intermediate review); United States v. Browne, 2016 WL 4473226 (3rd Cir. 2016) (Facebook chats can be used to convict child pornographer defendant if properly authenticated, the court holding “it is no less proper to consider a wide range of evidence for the authentication of social media records than it is for more traditional documentary evidence.”).

Community versus National Standards for Indecency or Obscenity on the Internet

§ 30.1.4.2, page 1461, n.136: Similar to Justice O’Connor’s concerns, the Ninth Circuit held in United States v. Kilbride, 584 F.3d 1240 (2009), that national, rather than local, community standards should be applied to whether images transmitted over the Internet were obscene.

Defamation and Other Such Actions Over the Internet

§ 30.2.1.1.A, page 1468, n.158: See also Obsidian Finance Group, LLC v. Cox, 740 F.3d 1284 (9th Cir. 2014) (liability for defamatory post blog involving matter of public concern must meet same New York Times v. Sullivan standard applied to institutionalized press). Cf. Klayman v. Zuckerberg, 753 F.3d 1354 (D.C. Cir. 2014) (lawsuit against Facebook for failing promptly to take down page calling for violence against Jews blocked by Communications Decency Act, which provides “interactive computer service” is not a “publisher” of information); Weigand v. NLRB, 783 F.3d 889 (D.C. Cir. 2015) (union not liable for members’ remarks on union’s Facebook page); Fields v. Twitter, Inc., 200 F. Supp. 3d 964 (N.D. Cal. 2016) (Communications Decency Act blocks suit by family members of deceased United States government contractors shot by Jordanian police officer, responsibility for which was claimed by a terrorist organization (ISIS), against Twitter for allowing ISIS to use its social network to spread propaganda, raise funds, and recruit fighters); Fields v. Twitter, Inc., 881 F.3d 739 (9th Cir. 2018) (Anti-Terrorism Act requires individuals show direct relationship, not mere foreseeability, between injuries by terrorists and Twitter’s conduct to establish “proximate causation” to prove element of “material support”; use by ISIS of Twitter does not establish such a direct relationship).

Recent Decisions Regarding First Amendment Rights of Prisoners

§ 30.2.1.2, page 1472, text following n.174: For these cases, see A3.

Recent Decisions Related to Garcetti and Pickering

§ 30.2.2.1, page 1479, text following n.195: Lower courts have split over whether determining if a government’s employee’s speech is made as a citizen on a matter of public concern is a question of law, or a mixed question of law and fact for the trier of fact, which would sometimes be a jury. The Fifth, Sixth, Tenth, and D.C. Circuits have held the determination is a question of law; the Third, Seventh, Eighth, and Ninth Circuits have held the determination is a mixed question of law and fact. See, e.g., Posey v. Lake Pend Oreille Sch. Dist. No. 84, 546 F.3d 1121 (9th Cir. 2008); Mayhew v. Town of Smyrna, 856 F.3d 456 (6th Cir. 2017).
After *Garcetti*, there are two separate issues to consider to trigger *Pickering* balancing – (1) is the speech as an employee under *Garcetti*, and thus unprotected, and (2) if instead, as a citizen, is it on a matter of public concern. See e.g., *Lane v. Franks*, 134 S. Ct. 2369 (2014) (director’s sworn testimony at former program employee’s corruption trial on a matter of public concern, even though information learned in the course of employment); *Garcia v. Hartford Police Dep’t*, 706 F.3d 120 (2nd Cir. 2013) (police sergeant speaking on matter of public concern when he complained of other officers’ bias against Hispanics); *Jackler v. Byrne*, 658 F.3d 225 (2nd Cir. 2011) (probationary police officer’s refusal to follow the alleged orders of his supervisors to withdraw his report confirming that another officer used excessive force was on a matter of public concern); *Westmoreland v. Sutherland*, 662 F.3d 714 (6th Cir. 2011) (city firefighter and former dive rescue team leader was speaking on a matter of public concern when he said a drowned 7-year-old boy could have been saved if the city had not disbanded the dive team for budgetary reasons); *Matthews v. City of New York*, 779 F.3d 167 (2nd Cir. 2015) (police officer complaint about arrest quota policy a matter of public concern); *Town of Ball, Louisiana v. Howell*, 827 F.3d 515 (5th Cir. 2016) (officer’s speech while assisting FBI in fraud allegation against his department not within scope of his duties). But see *Quint v. University of Oregon*, 2013 WL 363782 (D. Oregon 2013) (instructor who asked students if they wanted him to shoot them for violating no-talking rule did not show speech related to matter of public concern about tolerance of other’s rules); *Nubiak v. City of Chicago*, 810 F.3d 476 (7th Cir. 2016) (female officer complaint about sexual harassment against her employee related under *Garcetti* and not a matter of public concern); *Kennedy v. Bremerton School District*, 869 F.3d 813 (9th Cir. 2017) (high school coach who prayed at midfield following football game could be fired as his speech was in the course of employment as defined in *Garcetti*); *Crouch v. Town of Moncks Corner*, 848 F.3d 576 (4th Cir. 2017) (qualified immunity applies since not clearly established that speech was on a matter of public concern, and not work-related, when officers encouraged a citizen to file a complaint of excessive force against their lieutenant); *Lincoln v. Maketa*, 880 F.3d 533 (10th Cir. 2018) (qualified immunity applies since not clearly established that speech was as a citizen on a matter of public concern, and not work-related, when lieutenant did not follow Sheriff’s orders to give a false account to the media stating that an Internal Affairs document had been stolen by political opponents). See also *Montero v. City of Yonkers*, 890 F.3d 386 (2nd Cir. 2018) (whether union official who criticizes employer is acting within the scope of employment should be considered case-by-case, rejecting the Sixth, Seventh, and Ninth’s Circuits which have held union official always speaks as a private citizen, not part of job responsibilities).

For cases applying *Pickering*, see *Grazier v. City of Greenville, Mississippi*, 775 F.3d 731 (5th Cir. 2015) (police officer’s interest in not showing up to mayor’s public Facebook page comments critical of police chief for not allowing police officers to use police cars to attend slain police officer’s funeral outweighed by city’s interest in good working relationships, justifying firing); *Lalowski v. City of Des Plaines*, 789 F.3d 784 (2015) (police officer’s off-duty verbal altercation with anti-abortion protestor, as well as history of using profane language against citizens, justified firing); *Rock v. Levinski*, 2015 WL 3939020 (June 29, 2015) (school district interest in good working relationships justified firing principal who spoke at public meeting in opposition to plan to close her school); *Grutzmacher v. Howard County*, 851 F.3d 332 (4th Cir. 2017) (workplace disruption caused by inflammatory Facebook posts, such as suggesting “beating a liberal to death with another liberal” to get liberals outlawed like guns justified firing of fire department battalion chief). But see *Liverman v. City of Petersburg*, 844 F.3d 400 (4th Cir. 2016) (department policy that prohibits essentially all speech critical of the department overbroad under *Pickering*); *Moonin v. Tice*, 868 F.3d 853 (9th Cir. 2017) (policy against officers discussing canine program with “anyone” outside the department unreasonably overbroad). *Cf. Oyama v. University of Hawai‘i*, 813 F.3d 850 (9th Cir. 2015) (student teacher candidate who was denied application to become a student teacher in part because of his views that online child predation should be legal, and real life child predation should be legal after puberty begins, involves aspects of *Tinker*, *Pickering*, and professional “certification”; court adopts hybrid test of whether government action was “related directly to defined and established professional standards, was narrowly tailored to serve the [school’s] mission of evaluating [candidate’s] suitability for teaching, and reflected reasonable professional judgment”).

In *Borough of Duryea, Pa. v. Guarnieri*, 131 S. Ct. 2488 (2011), the Court held that *Garcetti* applies when the complaint is brought for retaliation against a government employee in violation of a First Amendment right to petition for a redress of grievances, as well as a free speech case. Concurring, Justices Scalia and Thomas expressed doubt that filing a lawsuit was a “petition” within the original meaning of the Petition
F.3d 300, 307-08 (2nd Cir. 2018) (public access television stations are public forums, as electronic equivalent
judgment in part and dissenting in part). In 

Cases Involving Regulation of Political Speech of Government Employees

§ 30.2.2.2, page 1483, n.205: See also Heffernan v. City of Paterson, 136 S. Ct. 1412 (2016) (employee protected under Elrod when demoted because government official mistakenly believed that he had supported particular candidate for mayor, even though he actually did not) (Thomas, J., joined by Alito, J., dissenting). Regarding First Amendment rights of legislators, in Nevada Comm’n on Ethics v. Carrigan, 131 S. Ct. 2343 (2011), the Court considered Nevada’s Ethics in Government Law, which requires public officials to recuse themselves from voting on, or advocating the passage or failure of, a matter in which in the judgment of a reasonable person the individual would have a personal conflict of interest. Based on long-standing congressional and state practice adopting such general applicable conflict-of-interest recusal rules, the Court held that a legislator has no First Amendment interest because “the legislative power thus committed is not personal to the legislator but belongs to the people; the legislator has no personal right to it.” Id. at 2350. See also Loftus v. Bobzien, 848 F.3d 278 (4th Cir. 2017) (since no constitutional right to elective office, county attorney who lost her job based on conflict of interest with new position on city council has no claim).

Regulations of Public Broadcasting Stations

§ 30.3.1, page 1487, text following n.216: See generally Minority Television Project, Inc. v. FCC, 736 F.3d 1192 (9th Cir. 2013) (9-2 en banc decision) (prohibition against for-profit and political advertisements on public broadcasting stations constitutional under intermediate standard of review of Red Lion and League of Women Voters; regulation was narrowly tailored to further government’s substantial interest in maintaining educational mission and nature of public broadcasting); Halleck v. Manhattan Community Access Corp., 882 F.3d 300, 307-08 (2nd Cir. 2018) (public access television stations are public forums, as electronic equivalent of public squares, recognizing disagreement with D.C. Circuit, and split among federal district courts).

Commercial Speech Regulations

§ 30.3.2, page 1496, text following n.250: Consistent with the recent trend of courts being vigorous in applying the Central Hudson test, in IMS Health, Inc. v. Ayotte, 490 F. Supp. 2d 163 (D.N.H. 2007), a district court in New Hampshire struck down New Hampshire’s first-in-the-nation law banning the sale of data on individual doctors’ drug prescribing habits. The court indicated that the law was not narrowly tailored, in that the state could deal with its concern that distributing such information might be improperly used by pharmaceutical companies in their marketing plans to individual doctors, by regulating improper inducements to influence prescribing practices, issuing best practice guidelines, or requiring continuing education about prescriptions. The Supreme Court similarly ruled in Sorrell v. IMS Health, Inc., 131 S. Ct. 2653, 2658-59 (2011), that a Vermont law that restricted the sale, disclosure, and use of pharmacy records that reveal the prescribing practices of doctors was unconstitutional. Id. at 2673 (Breyer, J., joined by Ginsburg & Kagan, JJ., dissenting). See generally Heffner v. Murphy, 745 F.3d 56 (3rd Cir. 2014) (ban on use of trade names by funeral parlors unconstitutional); R.J. Reynolds Tobacco Co. v. Food & Drug Administration, 696 F.3d 1205 (D.C. Cir. 2012) (FDA rule requiring tobacco companies to place graphic images on all packages of cigarettes sold in the United States unconstitutional, since FDA did not provide substantial evidence that graphic warnings would directly advance interest in reducing smoking rates to a material degree); Dwyer v. Cappell, 762 F.3d 275 (3rd Cir. 2014) (requiring attorneys to post entire opinion to use judicial compliment on website overbroad); Missouri Broadcasters Ass’n. v. Lacy, 846 F.3d 295 (8th Cir. 2017) (complaint that alcohol ad restrictions violate Central Hudson survive motion to dismiss, particularly banning alcohol manufactures from advertizing rebate coupons, but exempting those who make products other than beer or wine).
In *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144 (2017), the Court held that New York’s “no-surcharge” law, which permits retailers to give discounts for cash purchases, but prevents surcharges for credit card purchases, regulate how merchants may communicate their prices, and thus triggers *Central Hudson*’s heightened review, rather than minimum rational review applicable to economic regulations. In *Italian Colors Restaurant v. Becerra*, 878 F.3d 1165 (9th Cir. 2018), the 9th Circuit held that such a law did violate the *Central Hudson* standard of review. See also *IMDb.com, Inc. v. Becerra*, 2018 WL 979031 (N.D. Cal. 2018) (California law forbidding IMDb from publishing truthful age-related information upon request by a subscriber, which was passed in part to make age discrimination more difficult, regulates non-commercial speech and is unconstitutional under strict scrutiny, particularly as state explored no less-speech-restrictive alternatives); *King v. Governor of New Jersey*, 767 F.3d 216, 222-35 (3rd Cir. 2014) (“commercial speech” analysis applies to “professional speech” regulations of persons subject to licensing, acknowledging a lower court split on the issue). In *National Institute of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371-76 (2018), the Supreme Court rejected this exception for “professional speech” and strongly indicated such content-based regulations should trigger strict scrutiny. Even under the trend of more vigorous review, in *Coyote Pub. Co. v. Miller*, 598 F.3d 592 (9th Cir. 2010), the Ninth Circuit upheld a Nevada statute that prohibited brothels from advertising in “any public theater, on the public streets, or on any public highway” in the 11 rural counties in Nevada where licensed prostitution is legal. The laws were narrowly drawn and left open ample alternative channels of communication; they only banned advertising in public places where “it would reach residents who do not seek it out,” but permitted “other forms of advertising likely to reach those already interested in patronizing the brothels.” In *Educational Media Co. at Virginia Tech, Inc. v. Swecker*, 602 F.3d 583 (4th Cir. 2014), the Fourth Circuit upheld restricting ads for alcohol in college newspapers as being directly related to the interest in restricting alcohol use by persons under 21.

In 1985, the Court decided in *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 651 (1985), that where the government could show the “possibility of consumer confusion or deception,” even though the commercial speech could not be proven to be unlawful, false, or misleading, then the government could require “uncontroversial, factual disclosures” as long as they were “reasonably related to the state’s interest in preventing deception of consumers” because “disclosure requirements trench much more narrowly on an advertiser’s interest than do flat prohibitions on speech.” As phrased in *Zauderer*, this was an example of a 2nd-order reasonableness balancing test, as the Court phrased the issue as whether the challenger could show the government regulation was unreasonable. Id. at 651 n.15. In contrast, in *National Institute of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361, 2377 (2018) (California law requiring unlicensed “pregnancy-related clinics” to post notices they are not state-licensed, at clinics and on ads, including billboards, in English, Spanish, or any other language spoken by a named percentage of residents in the county (for Los Angeles County, 13 languages), unreasonably overbroad), the Court placed the burden on the government not only to show the “possibility of consumer confusion” to trigger the *Zauderer* test, but also to prove the disclosure requirement was “reasonable.” Cf. *CTIA-The Wireless Association v. City of Berkeley, Cal.*, 854 F.3d 1105, 1117-19 (9th Cir. 2017) (also placing burden on the government). In *Becerra*, the Court did not acknowledge this shift in burden from *Zauderer*, and cited *Ibanez v. Florida Dep’t of Business and Professional Regulation, Bd. of Accountancy*, 512 U.S. 136, 146 (1994), which cited *Edenfield v. Fane*, 507 U.S. 761, 770 (1993), to support placing the burden on the government, despite both *Ibanez* and *Edenfield* being cases of regular *Central Hudson* review where the burden is properly on the government, as is usual under intermediate review. However, this *Becerra* 3rd-order reasonableness balancing test may well reflect the Court’s current view, and is consistent with the Court’s increased commercial speech scrutiny. But see *POM Wonderful, LLC v. FTC*, 777 F.3d 478 (D.C. Cir. 2015) (adopting deferential “substantial evidence” standard, not de novo, review to review FTC’s finding statements are “deceptive and misleading”).

On when to apply *Zauderer*, see *American Meat Institute v. United States Dept. of Agriculture*, 760 F.3d 18 (D.C. Cir. 2104) (required disclosure of purely factual information, like regulations to prevent consumer deception, trigger rational review test of *Zauderer*); *CTIA-The Wireless Association v. City of Berkeley, Cal.*, 854 F.3d 1105, 1116-17 (9th Cir. 2017) (joining First, Second, Sixth Circuits in holding that *Zauderer* applies to any factual disclosure requirement, including information or health, safety, and welfare concerns, and is not limited to preventing consumer deception, as held in *R.J. Reynolds*, cited on page 2125). The Court did not address this issue directly in *National Institute of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361, 2372 (2018), but did phrase the *Zauderer* test in terms of any “factual, noncontroversial information.”
§ 30.4.2.1, page 1500, n.269: The principle that the government may not enhance the relative voice of one candidate was reinforced in Davis v. Federal Election Commission, 128 S. Ct. 2759 (2008). In Davis, a 5-4 Court invalidated the “Millionaire’s Amendment” to campaign financing laws. That amendment allowed a candidate to receive treble the normal limit on individual contributions and unlimited party expenditures if the other candidate is regarded as self-financing because of spending more than $350,000 of personal funds. The Court noted preventing corruption or the appearance of corruption have been viewed as compelling interests; however, those interests are not advanced by the Amendment. A government goal to reduce the advantage that wealthy individuals possess in campaigns for government office is not a compelling interest; indeed, it may not even be legitimate. Id. at 2773-75. The dissent said the Amendment does not deprive the millionaire of any speech. The state has an interest in combating the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions. Id. at 2777-82 (Stevens, J., joined by Souter, Ginsburg & Breyer, JJ., dissenting). The Court similarly ruled in Arizona Free Enterprise Club’s Freedom Club PAC v. Bennett, 131 S. Ct. 2806, 2812-13 (2011), that an Arizona law was unconstitutional which provided that candidates for state office who accept public financing can receive additional money – roughly one dollar for every dollar spent by privately financed candidate – once a set spending limit is reached. The Court held there was no compelling interest to equalize electoral funding. Four Justices dissented. Id. at 2829 (Kagan, J., joined by Ginsburg, Breyer & Sotomayor, JJ., dissenting) (compelling interest to counteract corruption of large campaign contributions).

Corporate Speech and Expenditures on Political Campaigns

§ 30.4.2.1, page 1509, n.302: In Citizens United v. Federal Election Commission, 130 S. Ct. 876 (2010), the Court considered 2 U.S.C. § 441b, which barred corporations from making independent expenditures that referred to a clearly identified candidate within 30 days of a primary election or within 60 days of a general election for public office. The Government advanced three interests which it said were compelling: distorting effects of large aggregations of wealth, an anti-corruption interest, and a shareholder protection interest. For a 5-4 Court, Justice Kennedy rejected each one. He said that First Amendment protection does not depend on the speaker’s financial ability to engage in public discourse; independent expenditures do not give rise to corruption or the appearance of corruption; and if the shareholder protection theory were adopted it would give the Government power to restrict the political speech of media corporations, and there is little evidence of abuse that cannot be protected by shareholders through the processes of corporation democracy. The Court noted it was not reaching the question of whether the Government has a compelling interest in preventing foreign corporations from influencing our Nation’s political process. Id. at 903-11. In striking down 2 U.S.C. §441(b), Justice Kennedy overruled Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990), and part of McConnell v. FEC, 540 U.S. 93 (2003). Those cases had upheld limits on electioneering because of the speaker’s corporate identity. Stare decisis did not require continued acceptance as the cases were not well reasoned in abandoning free speech principles, had been undermined by various circumventions, and no serious reliance interests were at stake. 130 S. Ct. at 911-13. On precedent, see E-Treatise at Supplement at § 7.3.3.4, end of section (not well-reasoned); § 7.3.3.3 (changed facts); § 7.3.2 (reliance). See generally American Tradition Partnership Inc. v. Bullock, 132 S. Ct. 2490 (2012) (Citizens United applies even if state Supreme Court, here Montana, holds corrupting influence of corporate contributions is compelling interest in their state); id. at 2491-92 (Breyer, J., joined by Ginsburg, Sotomayor & Kagan,JJ., dissenting) (Citizens United should not bar a state Supreme Court from making its own finding on in-state corruption); Texans for Free Enterprise v. Texas Ethics Commission, 732 F.3d 535 (5th Cir. 2013) (contributions to independent-expense action political committees cannot be limited under Citizens United; Republican Party of New Mexico v. King, 741 F.3d 1089 (10th Cir. 2013) (same); Wisconsin Right to Life, Inc. v. Barland, 751 F.3d 804 (7th Cir. 2014) (registration/reporting requirements for independent-expense committee spending more than $300 invalid); Missourians for Fiscal Accountability v. Klahr, 2018 WL 29249973 (8th Cir. 2018) (law requiring groups to support or oppose ballot measure to form at least 30 days before election invalid under strict scrutiny as law bans expenditures). But see Minnesota Citizens Concerned for Life, Inc. v. Swanson, 640 F.3d 304 (8th Cir. 2011) (requiring corporations to funnel campaign contributions through “political funds” permissible disclosure requirement); United States v. Danieleczyk, 683 F.3d 611 (4th Cir. 2012) (century-old federal ban on direct corporate contributions to federal candidates intact despite Citizens United).
The statute also included in 2 U.S.C. § 441(d) a disclaimer requirement indicating who is responsible for the content of any advertisement, and in 2 U.S.C. § 444(f) a disclosure requirement for any person spending more than $10,000 on electioneering communications within a calendar year. Justice Kennedy found application to a movie broadcast via video-on-demand was constitutional; there had been no showing these requirements would impose a chill on speech or expression. 130 S. Ct. at 913-14, 917. Dissenting on this conclusion, Justice Thomas pointed to a number of examples wherein persons whose names and addresses were disclosed, as required by law, were subjected to attacks and were left subject to retaliation from elected officials. He said that persons should have a right to anonymous speech. Id. at 980-82 (Thomas, J., concurring in part and dissenting in part). While Court majorities have been willing to consider those risks to freedom of association as grounds for not requiring disclosure in some cases, as in NAACP v. Alabama, 357 U.S. 449 (1958), discussed in the E-Treatise at § 30.4.2.1 n.270, for Justice Thomas the possibility of bringing such an applied action would require substantial litigation over an extended time during which there would be a risk of chilling speech. 130 S. Ct. at 982 (Thomas, J., concurring in part and dissenting in part).

Four Justices dissented in Citizens United. Id. at 929 (Stevens, J., joined by Ginsburg, Breyer & Sotomayor, JJ., dissenting). Justice Stevens claimed that stare decisis had been inappropriately departed from because Austin has long been relied upon by state legislatures, and the case had not been proved unworkable. Id. at 938-40. Stevens said there was plenty of evidence supporting Congress’s concern to deal with corruption, distortion, and shareholder protection. The fact that corporations have no consciences, no beliefs, no feelings, and no thoughts or desires is a reminder they are not “We the People” by whom and for whom our Constitution was established. Id. at 960-79. Stevens concluded the majority view is contrary to long recognition by the people of a need to prevent corporations from undermining self-government. Id. at 948-60. These four Justices did agree with Kennedy the disclaimer and disclosure requirements were valid. Id. at 979.

Speech Relating to Campaign Financing and the Election of Candidates

§ 30.4.2.1, page 1510, n.305: Reflecting increased skepticism toward campaign finance laws present since the 2006 case of Randall v. Sorrell, discussed in the E-Treatise at § 30.4.2.1 nn.304-05, in Federal Election Commission v. Wisconsin Right to Life, Inc., 127 S. Ct. 2652 (2007), Chief Justice Roberts and Justice Alito applied the strict scrutiny standard of review adopted in McConnell v. FEC for campaign expenditures, discussed at § 30.4.2.1 n.302, but held that while McConnell had upheld a ban on “express advocacy” by corporations within 60 days of a general election, or 30 days of a primary election, based on a compelling interest of regulating “express advocacy” by corporations whose economic power could otherwise distort the election process, the ads at issue here were more properly viewed as “issue ads,” not “express advocacy” for a candidate, and thus were not controlled by McConnell. In adopting a test to distinguish “express advocacy” from “issue advocacy,” Chief Justice Roberts adopted a test by which most ads would be “issue ads,” since “our test affords protection unless an ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate” and any “tie is resolved in favor of protecting speech.” For such “issue ads,” Chief Justice Roberts noted that the Court had never recognized a compelling interest in regulating such ads. 127 S. Ct. at 2672-74 (Roberts, C.J., announcing judgment of the Court, and joined by Alito, J., with respect to Parts III and IV). In this case, Justices Scalia, Kennedy, and Thomas continued their view that McConnell was wrongly decided and even “express advocacy” should be permitted by corporations throughout the election. Id. at 2674-75 (Scalia, J., joined by Kennedy & Thomas, JJ., concurring in part and concurring in the judgment). Given Chief Justice Roberts’ test, where most ads will be viewed as “issue ads,” the result will be the same under either approach. Justices Stevens, Souter, Ginsburg, and Breyer continued their more accommodating approach toward campaign finance laws, and would have upheld the regulations on the compelling interest concerned with distortion of the election process by corporations, which applies to both “express advocacy” ads and most “issue ads,” which should be viewed as the “functional equivalent” of express advocacy. Id. at 2687-89 (Souter, J., joined by Stevens, Ginsburg & Breyer, JJ., dissenting).

In McCutcheon v. Federal Elections Commission, 134 S. Ct. 1434 (2014), a 5-4 Court held that aggregate contribution limits that are placed on an individual donor’s political contributions during an election cycle fail even Buckley’s less than strict scrutiny review, because they limit the number of separate candidates an individual can support, although a similar overall limit had been upheld in Buckley; id. at 1465 (Breyer, J., joined by Ginsburg, Sotomayor & Kagan, J., dissenting) (court should follow Buckley).
Disclosure Requirements on Freedom of Speech and Association

§ 30.4.2.2, page 1513, end of section: In John Doe No. 1 v. Reed, 130 S. Ct. 2811 (2010), an 8-1 Supreme Court upheld a Washington state law requiring public disclosure of names and addresses of signers of referendum petitions, applying “exacting scrutiny,” defined as requiring a “substantial relation” between the law and an “important” government interest, that is, an intermediate scrutiny approach. Justice Thomas dissented, arguing that the disclosure requirement was unconstitutional, and that strict scrutiny should apply. Id. at 2837 (Thomas, J., dissenting); Chula Vista Citizens for Jobs and Fair Competition v. Norris, 782 F.3d 520 (9th Cir. 2014) (en banc) (requirement that names of official proponents appear on text of proposition used by circulators to solicit voter signatures constitutional under Doe’s less than strict scrutiny, “exacting” scrutiny approach); Delaware Strong Families v. Denn, 793 F.3d 304 (3rd Cir. 2015) (requirement groups spending more than $500 annually report contributors of $100 or more constitutional); Americans for Prosperity Foundation v. Becerra, 2018 WL 4320193 (9th Cir. 2018) (requiring nonprofit to report names and addresses of anyone contributing more than 2% of annual contributions constitutional under Reed). But see Coalition for Secular Government v. Williams, 815 F.3d 1267 (10th Cir. 2016) (application of disclosure requirement to group spending only $3,500 to advocate against a state referendum unconstitutional).

Speech Regulating the Election of Candidates to Office

§ 30.4.2.3, page 1513, text following n.321: A separate problem involves regulating false or deceptive speech made about candidates for office. See, e.g., Susan B. Anthony List v. Driehaus, 814 F.3d 466 (6th Cir. 2016) (Ohio’s political false statement law not narrowly tailored to promote compelling interest in preserving integrity of the political process); Commonwealth v. Lucas, 34 N.E.3d 1242 (Mass. 2015) (similar law invalid under Massachusetts Constitution; counterspeech appropriate remedy); Attorney Grievance Comm’n of Maryland v. Stanalonis, 126 A.3d 6 (Md. 2015) (judicial candidate who sent fliers saying incumbent judge “[o]pposes registration of convicted sexual predators” did not violate state ethics rules, even though more accurate to say the judge “opposed placing his clients” in the registry when representing them).

Another problem which has emerged are laws regulating voters’ speech concerning “ballot selfies” which indicate the party has voted, and for which candidate. See generally Rideout v. Gardner, 838 F.3d 65 (1st Cir. 2016) (ban on ballot selfies, argued by state to prevent vote buying or voter coercion, not narrowly tailored under strict scrutiny; states did not show more narrowly tailored statute banning use of selfie to buy or coerce votes would not be effective); Silverberg v. Board of Elections of New York, 216 F. Supp. 3d 411 (S.D.N.Y. 2016) (preliminary injunction against ban on ballot selfies, brought 13 days before election, denied).
§ 30.4.2.4, page 1517, n.331: With regard to choosing judges in elections, New York is one of nine states that use a “hybrid” system. In *New York State Bd. of Elections v. Lopez Torres*, 128 S. Ct. 791 (2008), the Court considered whether the First Amendment was violated by a New York requirement which created two avenues to be on the final election ballot: (1) selection at a convention of delegates chosen by party members in a primary election or (2) by a petition signed by the lesser of 5 percent of the number of votes last cast for Governor in the judicial district or either 3,500 or 4,000 voters, depending on the size of the district. Justice Scalia wrote for the Court that a state may require party use of primaries or conventions to select nominees who appear on the general-election ballot, and there is no precedent establishing an individual’s constitutional right to have a fair shot at a party’s nomination. *Id.* at 799. See generally *Sanders County Republican Cen. Comm. v. Bullock*, 698 F.3d 741 (2012) (applying strict scrutiny, Montana law banning political party endorsements of judicial candidates unconstitutional burden on speech and association rights, as not advancing a compelling interest and not being narrowly tailored); *Ohio Council 8 American Federation of State, Cty. & Mun. Emps., AFL-CIO v. Husted*, 814 F.3d 329 (6th Cir. 2016) (Ohio law precluding candidates for judicial office from listing political affiliation on ballot constitutional).

**Regulation of Judicial Speech in the Context of Campaigns**

§ 30.4.2.4, page 1520, n.341: In *Siefert v. Alexander*, 608 F.3d 974 (7th Cir. 2010), the Seventh Circuit held that a Wisconsin judicial ethics rule barring judges or judicial candidates from being members of a political party was unconstitutional under strict scrutiny, but that a rule preventing judges or judicial candidates from personal solicitation of campaign contributions was constitutional as advancing a compelling interest in preventing corruption and the appearance of corruption. The Court also held that a ban on judges or judicial candidates endorsing others in partisan elections was constitutional, viewing it merely as a regulation of government workers, and thus subject only to the 3rd-order rational review *Pickering* balancing test, discussed in the E-Treatise at § 30.2.2.1 nn.178-83. In *Wersel v. Sexton*, 674 F.3d 1010 (8th Cir. 2012) (7-5 *en banc*), applying strict scrutiny, the Eighth Circuit upheld constitutional provisions prohibiting judicial candidates from publicly endorsing or opposing candidates for a different public office, soliciting funds for political candidates or organizations, and personally soliciting campaign funds, viewing provisions as narrowly tailored to serve compelling interests in judicial impartiality and appearance of impartiality. But see *Wolfson v. Concannon*, 750 F.3d 1145 (9th Cir. 2014) (Arizona provisions banning judicial candidates from giving speeches on behalf of other candidates invalid under strict scrutiny, disagreeing with *Wersel v. Sexton*). See also *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656 (2015) (rule banning judicial candidates from personally soliciting campaign funds satisfies strict scrutiny)(Scalia, Kennedy, Thomas & Alito, JJ., dissenting); *French v. Jones*, 876 F.3d 1228 (9th Cir. 2017) (Montana law prohibiting judicial candidates from seeking or accepting political endorsements constitutional after *Williams-Yulee*); In re *Judicial Campaign Complaint Against O’Toole*, 24 N.E.3d 1114 (Ohio 2014) (constitutional to prohibit judicial candidate from making “knowingly false” statements; overbroad to regulate “misleading or deceptive” statements).

**Freedom of Association and Anti-Discrimination Laws**

§ 31.2.2, page 1530, text following n.28: Faced with public pressure, the Boy Scouts voted in 2013 to change their national membership policy to allow youths to join without regard to sexual orientation; in 2015 to allow adult homosexuals to participate in leadership positions; and in 2017 lifted the ban on transgendered youths being Scouts. Local scout troops affiliated with churches may still restrict membership at the local level on religious grounds. On applicability of anti-discrimination laws, see also *Elane Photography, LLC v. Wilcock*, 309 P.3d 53 (N. Mex. 2012) (commercial photography business that offers its services to the public constitutes a “public accommodation” under New Mexico Human Rights Act, and thus cannot discriminate in service based on sexual orientation), cert. denied, 134 S. Ct. 1787 (2014).

**Freedom of Association and Rights of Groups**

§ 31.2.3, page 1533, text following n.42: On applicability of law burdening freedom of association of groups generally, see *Laborers Local 236, AFL-CIO v. Walker*, 749 F.3d 628 (7th Cir. 2014) (Wisconsin statute
restricting collective bargaining ability of unions by providing state/local government employers can bargain with most public unions (those not defined as “public safety employees”) only over base wages, and eliminating payroll deductions for union dues, does not violate union’s freedom of association or the right to petition government for grievances, since provisions act directly only on state/local employers, not unions).

Freedom of Association: Policies Concerning Elections

§ 31.2.4, page 1534, text following n.46: In Washington State Grange v. Washington State Republican Party, 128 S. Ct. 1184 (2008), a 7-2 Court refused to find that a “party preference” primary election ballot requirement was a severe burden on political parties’ associational rights. Because it did not impose a severe burden, the Court applied second-order reasonableness analysis. Id. at 1195-96. The law required candidates to identify themselves on the ballot by a self-designated party preference. Justice Thomas wrote for the Court, “There is simply no basis to presume that a well-informed electorate will interpret a candidate’s party-preference designation to mean that the candidate is that party’s chosen nominee or representative or that the party associates with or approves of the candidate.” Id. at 1193. The dissent said there was a severe burden on parties’ associational rights, as voters will rely on designation to determine what the party and candidate stand for; thus strict scrutiny was required. Id. at 1197-98 (Scalia, J., joined by Kennedy, J., dissenting). See also Pisano v. Strach, 743 F.3d 927 (4th Cir. 2014) (requirement for “new” political parties to have petition signed by 2% of the total number of voters who voted in the most recent election for Governor by June 1 in advance of November election not a severe burden, imposing only reasonableness review); Marcellus v. Virginia State Board of Elections, 849 F.3d 169 (4th Cir. 2017) (Virginia can prohibit political party identification for local offices, while permitting political party designations for federal, statewide, and General Assembly offices, under reasonableness balancing based on desire to minimize partisanship for local government, promote impartial governance, and maximize number of citizens eligible to hold local office). But see Libertarian Party of Virginia v. Judd, 718 F.3d 308 (4th Cir. 2013) (Virginia law requiring witnesses to verify each signature gathered for a petition to nominate a candidate for the ballot in statewide elections is not narrowly tailored and fails strict scrutiny review applicable to severe burdens on access to the ballot).

Prayers Opening Legislative Sessions

§ 32.1.2.3, page 1550, n.49: In Marsh, the prayer opening the legislative session was non-denominational. Where the prayer is not non-denominational, but favors a particular religious tenet, such as referencing “Jesus Christ, our Lord,” the prayers typically had been declared unconstitutional. See, e.g., Joyner v. Forsyth County, 653 F.3d 341 (4th Cir. 2011). But see Pelphrey v. Cobb County, Georgia, 547 F.3d 1263 (11th Cir. 2008) (denominational prayers permissible as long as legislature offers prayer opportunities by volunteer clergy or other members of the community on a non-discriminatory basis, even where more than 95% of volunteers are Christian, and 70% of prayers contained Christian references, such as “in Jesus’ name we pray.”). The Supreme Court considered this issue in Town of Greece, New York v. Galloway, 134 S. Ct.1811 (2014). Similar to Pelphrey, a 5-4 Court held that such a scheme was consistent with historical traditions of invocations opening government meetings, id. at 1820-24 (Kennedy, J., opinion for the Court), and did not involve coercion or proselytizing of religion, id. at 1824-28 (Kennedy, J., joined by Roberts, C.J., and Alito, J.). The practice did not discriminate based on religion, since all groups, including atheists, had an opportunity to offer the opening invocation. Id. at 1816-17. Indeed, following the Court’s decision in Galloway, an atheist has delivered the opening invocation in the town of Greece. Justice Kennedy noted that the Town of Greece’s practice would support, like non-denominational statements, the “ceremonial purpose” of recognizing the importance of religion in many people’s lives. Id. at 1827-28. A four-Justice dissent indicated that a range of denominational, sectarian invocations is likely to undermine the norm lying behind the Establishment Clause that “when each person performs the duties or seeks the benefits of citizenship, she does so not as an adherent to one or another religions, but simply as an American.” In this case, the dissent noted, until the litigation was commenced, the town did not recognize “religious diversity” or “in any way reach out to adherents of non-Christian religions.” Id. at 1841-42 (Kagan, J., joined by Ginsburg, Breyer & Sotomayor, JJ., dissenting). In considering this issue, probably the dissent has the better of the factual argument, and Galloway may eventually be overruled or limited to its facts. In any event, most cities of any size, as well as the federal government, are likely to stick more with non-denominational statements as a matter of political sensitivity to the diverse communities they serve. That Justice Kennedy joined the conservative
wing of the Court is no surprise. See generally R. Randall Kelso, Justice Kennedy’s Jurisprudence on the First Amendment Religion Clauses, 44 McGEORGE L. REV. 103, 139-150 (2013) (noting that Kennedy rejects the “no endorsement” test in favor of the “no coercion/proseletizing” test for Establishment Clause doctrine, and outside the school context rarely finds religious statements constitute coercion or proseletizing of religion). After Galloway, courts have struggled with whether denominational prayers opening government meetings may be given by legislators or council members themselves. See, e.g., Lund v. Rowan County, 837 F.3d 407 (4th Cir. 2016) (2-1 panel: practice constitutional), rev’d, 863 F.3d 268 (4th Cir. 2017) (10-5 en banc) (council members giving prayers and inviting public to join unconstitutional; only Christianity mentioned and 97% of prayers mentioned “Jesus”, “Christ”, or “Savior”); Bormuth v. County of Jackson, 849 F.3d 266 (6th Cir. 2017) (2-1 panel: practice unconstitutional), rev’d, 870 F.3d 494 (6th Cir. 2017) (9-6 en banc opinion; practice constitutional under history and traditions approach of Marsh and Galloway).

The Modern Natural Law Era of Establishment Clause Analysis: Aid to Schools

§ 32.1.3.1.B(1), page 1577, n.137: In Moss v. Spartanburg County School Dist. Seven, 683 F.3d 599 (4th Cir. 2012), the Fourth Circuit upheld a school district’s policy of granting credits for off-campus religious courses offered through an accredited private institution, relying on Zelman v. Harris.

The Modern Natural Law Era of Establishment Clause Analysis: Ceremonial Deism

§ 32.1.3.1.B(2), page 1581, n.151: Consistent with Justice O’Connor’s concurrence in Newdow, in Newdow v. Rio Linda Union School Dist., 597 F.3d 1007 (9th Cir. 2010), the Ninth Circuit held that voluntary recitation of the Pledge of Allegiance even with the phrase “Under God” advanced the secular purposes of (1) underscoring the political philosophy of the Founding Fathers that God granted certain inalienable rights to the people which government cannot take away, and (2) adding a note of importance to the Pledge as a matter of ceremonial deism. This decision departed from the Ninth Circuit’s earlier ruling in Newdow v. U.S. Congress, 328 F.3d 466 (9th Cir. 2003) (“Under God” in Pledge unconstitutional), vacated on standing grounds sub. nom. Elk Grove Unified School Dist. v. Newdow, 542 U.S. 1 (2004), discussed in the E-Treatise at § 17.3.1.4.E n.488. See also Newdow v. Peterson, 753 F.3d 105 (2nd Cir. 2014) (motto “In God We Trust” on United States currency does not violate the Establishment Clause), and cases cited therein.

The Modern Natural Law Era of Establishment Clause Analysis: Religion In School Cases

§ 32.1.3.1.B(2), page 1583, n.158: In Doe v. Indian River School Dist., 653 F.3d 256 (3rd Cir. 2011), the Third Circuit held that a local school board’s practice of opening meetings regularly attended by students with a prayer violates the Establishment Clause. In contrast, in American Humanist Association v. McCarty, 851 F.3d 521 (5th Cir. 2017), the Fifth Circuit held that an opening invocation or prayer at school board meetings was more like the legislative prayer upheld in Marsh and Galloway, discussed in this Supplement at § 32.1.2.3 n.49, rather than school-prayer in Weisman, even where students were permitted to lead the prayer). On other cases involving religion in schools, see Borden v. School Dist. of the Township of East Brunswick, 523 F.3d 153 (3rd Cir. 2008) (public school district did not violate the First Amendment rights of a football coach in barring him from kneeling on one knee and bowing his head – avowedly out of respect for his players – while they engaged in pregame prayer, where the coach had a 23-year-history of “orchestrating” player prayers; court held that a reasonable observer would have concluded that his proposed silent kneeling, when viewed from history and context, endorsed religion); Doe ex rel. Doe v. Elmbrook Sch. Dist., 687 F.3d 840 (7th Cir. 2012) (public school district’s use of evangelical church for high school graduation unconstitutional as endorsement of religion and is religiously coercive); Morgan v. Swanson, 755 F.3d 757 (5th Cir. 2014) (principal has qualified immunity when he refused to permit parent attending an in-class winter party with his son to distribute candy canes bearing a religious message); Freedom From Religious Foundation, Inc. v. Concord Community Schools, 885 F.3d 1038 (7th Cir. 2018) (second half of high school “Christmas Spectacular”, which was altered after litigation began from exclusive focus on “The Story of Christmas” through the lens of the nativity scene to “The Spirit of the Season” and now includes celebration of many cultures with songs representing Hanukkah and Kwanzaa, as well as traditional Christmas carols like “O Holy Night,” with only a 2-minute portrayal of the nativity scene, constitutional under coercion test, endorsement test, or Lemon test).
§ 32.1.3.1.B(2), page 1585, n.168: Although schools may include sacred choral music as part of overall music curriculum, a school is not required to do so. In Stratechuk v. Board of Education, South Orange-Maplewood School Dist., 587 F.3d 597 (3rd Cir. 2009), the Third Circuit held a school district policy to bar performance of religious holiday music at seasonal shows, while continuing to allow it to be taught in class, had a legitimate secular purpose of avoiding potential Establishment Clause problems, particularly given a history at school of parental complaints about which religious holiday music had been included in the past.

§ 32.1.3.1.B(2), page 1587, text following n.175: While public schools may permit religious organization to use their facilities on a non-discriminatory basis during after school hours, they are not required to open their schools for worship services. See Bronx Household of Faith v. Board of Education of the City of New York, 750 F.3d 184 (2nd Cir. 2014). Cf. Barnes-Wallace v. San Diego, 704 F.3d 1067 (9th Cir. 2012) (San Diego’s rent-free leases of property to Boy Scouts – an organization that at the time prohibited atheists, agnostics, or “open or avowed” homosexuals from being members – does not violate the Establishment Clause because the city provides similar leases to both secular and religious nonprofit organizations) (In January 2014, the Boy Scouts changed their national membership policy to ban only “open or avowed” homosexual adults from membership, and by July 2015 had dropped that nationwide ban); Jewish People for the Betterment of Westhampton Beach v. Village of Westhampton Beach, 778 F.2d 390 (2nd Cir. 2015) (neutral accommodation permitting “nearly invisible” plastic strips known as “lechis” on utility poles to create “eruv” – aiding certain activities on Jewish Sabbath and Yom Kippur – constitutional).

§ 32.1.3.2.B, page 1594, n.202: In Pleasant Grove City, Utah v. Summum, 129 S. Ct. 1125, 1129 (2009), a unanimous Court held that placing in a city’s public park a passive monument containing the Seven Aphorisms of Summum would not violate the Free Speech Clause because it would be government speech. Justice Souter warned that the Establishment Clause would be violated if such a monument appeared to a reasonable observer as an endorsement of religion. Id. at 1141-42 (Souter, J., concurring in the judgment). Justice Scalia, concurring with Justice Thomas, said there was little danger of that result because the case was so similar to Van Orden v. Perry, 545 U.S. 677 (2005), where the Court had upheld against an Establishment Clause challenge a virtually identical Ten Commandments monument donated by a private group. 129 S. Ct. at 1139-40 (Scalia, J., joined by Thomas, J., concurring). See also Freedom from Religion Foundation, Inc. v. City of Warren, Michigan, 707 F.3d 686 (6th Cir. 2013) (city’s annual holiday display constitutional under Lynch v. Donnelly and County of Allegheny; display is government speech, and thus city’s refusal to add secular message, including phrase “religion is but myth and superstition,” not free speech issue).

In Salazar v. Buono, 130 S. Ct. 1803 (2010), in 1934 private citizens had placed a Latin cross on a rock outcropping in a remote section of the Mojave Desert, owned by the federal government, in order to honor American soldiers who died in World War I. In 2004, the federal government passed a statute to transfer the cross and land on which it stands to a private party, the Veterans of Foreign Wars, to avoid a violation of the Establishment Clause. A 5-4 Court remanded the case to the district court to determine whether a “reasonable observer” would view the transfer as an endorsement. Id. at 1821 (Kennedy, J., announcing the judgment of the Court). Suggesting it did not, Justice Kennedy noted, “Here, one Latin cross in the desert evokes far more than religion.” Id. at 1820 (Kennedy, J., joined by Roberts, C.J., and by Alito, J., in part). Chief Justice Roberts also indicated transferring the land was likely constitutional, because it would be permissible “for the Government to tear down the cross, sell the land to the Veterans of Foreign War, and return the cross to them, with the VFW immediately raising the cross again.” Id. at 1821 (Roberts, C.J., concurring). Justice Alito would have ruled the transfer was permissible. Id. at 1821 (Alito, J., concurring in part and concurring in the judgment). Justices Scalia and Thomas would have permitted the transfer because the plaintiffs did not have standing, raising only a generalized grievance. Id. at 1824 (Scalia, J., joined by Thomas, J., concurring in the judgment). Three Justices dissented on grounds that the proposed transfer itself was an endorsement of the Latin cross. Id. at 1828, 1839 (Stevens, J., joined by Ginsburg & Sotomayor, JJ., dissenting). Justice

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Breyer dissented on grounds that the district court’s ban on transfer of the property was covered by an original injunction, which had earlier been affirmed. *Id.* at 1843 (Breyer, J., dissenting). In contrast, Justice Kennedy noted that since the government’s right to transfer was not litigated in earlier cases, the original injunction did not cover that contingency. *Id.* at 1817 (Kennedy, J., joined by Roberts, C.J., and by Alito, J., in part).

The accommodation permitted in *Buono*, of course, has its limits. For example, in *American Atheists, Inc. v. Duncan*, 616 F.3d 1145 (10th Cir. 2010), the Tenth Circuit held that a sequence of crosses erected on Utah highways to memorialize fallen Utah Highway Patrol state troopers would convey to a reasonable observer that the state endorses a certain religion. *See also Trunk v. City of San Diego*, 629 F.3d 1099 (9th Cir. 2011) (symbolism, history, and prominence of a 43-foot cross, which had been incorporated into a war memorial, sends a message that sacrifices of Christian soldiers are valued more highly), *on remand*, 2013 WL 6528884 (S.D. Cal. 2013) (cross ordered removed); *Tearpock-Martini v. Borough of Shickshinney*, 756 F.3d 232 (3rd Cir. 2014) (Establishment Clause claim against directional sign (“Bible Baptist Church Welcomes You!” with directional arrow “1 Block”) sponsored by Baptist church and erected on public land may proceed, since each day’s display constitutes new potential violation, and thus claim not barred by statute of limitations).

### Display Cases Involving the Ten Commandments

**§ 32.1.3.2.B, page 1595, n.204: See also Green v. Haskell County Board of Commissioners, 568 F.3d 784 (10th Cir. 2009)** (placement of monument on a county courthouse lawn impermissible endorsement, particularly given statements by Commissioners underscoring the religious significance of the message; the county was also ordered to pay over 10 years $199,000 in attorneys’ fees to the prevailing party. CNN Wire Staff, *Oklahoma county must pay up in Ten Commandments case* (July 28, 2010) (Internet cite); *ACLU of Kentucky v. McCreary County, Kentucky*, 607 F.3d 439 (6th Cir. 2010) (preliminary injunction against Ten Commandments display affirmed in *McCreary County* made permanent).* Red River Freethinkers v. City of Fargo*, 764 F.3d 948 (8th Cir. 2014) (monument standing for years on city-owned land constitutional as similar to monument in *Van Orden*); *Prescott v. Oklahoma Capitol Preservation Commission*, 373 P.3d 1032 (Okla. 2015) (Ten Commandments display on Oklahoma capitol grounds invalid under Oklahoma Constitution); *Felix v. Bloomfield*, 841 F.3d 848 (10th Cir. 2016) (5-foot tall, 3,400-pound monument displaying the Ten Commandments on city hall lawn unconstitutional as endorsement of religion); *American Humanist Ass’n v. Maryland-National Capital Park & Planning Comm’n*, 874 F3d 195 (4th Cir. 2017) (40-foot tall Latin Cross, established in memory of soldiers who died in World War I, unconstitutional as primary effect of endorsing religion and excessive entangles government in religion).

### Establishment Clause Challenges Generally

**§ 32.1.4, page 1604, end of section: On the specific issue of faith-based initiatives, see Phillip C. Aka, *Assessing the Constitutionality of President George W. Bush’s Faith-Based Initiatives*, 9 J.L. Soc. No. 1 (2008). Standing to sue on this issue or other similar issues might be a problem. As held in *Hein v. Freedom From Religion Foundation, Inc.*, 127 S. Ct. 2553 (2007), discussed in this Supplement at § 17.3.1.4.B n.450, taxpayers lack standing to challenge such executive action. Even challenges to congressional action would have to involve congressional appropriations under the Spending Clause, as reflected in *Valley Forge*, discussed in the E-Treatise at § 17.3.1.2.C nn.350-52. For any non-Spending Clause challenge, individuals would have to establish a distinct injury-in-fact, caused by the challenged conduct, and redressable by the court. That may be difficult to establish. See, e.g., *Freedom from Religious Foundation, Inc. v. Obama*, 641 F.3d 803 (7th Cir. 2011) (plaintiffs did not have concrete injury to challenge federal statute, 36 U.S.C. § 119, originally passed in 1952, and amended in 1988, creating a National Day of Prayer); *Ansley v. Warren*, 2017 WL 2782622 (4th Cir. 2017) (absent specific injury plaintiffs have no standing to challenge North Carolina law allowing state magistrates to recuse themselves from performing same-sex marriages on religious grounds); *Barber v. Bryant*, 193 F. Supp. 3d 677 (S.D. Miss. 2016) (Mississippi law which grants rights to discriminate only to those holding religious beliefs against LGBT or unmarried persons violates religious neutrality under Establishment Clause; irrational under Equal Protection Clause), *rev’d*, 860 F.3d 345 (5th Cir. 2017) (absent specific harm, plaintiff’s generalized grievance about possible applications of statute not enough for standing).
Cases Under Employment Division v. Smith

§ 32.2.2.5, page 1612, text following note 253: See Phillips v. City of New York, 775 F.3d 538 (2d Cir. 2015) (state law that public school students be vaccinated is neutral law of general applicability; rationally related to legitimate state interests under Free Exercise and Due Process clauses, citing Jacobson v. Commonwealth of Massachusetts, 197 U.S. 11 (1905)); Nikolao v. Lyon, 875 F.3d 310 (6th Cir. 2017) (no Free Exercise burden by requiring parent to explain religious reasons for not wanting child to be vaccinated prior to attending public school when waiver granted); Craig v. Masterpiece Cakeshop, Inc., 370 P.3d 272 (Colo. App. 2015) (anti-discrimination law neutral and rational; cake maker has no Free Exercise right to refuse to make wedding cake for same-sex couple), rev’d, 138 S. Ct. 1719 (2018) (while on its face the law is neutral, statute applied in this case with religious discriminatory intent, triggering strict scrutiny under Lukumi); State v. Arlene’s Flowers, Inc., 389 P.3d 543 (Wash. 2017) (flower shop owner violated Washington Law Against Discrimination (WLAD) by refusing to provide flowers for same-sex wedding; law is generally applicable neutral law triggering only rational basis review under the Free Exercise Clause), vacated, 2018 WL 3096308 (U.S. Sup. Ct. 2018) (reconsider in light of Masterpiece Cakeshop).

Cases Under Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah

§ 32.2.2.5, page 1612, n.254: In Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012 (2017), the Court held that a state program which excluded churches from a program providing grants to non-profit organizations to purchase rubber playground surfaces made from recycled tires was discrimination against religion, triggering strict scrutiny under Lukumi. The Court distinguished Locke v. Davey, discussed in the E-Treatise at § 32.2.2.5, page 1615, n.265, by noting the program there went “a long way toward including religion in its benefits” and permitted the individual to use government funds to take religious courses and only prevented using the funds to get a religious degree, a case raising greater Establishment Clause concerns than use of recycled tires to resurface playgrounds. Four Justices noted in footnote 3, “This case involves express discrimination based on religious identity with respect to playground funding. We do not address religious uses of funding or other forms of discrimination.” Id. at 2024 n.3 (Roberts, C.J., joined by Kennedy, Alito & Kagan, JJ.); id. at 2026 (Gorsuch, J., joined by Thomas, J., concurring in part) (refusing to join footnote 3 and indicating strict scrutiny should be applied more broadly); id. at 2027 (Breyer, J., concurring in the judgment) (case should be viewed, like police and fire protection, as neutral provision of “public benefit”); id. at 2028 (Sotomayor, J., joined by Ginsburg, J., dissenting) (requiring the state to provide public funds directly to the church, even if for a playground, violates the Establishment Clause). Cf. Moses v. Skandera, 367 P.3d 838 (N. Mex. 2015) (provision of schoolbooks to religious schools violates New Mexico Constitution), judgment vacated and remanded in light of Trinity, 2017 WL 2742852 (U.S. Sup. Ct. 2017); Taxpayers for Public Education v. Douglas Cty. Sch. Dist., 351 P.3d 461 (Colo. 2015) (state scholarship program providing grants to both public and private schools violates Colorado Constitution), judgment vacated and remanded in light of Trinity, 2017 WL 2742829 (U.S. Sup. Ct. 2017). See also Central Rabbinical Congress of the United States and Canada v. New York City Dept. of Health and Mental Hygiene, 763 F.3d 183 (2nd Cir. 2014) (city ordinance prohibiting any person from performing direct oral suction as part of circumcision without written signed consent triggers strict scrutiny as singling out religious practice, but remanded for trial on whether ordinance is constitutional given interest in preventing spread of herpes simplex virus, which can be fatal to infants due to undeveloped immune systems).

RLUIPA and Religious Rights for Prisoners and Under Land Use Regulations

§ 32.2.2.5, page 1614, text following note 259: See Garner v. Kennedy, 713 F.3d 237, 240-48 (5th Cir. 2013) (ban on prisoners wearing head covering while in transit in prison valid on safety grounds, since weapons, like knife, could be hidden in covering; ban on prisoners wearing quarter-inch beard invalid, since no compelling interest given policy allowing inmates with “skin conditions” to wear short beards); Holt v. Hobbs, 135 S. Ct. 853, 859-60 (2015) (prison regulation banning one-half inch beard invalid under RLUIPA); Ali v. Stephens, 822 F.3d 776 (5th Cir. 2016) (ban on growing a 4-inch beard invalid). But see Knight v. Thompson, 796 F.3d 1289 (11th Cir. 2015) (short hair policy for prisoners applied to Native American valid), cert. denied, 136 S. Ct. 1824 (2016). See also Haight v. Thompson, 763 F.3d 554 (6th Cir. 2014) (Native Americans raise colorable claim of right to purchase buffalo meat for once-a-year “powwow” religious
ceremony); Jehovah v. Clarke, 798 F.3d 169 (4th Cir. 2015) (inmate can continue to press claims he should be allowed to drink wine during communion and being harassed by non-Christian cellmate chilled religious practice); Cavanaugh v. Bartelt, 2016 WL 1446447 (D. Neb. 2016) (prisoner worship of Flying Spaghetti Monster parody, not religion). In Garner v. Kennedy, the Fifth Circuit quoted language from the Court’s opinion in Cutter v. Wilkinson, 544 U.S. 709, 723 (2005), which noted in passing RLUIPA Congress intended the courts to give “due deference” to prison regulations “to maintain good order, security and discipline, consistent with consideration of costs and limited resources.” 713 F.3d at 745 n.26. While usually cost considerations are not important or compelling interests to justify regulation under intermediate review or strict scrutiny, as discussed in the E-Treatise at § 26.1.1.2 n.44, since the issue here is interpreting a statute, it is appropriate to take into account Congress’ intent in the RLUIPA statutory “strict scrutiny” analysis.

On land use regulations, see Marci A. Hamilton, RLUIPA is a Bridge Too Far: Inconvenience is Not Discrimination, 39 Fordham Urb. L.J. 959 (2012) (discussing cases on both sides), citing, inter alia, Vision Church v. Village of Long Grove, 468 F.3d 975 (7th Cir. 2006) (denial of special use permit to build a church, which would have violated zoning law on size of buildings, not substantial burden); Wesleyan Methodist Church of Canisteo v. Village of Canisteeo, 792 F. Supp. 2d 667, 673-74 (W.D.N.Y. 2011) (no substantial burden when zoning law prevented building church in “light industrial zone”); Helen Greek Orthodox Church v. City of New Berlin, 396 F.3d 895, 901 (7th Cir. 2005) (zoning ordinance preventing building of church in residential area with insufficient provisions for exemptions a substantial burden); Douglas Laycock & Luke W. Goodrich, RLUIPA: Necessary, Modest, and Under-Enforced, 39 Fordham Urb. L.J. 1021 (2012). See also Tree of Life Christian Schs. v. City of Upper Arlington, 823 F.3d 365 (6th Cir. 2016) (whether city’s refusal to rezone office building for use as religious school treated religion differently fact question; court left open whether comparison should be only to schools, as city argued, or any non-religious use, such as day-care center, as church argued); Andon, LLC v. City of Newport News, 813 F.3d 510 (4th Cir. 2016) (congregation knew it could not meet zoning law, but signed lease anyway, cannot claim substantial burden).

**Obamacare Contraceptive Coverage Mandate and Subsidies for Individual Mandate**

§ 32.2.2.5, page 1615, text following n.263: One aspect of the Affordable Care Act (ACA) (Obamacare) was a mandate that employers’ health insurance plans provide contraceptive coverage free of cost. Catholic-based institutions, such as universities and hospitals, and secular corporations, whose CEOs have religious objections to contraception, particularly those that work after fertilization, such as morning-after pills, which they view as abortifacients, sued claiming the mandate is unlawful. In Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014), a 5-4 Court ruled that closely-held for-profit corporations do have religious rights under RFRA, id. at 2767-75; that the requirement to include contraception in their company-provided insurance plan was a substantial burden on their religious beliefs, id. at 2775-79; and under RFRA’s strict scrutiny standard there were less restrictive effective alternatives to advance the government’s compelling interest in making contraceptive coverage available to women, id. at 2779-80. The Court noted the government could “assume the cost” of providing coverage, or extend the current exemption for “non-profit organizations with religious objections” where the non-profit can certify it opposes providing coverage, and the insurance company must arrange independently with the plan participants to provide coverage without imposing “any cost-sharing requirements.” Id. at 2780-82. Justice Kennedy noted the opinion’s narrow holding. Id. at 2785 (Kennedy, J., concurring). Four Justices dissented. They noted, as discussed in the E-Treatise at § 32.2.2.5 mn.257-62, the legislative intent behind RFRA in 1993 was to restore statutorily the Court’s Free Exercise Clause doctrine prior to Employment Division v. Smith in 1990. Id. at 2791-93 (Ginsburg, J., joined by Sotomayor, J., and joined by Breyer & Kagan, JJ., except as to Part III-C-1, dissenting). Two dissenting Justices concluded in Part III-C-1 that there was no pre-1990 case law supporting the notion for-profit corporations had free exercise clause rights. Id. at 2793-97 (Ginsburg, J., joined by Sotomayor, J., dissenting). All four Justices in dissent agreed that even if for-profit corporations had religious rights, having to include such coverage was not a “substantial burden,” since contraceptives would be used by the “autonomous choice” of the plan participants. Id. at 2797-99 (Ginsburg, J., joined by Sotomayor, J., and joined by Breyer & Kagan, JJ., dissenting). The dissent concluded the majority’s “let the government pay” option was not as effective an alternative as direct coverage from the employer, id. at 2802-03, and it was not clear the alternative of certifying objections, triggering an insurance company obligation to provide coverage independently, with added paperwork costs, would be as effective either, id. at 2803.
Another issue under the ACA turned out to be whether the provision for federal subsidies to low-income individuals buying insurance on an insurance exchange “established by the State” included subsidies for individuals buying insurance on the “federal exchange” available 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 the Act did provide for subsidies to all individuals in every state. *King v. Burwell*, 135 S. Ct. 2480 (2015) (Scalia, J., joined by Thomas & Alito, JJ., dissenting) (“State” literally means state).

On the issue of how to determine whether something is a “substantial burden” on the exercise of religion, courts have tended to split between two tests: (1) does the burden have to involve a religious exercise which is “compelled” by the religion or otherwise forces the individual to a “stark choice”; or (2) is it enough if the objection to following the government regulations is “religiously motivated” or otherwise “important” to religious practice. *See generally United States v. Sterling*, 75 M.J. 407, 417-19 (U.S. Ct. App. for Armed Forces 2016) (under either approach no substantial burden when lance corporal required to remove from desk sign stating, “no weapon formed against me shall prosper”; option (1) above adopted by Third, Fourth, Ninth, and District of Columbia Circuits; option (2) adopted by First, Second, Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits), *cert. denied*, 2017 WL 2407485 (2017).

**Post-Locke v. Davey Decisions**

§ 32.2.2.5, page 1615, text following n.265: In *Colorado Christian University v. Weaver*, 534 F.3d 1245 (10th Cir. 2008), the Tenth Circuit distinguished *Locke v. Davey* and held that a Colorado statute excluding students at “pervasively sectarian” colleges from generally available state scholarships was unconstitutional. In *Locke*, the state of Washington excluded all theology majors from its funding program. In *Weaver*, Colorado only excluded “pervasively sectarian” colleges, not all “sectarian” colleges. Thus, students attending some religious institutions would be eligible; some would not. The court noted the statute entangled the state in “trolling through a person’s or institution’s religious beliefs,” which supported finding statute discriminated against religion, triggering a strict scrutiny approach under *Smith* and *Lukumi*, not rational review. In *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017), discussed in this Supplement at § 3.2.2.5, page 2135, n.245, the Court held a state program which excluded churches from a program providing grants to non-profit organizations to purchase rubber playground surfaces made from recycled tires constituted discrimination against religion, triggering strict scrutiny under *Lukumi*, distinguishing *Locke v. Davey*. *See generally Caplan v. Town of Acton*, 92 N.E.3d 691 (Mass. 2018) (state can deny grant to church to fix stained glass window with religious imagery given greater Establishment Clause concern here as opposed to that in *Trinity*); *Illinois Bible Colleges Ass’n v. Anderson*, 870 F.3d 631 (7th Cir. 2017) (state law requiring all higher education institutions to get approval before offering degrees applies equally to secular and religious institutions, and thus triggers rational review under *Smith*, not strict scrutiny under *Trinity*; the law does not necessarily create excessive entanglement under Establishment Clause).

**Clergy and Ministerial Exception**

§ 32.2.2.5, page 1617, n.270: *See also State v. Wenthe*, 839 N.W.2d 83 (Minn. 2013) (criminalizing sexual activity between clergy and parishioners does not violate Establishment Clause); *Pfeil v. St. Matthews Evangelical Lutheran Church of the Unaltered Augsburg Confession of Worthington*, 877 N.W.2d 528 (Minn. 2016) (3-2 decision, with two Justices not participating: pastors and church cannot be held liable for alleged defamatory statements made during course of formal church discipline proceedings).

**Religious Accommodation of Employees**

§ 32.2.2.5, page 1618, text following n.275: *See also Fields v. City of Tulsa*, 753 F.3d 1000 (10th Cir. 2014) (police department did not violate officer’s freedom of religion by requiring him either to attend Islamic Society of Tulsa’s “Law Enforcement Appreciation Day” or order subordinate to do so; he made no claim ordering another to do so would violate his religious beliefs); *Stormans, Inc. v. Wiesman*, 794 F.3d 1064 (9th Cir. 2015) (Washington law requiring pharmacist with objections to filling a prescription to find another pharmacist in same store to so fill, valid), *cert. denied*, 136 S. Ct. 2433 (2016) (Alito, J., joined by Roberts, C.J., and Thomas, J., dissenting).
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The need for such a message is particularly true since “‘capital’ is always more mobile than ‘labor.’ This means that investors can shift their capital more quickly into profitable new fields of endeavor or countries providing more advantageous investment options than laborers can be retrained . . . . This means that in a market system, the rich will get richer over time, and income inequalities will increase [if] left uncorrected by some mechanism of progressive redistributive taxation.” R. Randall Kelso, Narcissism, Generation X, The Corporate Elite, and the Religious Right Within the Modern Republican Party: A Set of “Friendly” Observations for President Bush, 24 Cardozo L. Rev. 1971, 2019-20 (2003). Protectionism from trade is not sound economics, but, as noted in the E-Treatise at § 14.2.2, pages 441-42, “Adam Smith’s support for competitive markets [in The Wealth of Nations] assumes a number of things. . . . Fourth, when a competitive market is not functioning properly, governmental regulation is warranted to correct that imbalance. . . . Adam Smith’s doctrine favors free, but fair, trade, with fairness defined not by reducing American workers to third-world status, but by trade agreements which help workers in those countries get equal rights, so that comparative productivity advantages will determine trade outcomes, not exploitation [based on] less adequate labor, environmental, and safety regulations abroad.” These observations reflect the popularity of Senator Bernie Sanders during his presidential campaign in 2016 among Democratic-leaning white working class voters and college students worried about future jobs, a message that never became a focus of the Clinton campaign. In any event, Clinton would have been a flawed candidate for such a message given her and her husband’s wealth from millions of dollars in speaking fees from elites made wealthy by global trade. Donald Trump made trade policy and declining living standards of working class Americans a centerpiece of his campaign, a focus that paid off among his white working class supporters.

It is also worth a reminder from 2003 that the trends in the Republican party on economic and other matters has been, since 2000, increasing self-centered, self-absorbed narcissism. See Kelso, supra, at 1979-85 (discussing such trends on economic policy matters, issues involving civil rights, and the appropriate balance between church and state, among others). In such a climate, the popularity of Donald Trump as a candidate for Republican voters should come as no surprise. As a counterweight to this observation, as noted in the E-Treatise Supplement, at page 2045, “In the long term, a society committed to modern natural law values, combined with current demographic trends, is likely to favor more current Democratic policy initiatives, rather than current Republican party traditionalism, as suggested by the discussion in E-Treatise at § 15.4 & §§ 16.1, 16.2 & 16.3.”

A2: § 19.3.2, text following n.42: Page 2061: Trump Travel Ban: During the 2017 Term, the Court was set to hear Trump v. International Refugee Assistance Project, 137 S. Ct. 2080 (2017) (per curiam) (denial of entry into the United States for 90 days from the effective date of the order of nationals from six predominantly Muslim countries (Iran, Libya, Somalia, Sudan, Syria, and Yemen) and suspension of decisions for 120 days on applications for refugee status from the same countries; lower courts had granted preliminary injunctions, some as violations of the Establishment Clause’s ban on religious discrimination, and others on grounds orders violated Immigration and Naturalization Act’s ban on religious and ethnic discrimination) (citations appear in per curiam opinion). The Court stayed enforcement of preliminary injunctions except for individuals with “bona fide” family or other connections to United States citizens. Id. (Thomas, Alito & Gorsuch, JJ., would have stayed the preliminary injunctions in their entirety). Following a narrow definition by the Trump Administration of “bona fide,” a lower court expanded the definition of “bona fide” for entry to include grandparents and other members typically viewed as extended family, and expanded the definition for refugees to include those sponsored by government-contracted refugee agencies. Trump v. State of Hawaii, 263 F.Supp.3d 1049 (D. Hawai‘i 2017). At the Supreme Court, the lower court’s expanded definition for entry was upheld; the Trump Administration’s narrow interpretation for refugees was reinstated. Trump v. Hawai‘i, 138 S. Ct. 34 (2017) (Thomas, Alito & Gorsuch, JJ., would have upheld the narrow definitions of the Trump Administration in their entirety).
Prior to the start of the October 2017 Term, the Trump Administration replaced the 90-day entry policy with a new policy to continue indefinitely into the future – removing Sudan from the policy, but adding Chad; adding some enhanced screening for individuals from Iraq; and adding to the policy North Korea and some government officials from Venezuela. Given this action, the Court dismissed the existing cases as moot. *Trump v. International Refugee Assistance Project*, 138 S. Ct. 353 (2017) (entry policy); *Trump v. Hawaii*, 138 S. Ct. 377 (2017) (refugee policy). The new entry policy was ruled invalid as inconsistent with the Immigration and Naturalization Act (INA) by a district court in *State of Hawaii v. Trump*, 265 F.Supp.3d 1140 (D. Hawai‘i 2017), aff’d, 878 F.3d 662 (9th Cir. 2017), and invalid as violating both the INA and unconstitutional under the Establishment Clause in *International Refugee Assistance Project v. Trump*, 265 F.Supp.3d 570 (D. Maryland 2017), aff’d, 883 F.3d 233 (4th Cir. 2018) (9-4 en banc) (focusing on Establishment Clause grounds). The Trump Administration appealed both rulings. The Supreme Court lifted all injunctions against the entry policy while considering the case. *Trump v. Hawaii*, 138 S. Ct. 542 (2017).

In *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018), a 5-4 Court majority decided the new entry policy was consistent with delegated authority to the President under the INA to craft exceptions to existing policy for national security reasons. On the constitutional issue, the majority eschewed the normal factor analysis to determine discriminatory intent, discussed in the E-Treatise at § 26.2.1.2, and said that because the case involved areas of traditional deference to government (foreign policy/national security, see § 19.3.2 n.43, and immigration, see § 18.3.4 nn.170-73), 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*, discussed at § 26.4.6. 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.

With regard to refugees, no new formal policy has been announced, but an on-going review for 11 unnamed countries has been instituted. While it is not clear which countries this covers, at the end of 2016, higher-security screening was required for most adult male nationals from 11 countries – Egypt, Iran, Iraq, Libya, Mali, North Korea, Somalia, South Sudan, Sudan, Syria, and Yemen – as well as Palestinians who lived in those countries. The Trump Administration announced a cap of 45,000 refugees being admitted for 2108. This is the lowest cap in decades, with caps of 19,000 from Africa; 17,500 from the Near East and South Asia; 5,000 for East Asia; 2,000 for Europe and Central Asia; and 1,500 for Latin America and Caribbean. See Laura Koran, CNN, *Trump administration dramatically scales back refugee admissions* (Sept. 27, 2017) (http://www.cnn.com/2017/09/27/politics/us-trump-refugee-admissions/index.html). For 2019, the cap is even lower at 30,000.

One other aspect of the case deserves mentioned. The Supreme Court repudiated the holding in *Korematsu*, discussed in the E-Treatise at § 26.2.1.1.C, indicating the case was “gravely wrong the day it was decided.” *Id.* at 2423; *id.* at 2448 (Ginsburg, J., joined by Sotomayor, J., dissenting). On the precise issue before the Court, the majority noted 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, which the Court majority did not find when deciding the case, as discussed above.

**A3:** § 30.2.4.2, text following n.174: Page 2123: Prisoner’s Rights: See generally Booker v. South Carolina Dep’t of Corrections, 885 F.3d 535 (4th Cir. 2017) (while prisoner has no due process right to a grievance procedure, a prisoner has a First Amendment right to be free from retaliation for filing a grievance once a grievance procedure is in place); Burns v. Martuscello, 890 F.3d 77 (2nd Cir. 2018) (prisoner has a First
Amendment right not to be punished for refusing to act as an informant for prison officials or for refusing to lie when pressured to do so by prison officials; *Sisney v. Kaemingk*, 886 F.3d 692 (8th Cir. 2018) (district court should consider prisoner’s as-applied challenge to ban on prisoners possessing pornographic materials, including two erotic novels, four Japanese *manga* comics, and nine images of Renaissance artwork, before considering overbreadth of regulation in a facial challenge applying *Turner*). See also *Levitan v. Ashcroft*, 281 F. 3d 1313 (D.C. Cir. 2002) (discussing how to apply *Employment Division v. Smith* in context of prisons: some courts say no free exercise review for neutral laws; some apply minimum rationality review; many courts, as in *Levitan*, hold *Smith* is not relevant and apply *Turner v. Safley*’s second-order reasonableness balancing approach, which is used for prisoners’ rights even if for non-prisoners a higher standard of review would be applied. Under any approach, the prison rule allowing only chaplain to consume wine during communion was constitutional); *Kemp v. Liebel*, 877 F.3d 346 (7th Cir. 2017) (qualified immunity applies because no clearly established right to have prison immediately provide Jewish volunteers to lead worship services when there was reasonable delay after prisoners were transferred to new facility to maintain a kosher diet).

**A4: § 32.2.2.5, text following n.263: Page 2136: Hobby Lobby:** Whether certification must be made by the company to the insurance company, to avoid any implication of complicity in contraceptive use the certification can go to the federal government who would then notify insurance company, remained undecided. See *Wheaton College v. Burwell*, 134 S. Ct. 2806 (2014) (religious college not required to give notice to insurance company to obtain injunction against the policy pending appeal); id. at 2806 (Sotomayor, J., joined by Ginsburg & Kagan, JJ., dissenting). The government has since changed the regulation to permit certification to the government. That option has been upheld by eight of nine Courts of Appeals as not being a substantial burden on religious freedom. See *Eternal Word Tel. Network v. HHS*, 818 F.3d 1122, 1141-42 (11th Cir. 2016). Cf. *Sharpe Holdings, Inc. v. HHS*, 801 F.3d 927 (8th Cir. 2015) (still substantial burden and not narrowly tailored), decision vacated, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (following oral argument, at Court’s request, both parties confirmed that it is “feasible” to provide contraceptive coverage though regular insurance company without any formal notice). On this issue, see generally *Conestoga Wood Specialties Corp. v. Secretary of U.S. Dep’t of Health and Human Services*, 724 F.3d 377 (3rd Cir. 2013) (2-1 panel decision) (secular for-profit corporations cannot engage in religious exercise and thus have no viable claim); id. at 389 (Jordan, J., dissenting) (corporations can engage in religious exercise, and mandate likely violates RFRA and Free Exercise Clause); Caroline Mala Corbin, *The Contraceptive Mandate*, 107 NW. U.L. REV. 1469 (2013) (mandate lawful); Katherine Lepard, *Standing Their Ground: Corporations’ Fight for Religious Rights in Light of the Enactment of the Patient Protection and Affordable Care Act Contraceptive Coverage Mandate*, 45 TEX. TECH L. REV. 1041 (2013) (mandate unlawful).

Not litigated before the Court was the preliminary question of whether RFRA applied at all to the contraceptive coverage under the Affordable Care Act (ACA). RFRA provided that its terms apply not only existing legislation in 1993, but to all future legislation unless the later Congress “explicitly excludes such application by reference to this Act.” 42 U.S.C. § 2000bb-3. Such an attempt by a past Congress to limit what a later Congress can do violates norms of constitutional democracy and the Article I, § 7 bicameralism and presentment clauses, which provide the constitutional means by which legislation is enacted, free from any additional requirements imposed by earlier Congresses, and is thus, by its literal terms, unconstitutional. See generally Michael J. Klareman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 505-07 (1997). Thus, the real question in *Burwell v. Hobby Lobby* is whether the Congress that passed the ACA in 2010 intended to incorporate by reference RFRA protections for religious exercise enacted in 1993. The 2010 Congress provided in the ACA their own set of religious opt-out provisions, limiting them to non-profit institutions. Typically, when a legislature addresses something specifically in a statute, the rule of statutory interpretation is that Congress did not intend other, unstated, broader exceptions to be implicitly incorporated by reference. See, e.g., *Silvers v. Sony Pictures Entertainment, Inc.*, 402 F.3d 881, 885 (9th Cir. 2004) (*en banc*) (“The doctrine of *expresio unius est exclusio alterius* ‘as applied to statutory interpretation creates a presumption that when a statute designates certain person, things, or manners of operation, all omissions should be understood as exclusions.’ *Boudette v Barnette*, 823 F.3d 754, 756-57 (9th Cir. 1991).”). The oft-cited Dictionary Act, 1 U.S.C. § 1, is different, since it can reasonably be assumed that an existing Congress in passing legislation enacted provisions consistent with standard definitions listed in the Dictionary Act. However, where the ACA was passed with no Republican votes, for the majority in *Burwell v. Hobby Lobby* to conclude that the Nancy Pelosi-led House of Representatives, and Harry Reed-led Senate, intended in passing the Act to give for-profit corporations a means to make it harder for women to get the contraceptive coverage mandated by the ACA strains credulity as a matter of unbiased statutory interpretation.
**Fifth Amendment Double Jeopardy:** In *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1871 (2016), the Court ruled that the “separate sovereign” doctrine did not apply between the United States and Puerto Rico, since Puerto Rico derives its legislative and prosecutorial authority from the United States. Thus, under the Double Jeopardy Clause, the United States and Puerto Rico could not prosecute the same person for the same conduct under equivalent laws. During the 2018 Term, the Court will consider whether to abandon the “separate sovereign” doctrine in *United States v. Gamble*, 674 Fed. App’x 750 (11th Cir. 2017), cert. granted, 138 S. Ct. 2707 (2018), a case involving an former convicted felon convicted of improperly possessing a gun under Alabama law (and sentenced to one year imprisonment), who was subsequently convicted of violating the federal statute against former felons possessing a gun (and sentenced to four years imprisonment).

**Sixth Amendment Right to Counsel:** In *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018), the Court confirmed that while certain trial management decisions are for the attorney, and thus subject to ineffective assistance of counsel analysis, some decisions are “reserved for the client – notably, whether to plead guilty, waive the right to jury trial, testify in one’ own behalf, and forgo an appeal.” *Id. at* 1508. This right is absolute, and thus is “structural” and not subject to “harmless error” analysis, discussed at § 23.2.1.3 n.185. In this case, a new trial had to be ordered when defendant’s counsel argued to the jury, over defendant’s objection, that the defendant was guilty of the alleged murder, based on counsel’s view that admitting guilt might save the defendant from imposition of the death penalty. The death penalty was nonetheless imposed. In their dissent, three Justices noted the counsel did not admit that the defendant committed first-degree murder, only that he killed the victims, not that he had the intent required for first-degree murder. In their view, this was a permissible trial strategy decision of the attorney. *Id. at* 1512-14 (Alito, J., joined by Thomas & Gorsuch, JJ., dissenting).

For discussion of how the requirement in *Gideon v. Wainwright*, 372 U.S. 335 (1963), for defendants to have counsel in all felony criminal cases and in misdemeanor cases where the accused is sentenced to any term of imprisonment, discussed in the E-Treatise at § 23.1.3.C nn.189-90, has worked out in practice, see generally George C. Thomas III, *How Gideon v. Wainwright Became Goldilocks*, 12 Ohio St. J. Crim. L. 307 (2015), and sources cited therein, in SYMPOSIUM ISSUE: THE FAILURES OF GIDEON AND NEW PATHS FOREWARD.

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